Reconceptualizing Constitutional Remedies

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Aziz Z. Huq, The Collapse of Constitutional Remedies (2021).

In his brilliant new book, *The Collapse of Constitutional Remedies*, Aziz Huq tells the tale of two eras for constitutional remedies in the US: a mid-century moment in which the Supreme Court created a new, expansive remedial architecture, and a late-century moment of remedial retrenchment. In the mid-twentieth century, Huq notes, the Court developed a "comprehensive" and "robust" four-part remedial architecture, involving injunctions, habeas relief, damages and the exclusion of evidence. (Pp. 87-97.) From the 1970's onwards, the Court began to hollow out the force of these remedies, by erecting a range of barriers to their availability, including the need to show an "obvious wrong", various immunity doctrines and evidentiary barriers. (Pp. 5-6, 103-32.) Huq also notes the way in which this retrenchment has occurred selectively, along two different 'tracks'[1]: one track, involving structural challenges based on federalism and separation of powers principles, has largely seen the availability of constitutional remedies hold steady; and another track, involving individuals' claims to protection from state violence, has witnessed a large-scale retreat. (Pp. 16, 134.)

Huq further notes the immense consequences of this selective retreat: the continued availability of remedies in structural cases has made it harder to advance social state objectives or preserve the infrastructural state, whereas the retreat of remedies in other cases has made it harder to challenge the despotic state. (Pp. 15-16.) In America today, as in the pre and post-Civil War era, the despotic state also bears disproportionately on the poor and racial minorities. Failing to curb the despotic state, therefore, is part of why we see a current crisis of racial injustice and violence in America. Another part is failing to uphold and enable the infrastructural state to enact the programs and regulations necessary to achieve racial and economic justice. (P. 8.)

Lest this sound dry, or academic, rest assured that Huq tells this tale – of two remedial paths – with enormous pith and pathos. The book is written in an accessible trade-press style (and if you have ever taken a federal courts class and struggled with the intricacies of section 1983 remedies or habeas relief, you will know what a feat that is). And it has a truly engaging narrative arc: the tale of two remedial paths is told through the lens of real litigants, with moving stories, which Huq presents with customary literary flair. This is not just a book about federal courts and constitutional history. It is a story about how the Constitution and federal courts have failed the likes of Lula Brewer, Alexander Baxter and Sergio Adrián Hernández Güereca – black, homeless and Hispanic petitioners who have been harmed by agents of the despotic state but received no remedy from the courts.

Huq also provides a compelling explanation for why this tale has unfolded: it is a story, he tells us, of a relatively thin "framework like" constitution[2] that does not put flesh on the bones of Art III, and what federal justice requires. This has also allowed for the flesh to be filled in in quite different ways over time, in ways that reflect the values of Reconstruction (the mid-century expansive remedial turn) and also the Founding (the early republic and late-20th century era of remedial retreat). Partisan politics and ideology, and the turn by the Republican party against the federal courts, also played a large role, along with bipartisan notions of institutional loyalty and docket-management on the part of Democrat-appointed judges. (Pp. 11-13.) Underlying all of this, Huq suggests, is also a misconceived notion of judicial independence and institutional role.

Perhaps the most interesting part of the book, however, is the suggestion by Huq that American economic and racial progressives should not be reading this story as one where the end is already written. Federal courts, Huq tells us, are not (yet at least) worth giving up on as potential instruments for progressive change, and/or constraints on the despotic

state.

This is especially noteworthy at the current political moment, when the White House Commission on the Supreme Court is debating whether and how *further* to limit the powers and finality of the Supreme Court.[3] And this, of course, reflects a widely shared belief on the left in the US that federal courts are beyond redemption as a source of progressive change, and instead likely to be a meaningful obstacle to such change.

Not so, or not so fast, says Huq. A new, or renewed, more expansive conception of constitutional remedies could offer an important tool for achieving racial and economic justice – by creating an additional check on current practices of racial and economic violence. (Pp. 14, 153.)

One wants, of course, to believe that Huq is right. Huq himself nods to the optimism, rather than University of Chicago-style realism, implicit in this argument. And one suspects it is indeed optimistic, though there is no telling what 4-8 years of a Democratic presidency could do to the composition and constitutional role conception of federal judges in the US. For this to occur, however, I suspect that one important coda to Huq's own coda is needed. For the Supreme Court to realize the full promise of its mid-century remedial architecture, it will need to revisit the decision it made (by the thinnest of margins) to adopt a narrow view of *positive rights* under the Due Process and Equal Protection clauses of the 14th Amendment.

A world in which the Court checks the despotic state is undoubtedly one in which it adopts a broad approach to constitutional remedies. But it is also one in which the Court reverses its decision in *Dandridge*[4] and *De Shaney*[5] and endorses the idea of both positive and negative constitutionalism as a core part of America's post-Reconstruction constitutional model.

There have been others at the University of Chicago, among other places, who have made the case for that kind of positive turn within the US.[6] But connecting that work to this important new book by Huq seems necessary to realize the full promise of either project – as a serious academic project that aims to help create a more equal, less despotic America.

1. On the idea of multiple remedial tracks, see especially the important new book on remedies by Kent Roach, Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law (2021).
2. Rosalind Dixon, Constitutional Drafting and Distrust, 13 **Int'l J. Const. L.** 819 (2015); Rosalind Dixon, Constitutional Carve-Outs, 37 **Oxford J. Legal Stud.** 276 (2017); Rosalind Dixon and David Landau, Tiered Constitutional Design, 86 **Geo. Wash. L. Rev. 438** (2018). See also, Mila Versteeg and Emily Zackin, Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design, 110 **Am. Political Sci. Rev.** 657 (2016).
3. Presidential Commission on the Supreme Court of the United States, The White House.
4. *Dandridge v. Williams*, 397 U.S. 471 (1970).
5. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).
6. Cass R. Sunstein, The Partial Constitution (1993). See also, Adrienne Stone and Lael Weis, Positive and Negative Constitutionalism and the Limits of Universalism: A Review Essay, __ **Oxford J. Legal Stud.** __ (Apr. 21, 2021).

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