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The Importance and Complexity of Remedies

1.1 Introduction

We live in a world rich with rights. Alas, we live in a world poor in remedies.

Since World War II, the world has become much more concerned with human rights. Many new international and domestic laws have been enacted to "guarantee" rights. However, remedies have not been guaranteed. They are not always ordered. When ordered, they frequently fail to fully repair the harm of violations or prevent new ones.

Sometimes unarticulated concerns about whether remedies are manageable have deterred courts from finding that rights have been violated, especially with respect to socio-economic and Indigenous rights. Supranational courts have often assumed that their decisions that a right has been violated are a sufficient remedy.

Even when remedies are ordered, they have often been disappointing. Damages are frequently used, but their amount is often quite modest. They can fail to vindicate the many intangible and non-monetary values protected by various forms of human rights. Damages attempt to repair the past but may fail to prevent future and repetitive violations. They can also allow governments to buy their way out of supposedly mandatory human rights obligations. Nonetheless, both domestic and

supra-national courts remain attracted to damages: they are an easy-to-manage remedy that ends judicial involvement in a case.

Another reason why we are poor with respect to remedies is that governments do not always fully comply with remedies. Lack of compliance with remedies ordered by international tribunals is well documented.[1] Less known is that governments, even in established democracies, have failed to comply with the spirit if not the letter of remedies ordered by domestic courts. Even when governments accept remedies, they often fail to take steps to prevent similar violations in the future.

Courts often rely on declarations about human rights obligations, but the parties do not always agree on how these general declarations should be implemented. At the same time, more prescriptive and mandatory remedies are not always the answer. Courts must be concerned about respecting limits on the judicial role in the separation of powers including limits on their own expertise and knowledge. The limits on the powers of supra-national courts are even greater.

Some domestic courts have powers to strike down laws that violate human rights, but such a remedy can be blunt. Alternative remedies such as suspending or delaying a declaration of invalidity or issuing a non-binding declaration of incompatibility, however, can leave litigants with no immediate remedy. Conversely, other remedies such as interpreting laws to comply with human rights may strain legislative intent and the separation of powers.

Systemic remedies designed to prevent similar violations in the future are important. Alas, they often depend on the ability of courts to persuade governments and society to respect human rights. As the ambitions of remedies increase, so too does the risk of failure. Human rights contemplate a perfect world. In contrast, remedies respond to our failures. They also create new failures. This book will attempt to confront the reality of remedial failure and the need for both domestic and supra-national courts to engage in iterative remedial processes.

Remedies are frequently a site for interest balancing but often in a manner that is less transparent and principled than occurs when determining whether limits on rights are justified and necessary to protect legitimate social interests. This book will argue that judges should apply proportionality principles to determine whether limits on remedies and

[1] The United States infamously executed Walter LaGrand in defiance of interim measures ordered by the International Court of Justice. *LaGrand (Germany* v. *United States)* [1999] ICJ Rep. 9; *LaGrand (Germany* v. *United States),* Judgment of 27 June 2001, [2001] ICJ Rep 466.

the use of less drastic alternative remedies are justified. This will make the exercise of remedial discretion more disciplined and transparent.

A final reason why we are poor with respect to remedies is that they have received much less attention than rights. Scholars, judges and litigators all devote less attention to remedies than the underlying human right. Many human rights instruments have remedial provisions, but they provide limited guidance in shaping remedies. Human rights law frequently seems to run out of steam when it comes to remedies.

1.1.1 *Remedies as a Challenging and Neglected Subject*

Why have remedies been neglected? Peter Schuck has suggested that "rights preoccupy a Don Quixote; remedies are the work of a Sancho Panza".[2] Canada's longest-serving chief justice, Beverley McLachlin, has observed that "'we are endowed with rights' slips off the legal tongue . . . 'we are endowed with remedies' has a more prosaic ring . . . Viewed as 'practical' but not necessarily 'exciting', remedies are relegated to the 'if I have room' or 'if I must' categories of most student and teaching timetables". Nevertheless, Chief Justice McLachlin eloquently defended remedies. They allow "us to mend our wounds and carry on – as individuals and as a society".[3]

Remedies are challenging to study because they cut across different fields of law even when, as in this book, they are limited to remedies for violations of human rights. Domestically, they involve criminal, civil, administrative and procedural law. Supra-nationally, they involve procedure and substance. They include the award of provisional measures and various follow-ups to remedial decisions. When remedies have received scholarly or judicial attention, there has been a tendency to focus on particular remedies while neglecting common issues throughout remedies. As Schuck has noted, "like many cross-speciality subjects" remedies languish "in a kind of academic no-man's land".[4]

This book will address a broad range of remedies including interim remedies, remedies for laws that violate human rights, damages,

[2] Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University, 1983), p.27.
[3] Beverley McLachlin, "Rights and Remedies – Remarks" in Robert J. Sharpe and Kent Roach (eds.), *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010), pp.22–23, 30.
[4] Schuck, *Suing Government,* p.xvi.

exclusion of improperly obtained evidence, stays of proceedings, sentence reductions, injunctions and declarations in order to highlight common issues and the possibility of a common approach to remedies. That said, remedies are inevitably contextual. Thus, separate chapters will be devoted to remedies used in the criminal process, in cases involving institutions such as the police and prisons and in the enforcement of socio-economic and Indigenous rights.

1.1.2 Supra-national Law and Remedies

Remedies engage both domestic and supra-national law. If domestic remedies have been exhausted and failed, recourse to supra-national law through the bodies associated with the United Nations or regional human rights courts is possible.

Some deride international law remedies because they only have persuasive force.[5] But this ignores the ingenuity of supra-national law. A central theme of this book is that domestic human rights lawyers can learn much about remedies from international law. Building on the work of the International Law Commission, the United Nations has developed *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (henceforth UN *Basic Principles*).[6] The UN *Basic Principles* recognize the importance of backward-looking forms of restitution, reparation and creative forms of satisfaction beyond damages but also forward-looking assurances of non-repetition. International criminal courts have broken new ground by using damages, sentence reductions and remedies for crime victims.

Domestic lawyers can learn much from international lawyers about the need for continuing and iterative attempts by all relevant public institutions and social actors to shape and revise remedies within a procedurally fair framework.[7] International law has grappled with the reality of

[5] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

[6] Adopted by the General Assembly 21 March 2006, A/Res/60/147 at para 18.

[7] For arguments that compliance or fidelity to international law depend on "interactive practices of legality" and "ongoing processes of interactional law-making" involving different institutions and social actors, see Jutta Brunée and Stephen Toope, *Legality and Legitimacy in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), pp.121–122. My colleagues' approach inspired by the work of Lon

remedial failure[8] and repetitive violations in a way that more established domestic courts have not.

As a newcomer to international law, I have been inspired by the international law distinction between specific measures to benefit litigants and general measures to prevent the reoccurrence of violations. From this practice emerges the major argument of this book: we should understand remedies as a two-track process. On the first track, courts should play the dominant role in providing meaningful remedies for the litigant. On the second systemic track, they should engage dialogically with the state to prevent similar rights violations in the future.

1.1.3 Outline of This Chapter

Section 1.2 of this chapter will outline a range of common issues that run throughout the individual remedies discussed in subsequent chapters. They include the multiple goals of remedies and the influence that the separation of powers, subsidiarity and competing social objectives play in constraining remedies.

Section 1.3 will discuss the legal process and interactionalist dialogic methodology used in the book and why it is suitable to the study of the complex subject of remedies.

Section 1.4 will examine the interactions between remedies in supranational and national law and the rationale for studying them together with examples taken from influential prior scholarship.

Section 1.5 will examine the relation between rights and remedies. A number of scholars have expressed concerns about "remedial deterrence".[9] This process operates when courts refuse to recognize rights because of concerns about the costs of remedies either for society at large or for the court itself. One source of remedial deterrence is the common idea that if courts recognize innovative and demanding rights, such as socio-economic rights and Indigenous rights, they must necessarily solve all of the remedial complexities of enforcing them. My interactionalist

Fuller also recognizes the importance of continual re-enforcement of norms including both softer attempts at persuasion and, when necessary, harder attempts at enforcement.

[8] Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014) pp.117–136; Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (New York: Oxford University Press, 2015), p.31.

[9] Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 *Colum. L. Rev.* 4; Sonja B. Starr, "Rethinking 'Effective Remedies' and Remedial Deterrence in International Courts" (2008) 83 *N.Y.U. L. Rev.* 693.

and dialogic legal process methodology will suggest that when attempting to prevent future violations, courts generally do not and should not act alone. They should be assisted by other actors who can help them grapple with the complexities and challenges of remedies.

Section 1.6 will examine the main textual sources for remedies in domestic and supra-national law. These texts are most important when they specifically restrict remedies. For example, the UK's Human Rights Act 1998[10] denies courts the power to invalidate legislation and only allows non-binding declarations of invalidity. The 11th Amendment of the American Bill of Rights restricts the power of the Federal Courts over states. Remedial texts generally provide a broad and flexible framework for remedies by stressing vague admonitions to provide effective remedies. They have the virtue of allowing remedies to be shaped to the context, but they have the vice of not providing litigants or judges with principled criteria to apply to remedies.

Section 1.7 will draw on private law debates to outline different approaches to the exercise of remedial discretion.[11] Discretion plays a helpful and necessary role in remedial jurisprudence to the extent that it allows judges to adjust remedies to the context. At the same time, a strong discretion that simply allows judges to decline to grant a remedy without attempting to justify the remedial choice is a threat to rights and the rule of law. I will suggest that the answer to the dilemma of remedial discretion is not to try to reduce the necessary role of remedial discretion to rigid rules but rather to recognize broad principles that should guide rather than determine the exercise of remedial discretion.

What are the principles that should govern remedial decision-making? Section 1.8 will examine the need for courts at the domestic level to respect their appropriate role in the separation of powers and for adjudicators at the supra-national level to respect subsidiarity and the primacy of domestic legal systems. These concerns about the appropriate role of adjudicators should not, however, be rigid or static. Much will

[10] c. 42.

[11] Peter Birks, "Three Kinds of Objections to Discretionary Remedialism" (2000) 29 *W. Aust. L. Rev.* 1; private law scholars have since the legal realists devoted more time to understanding the importance of remedies as qualifying and often limiting rights. See Guido Calabresi and Douglas Melamed, "Property Rules and Liability Rules: One View of the Cathedral" (1972) 85 *Harv. L. Rev.* 1089; Stephen A. Smith, "Rights and Remedies: A Complex Relationship" in Robert Sharpe and Kent Roach (eds.), *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010); Hanoch Dagan, "Remedies, Rights, and Properties" (2011) 4 *J. Tort L.* 1.

depend on the context and the respective performance of different institutions.

Section 1.9 will examine how principles of proportionality can help inform and discipline the way that competing social interests will constrain remedies, including questions of alternative remedies. Proportionality principles can assist courts in exercising remedial discretion in a more principled, transparent and disciplined manner. In particular, they can assist courts in determining whether governments can justify less drastic or even the award of no remedy because of competing social interests. Allowing competing social interests to compromise remedies is rightly controversial. It allows a second form of interest balancing after the state has failed to justify the human rights violation, sometimes on the basis of the same or similar social interests.[12] Nevertheless, ignoring compelling social interests will only increase the phenomena of remedial deterrence discussed in Section 1.5 of this chapter. In other words, it can lead to stunted interpretations of the underlying rights. Alternatively, ignoring competing interests can result in remedies that can cause serious and unanticipated social harms.

1.1.4 Outline of the Rest of the Book

I will argue in Chapter 2 that courts should take a two-track approach that distinguishes between remedies that compensate and protect litigants and more general and systemic measures to prevent or minimize similar violations in the future. Courts should recognize that they have a distinctive responsibility to provide individual remedies that is not shared by the executive or legislature. With respect to systemic remedies designed to prevent future violations, however, courts should play a more dialogic role that engages with the executive, the legislature, civil society and those who are supposed to benefit from the remedy. The judicial role should respect the separation of powers and subsidiarity. Nevertheless, courts should become interventionist if governments demonstrate that they are incapable or unwilling to take reasonable steps to prevent similar rights violations in the future.[13] Courts should also be responsive to requests for additional relief from those whose rights have or will be

[12] Paul Gewirtz, "Remedies and Resistance" (1983) 92 *Yale L. J.* 4; Robert Leckey, "The Harms of Remedial Discretion" (2016) 14 *I. Con.* 3, 584.

[13] Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable" (2005) 122 *S.A. L. J.* 325.

violated again. International courts are much closer to the two-track approach than domestic courts. This chapter will also suggest that an exclusive focus on one of the individual or systemic tracks can produce remedial pathologies and that the two-track approach is attentive to remedial failure.

Chapter 3 will examine the important and often neglected role that interim remedies play in both domestic and increasingly in supranational law. Interim remedies can provide a first-track remedy that prevents irreparable harm to human rights. At the same time, they can be revisited by requests to amend the relief, by settlements or by a trial on the merits, all of which may be able to provide a more comprehensive approach to systemic relief. To be sure, interim remedies will not always be justified and should be tailored to reflect proportionality principles. A full application of these principles may require courts to take a closer look at the merits of the applicant's claim than has often been the case at the pre-trial stage. It may also require courts to assess the respective harms to applicants and respondents of not granting the interim relief. Without effective interim remedies, however, the promise of human rights will often ring hollow.

Chapter 4 will examine the range of remedies for laws that violate human rights. These include new remedies such as suspended declarations of invalidity and non-binding declarations of incompatibility. The two-track approach as applied to these new remedies will often require that successful litigants be given some tangible remedy even while courts provide legislatures an opportunity to craft the ultimate systemic remedies. A two-track approach can also, in some cases, justify the use of prospective rulings to accommodate competing social interests provided that litigants are given the benefit of the ruling. Interpretative remedies, including those that "read in" words to legislation, can be justified to the extent that they advance legislative objectives in so far as they are consistent with the court's interpretation of human rights. They can achieve both individual and systemic justice. Nevertheless, courts should generally allow legislatures to make choices if there are a variety of rights-compliant outcomes.

Chapters 5 and 6 will examine the traditional remedies of damages and remedies in the criminal process such as the exclusion of improperly obtained evidence. These remedies are best justified as individual remedies to compensate for past harms. At the same time, a failure by the state to take reasonable steps to prevent similar violations in the future should be relevant. Courts should encourage states to use the many remedies at

their disposal to prevent similar violations in the future.[14] It will be suggested that supra-national courts, in part because of their more limited resources, have been more attentive to the dangers of repetitive violations than domestic courts.

The next three chapters will examine remedies in more innovative contexts. Chapter 7 will examine the range of remedies in cases where institutions such as prisons violate human rights. It will outline the implications of a two-track approach that compensates and prevents violations experienced by specific litigants while also supervising a more gradual systemic reform process designed to prevent future violations. Courts should often defer to the state that has the expertise, information and capacity to implement systemic remedies. At the same time, domestic courts should follow supra-national adjudicators by more frequently retaining jurisdiction to provide a transparent and fair process to entertain requests for additional relief. This chapter will advocate for a new intermediate remedy, the declaration plus, that combines the declaration's reliance on persuasion and deference to governments with the retention of jurisdiction that accompanies the use of injunctions. It will also be suggested that the two-track approach will be responsive to the reality of remedial failure in intractable institutional contexts. It can generate ongoing cycles of reform involving both individual remedies and enhanced systemic remedies.

Chapter 8 will examine remedies for violations of socio-economic rights such as housing and health rights. It will be argued that courts should be more willing to issue individual remedies. Individual remedies that prevent irreparable harm and compensate for harm, honour the integrity of adjudication as represented by traditional right to a remedy reasoning. They should not be disparaged as queue jumping, at least in cases where states have made unreasonable distributional or rationing choices. The South African and Colombian Constitutional Courts, like supra-national courts, have taken a two-track approach that combines individual remedies with more deferential systemic remedies.

Chapter 9 will examine remedies for violations of Indigenous rights. Interim remedies to prevent irreparable harm should play an important role. Courts have struggled with such remedies and have often failed to recognize or implement the priority of restitution of Indigenous land or even provide full compensation for pecuniary damages. Although they have been more generous with compensating for non-pecuniary harms, they

[14] Schuck, *Suing Government*.