

# The Relationship between Rights and Remedies in Private Law: A Comparison between the Common and the Civil Law Tradition

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## I. RIGHTS, REMEDIES AND THE “REMEDIAL IMAGINATION”<sup>1</sup>

I am called upon to answer a concrete and concise question: “Do the common law and civilian traditions differ in their approach to the relationship between rights and remedies, and if so, how?” This might look rather straightforward, but turns out to be more intricate a question than it seems at first glance. There is a complication we cannot help but take very seriously: French civilian Denis Tallon once remarked in a report on remedies for breach of contract that “the French reporter is confronted with a terminological difficulty which, as always, reflects a more fundamental problem: *what is a remedy?*”<sup>2</sup> We have to be aware right from the outset of our inquiry that the civil law is not familiar with the term or the concept of remedy as understood in the common law tradition. The French *recours*—which in the English language version of the Quebec civil code is translated as “remedy”—or the German *Rechtsbehelf* describe a “remedial right” of which one can avail oneself rather than a “cure” administered by a court.<sup>3</sup>

However, every legal system has to somehow bridge the gap between the abstract discourse of rights and norms and the social reality of enforcing these rights. Remedies translate the abstract and lofty discourse of the law into the life-world of the disputants. Actions, wrote common law Professor Charles A. Wright, “are not brought to vindicate nice theories as to negligence or nuisance or consideration.”<sup>4</sup> This, of

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<sup>1</sup> “Private Law and the Remedial Imagination: The Relationship between Rights and Remedies” was the motto of the first panel of the conference, which was chaired by Robert J. Sharpe and comprised Stephen A. Smith and the author.

<sup>2</sup> Denis Tallon, “Remedies (French Report)” in Donald Harris and Denis Tallon, eds., *Contract Law Today: Anglo-French Comparisons* (Paris: Librairie générale de droit et de jurisprudence, 1987), at p. 263 [emphasis added].

<sup>3</sup> For further details, see Part III.A., below.

<sup>4</sup> Charles A. Wright, “The Law of Remedies as a Social Institution” (1955) 18 U. Det. L.J. 376 at p. 377.

course, also holds true for the civil law. Civilians are well aware of the fact that, as Rudolph von Jhering put it, “a right that cannot be realized, that only exists on paper, is nothing but words, nothing but a legal phantom.”<sup>5</sup> The terminological difference—the absence of “remedy” in the civil law—does not hint to a difference in *function*, but to a different *epistemology*; we will see that the civil law discourse has traditionally laid a stronger emphasis on the concept of “rights,” which is in line with its tendency to approach law as an abstract normative system to be treated in a “scientific” manner. In the common law, remedies fall, in the words of Douglas Laycock, “somewhere between substance and procedure, distinct from both but overlapping with both.”<sup>6</sup> The civil law, enamoured with clear-cut categorization, lacks the “remedial imagination” for such a fabulous chimera.

## II. THE COMMON LAW

What is the approach of the common law tradition to the rights-remedies relationship? We have to differentiate between an empirical, factual description of how the common law tradition has dealt with the problem in its history, and what legal theorists and philosophers have argued ought to be the proper answer to the eternal question of how rights relate to remedies.

### A. COMMON LAW PRAGMATISM: REMEDIES BEFORE RIGHTS

Unlike the civilian, who is more academically inclined and weighed down by doctrinal theorization, the common lawyer has traditionally cared about what actually matters; he emphasizes *outcome*, actual results rather than idle theory. As English contract law scholar and legal theorist P.S. Atiyah put it: “English law has for long prided itself being strong on remedies, even if it is less interested in rights.”<sup>7</sup>

The reason for this tendency is usually said to be found in the history and structure of the common law. The common law developed

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<sup>5</sup> Rudolph von Jhering, *L'esprit du droit romain dans les diverses phases de son développement*, t. 3, 3d ed., trans. by de Meulenaere (Paris: Marescq, 1887), at p. 16.

<sup>6</sup> Douglas Laycock, *Modern American Remedies: Cases and Materials*, 3d ed. (Aspen: University of Michigan Aspen Law & Publishing, 2002), at p. 1.

<sup>7</sup> Patrick S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987), at p. 21 [Atiyah].

within a procedural framework of causes of actions. It was not until the abolition of the *Common Law Procedure Act* of 1852 that the question of division between substance and procedure at all became an issue of practical relevance.<sup>8</sup> Although the theoretical separation between procedure and substance exists in common law thought, “when it comes to remedies,” as Geoffrey Samuel observed, “this distinction can break down as a result of the legacy of the forms of action which themselves defined substantive ideas mainly through formal rules of procedure.”<sup>9</sup> Scholarly attempts at theoretical elucidation notwithstanding, in light of this “legacy,” traditional discourse: a) was more likely to develop a rhetoric that focused on the actual relief, the “remedy” to cure the plaintiff’s grievance granted by a judge; and b) had no need to engage in a clear distinction between substance and procedure when it came to remedies.<sup>10</sup>

## B. RIGHTS-BASED APPROACHES TO PRIVATE LAW

This might appear an accurate description of the *traditional* way the common law approached the relationship between right and remedy (which displayed, as Atiyah has reminded us, a certain lack of interest in the definition of substantive rights); yet, many authors would disagree that this is an accurate description of how remedies *should* be perceived. The common law is obviously not unfamiliar with a private law discourse of rights. Since the days of Hale and Blackstone,<sup>11</sup> English jurists map out

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<sup>8</sup> Of course, the “final blow was struck by the Judicature Act of 1873”: see Frederick W.M. Maitland, *The Forms of Actions at Common Law* ed. by A.H. Chaytor and W.J. Whittaker (Cambridge: Cambridge University Press, 1997), at pp. 6–7. See also Geoffrey Samuel, “Public and Private Law: A Private Lawyer’s Response” (1983) 46 *Mod. L. Rev.* 558, at p. 562f., and John Anthony Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000), at p. 83, n. 5.

<sup>9</sup> Geoffrey Samuel, *Law of Obligations and Legal Remedies*, 2d ed. (London: Cavendish, 2005), at p. 40 [Samuel, “Legal Remedies”].

<sup>10</sup> Frederick H. Lawson, “‘Das subjektive Recht’ in the English Law of Torts” in Frederick H. Lawson, *Many Laws: Selected Essays Part I* (Amsterdam: North-Holland, 1977), at p. 178.

<sup>11</sup> See Matthew Hale, *An Analysis of the Civil Part of the Law*, 6<sup>th</sup> ed. (London: Butterworth, 1820) – first edition published in 1713; William Blackstone, *Commentaries on the Laws of England*, vol. 1–3 (Oxford: Clarendon Press, 1765–1768).

private law by squaring two dichotomies: “rights” and “wrongs”<sup>12</sup> on the one hand, and “rights” and “remedies”<sup>13</sup> on the other. Particularly in recent times, the “rights”-side of the rights/remedies-dichotomy has attracted more and more attention that elicited not only academic but also important judicial statements. A prominent example comes to mind: Lord Diplock’s famous distinction between primary and secondary rights arising from a contract, his subtle sub-distinctions as to the different species of primary rights, and the implications for the administration of remedies.<sup>14</sup>

With the recent rise of remedies as a popular topic in the academy, legal theorists in the commonwealth have shown a renewed interest in the rights-remedies relationship; traditionally not quite so smitten with the pragmatist stance fairly common among legal scholars in the USA,<sup>15</sup> they have reacted to the popularity of “remedies as a legal subject”<sup>16</sup> by aiming at theoretical explanations of how remedies relate to rights. The works of Peter Birks,<sup>17</sup> Robert Stevens,<sup>18</sup> Stephen A. Smith<sup>19</sup> and Ernest J.

<sup>12</sup> Blackstone, *ibid.* vol. 1 (1765), at p. 117ff.: right v. wrong. “Right,” in this context, is at first not used in the sense of an individual entitlement, but in the sense of a state of affairs, of “what is right.”

<sup>13</sup> Blackstone, *ibid.* vol. 3 (1768), at p. 23ff. Blackstone actually states, at p. 23, that whenever a right is invaded, there is a remedy. Note, however, that Blackstone does not yet think in the categories of Austin’s secondary rights—Blackstone’s concept of rights remains, as Birks has called it, “superstructural” (Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20 *Oxford J. Legal Stud.* 1, at p. 5 [Birks]).

<sup>14</sup> See e.g. *Lep Air Services Ltd. v. Rolloswin Investments Ltd.* [1973] A.C. 331 (H.L.); *Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association Ltd.* [1966] 1 W.L.R. 287; *C. Czarnikow Ltd. v. Koufos, The Heron II* [1966] 2 Q.B. 695. See also Brice Dickson, “The Contribution of Lord Diplock to the General Law of Contract” (1989) 9 *Oxford J. Legal Stud.* 441 at p. 448.

<sup>15</sup> Cf. Neil Duxbury, “English Jurisprudence between Austin and Hart” (2005) 91 *Va. L. Rev.* 1 at p. 55.

<sup>16</sup> Stephen M. Waddams, “Remedies as Legal Subject” (1983) 3 *Oxford J. Legal Stud.* 113 [Waddams].

<sup>17</sup> See e.g. Birks, *supra* note 13.

<sup>18</sup> See e.g. Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

<sup>19</sup> See e.g. Stephen A. Smith, “The Law of Damages: Rules for Citizens or Rules for Courts?” in Dajkhongir Saidov and Ralph Cunnington, eds., *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008), at p. 33 [Smith, “Damages”]; Stephen A. Smith, “The Rights of Private Law” in Andrew Robertson and Hang Wu, eds., *The Goals of Private Law* (Oxford: Hart Publishing, 2009), at p. 181 [Smith, “Rights”].

Weinrib<sup>20</sup> stand witness to this academic interest in a rights-based theory of remedies. If we take account of the amount of scholarly writing produced, it seems fair to say that, in this day and age, there exists a more vivid academic discourse on the topic of rights—and their relationship to remedies—in common law jurisdictions than in the civil law world.

### C. A SPECIFIC EXAMPLE: SPECIFIC PERFORMANCE

What is the difference between these two approaches—the pragmatic and remedy-focused approach, and the rights-based approach? Rather than describing in detail the different sophisticated theories on the rights-remedies relationship, let us take a look at the law of contracts as an example. In the common law,<sup>21</sup> a decree for specific performance is thought of as an equitable remedy; it is a judicial order whose availability is (at least to a certain degree) within the court’s discretion and that presupposes that no adequate remedy exists at law, as damages are not sufficient to properly compensate for the suffered loss.<sup>22</sup>

For the pragmatist, the remedy is the starting point to define the rights-remedies-relationship; the remedy defines the right, or, as the ancient proverb goes, *ubi remedium, ibi ius*. In our contractual example, the fact that the award of damages is the “standard” remedy therefore defines the substantive “rights”-content of the contract. Most notably, and most radically, O.W. Holmes stated that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”<sup>23</sup> This approach, in the terminology suggested by Grant Hammond,<sup>24</sup> could be called “monist”—a “remedial monism,” one might add; expressed in the language of remedies and

<sup>20</sup> Ernest J. Weinrib, “Two Conceptions of Remedies” in Charles E.F. Rickett, ed., *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008), at p. 3.

<sup>21</sup> See e.g. Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 2008), at para. 7.10ff.; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at p. 906ff.; Edwin Peel, ed., *Treitel on the Law of Contract*, 12th ed. (London: Sweet & Maxwell, 2007), at para. 21–016ff.

<sup>22</sup> Sharpe, *ibid.* at para. 7.50ff.

<sup>23</sup> Oliver Wendell Holmes, “The Path of the Law” (1897) 10 *Harvard L. Rev.* 457, at p. 462.

<sup>24</sup> Grant Hammond, “Rethinking Remedies: The Changing Conception of the Relationship between Legal and Equitable Remedies” in Jerry Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough, Ont.: Carswell, 1991), at p. 90 [Hammond].

rights, “right” is mostly eclipsed and consumed by “remedy.” The remedy is what matters: saying that there was a “right” is just another way of saying that a remedy has actually been granted. It is important to note that this is not just a position held by a theoretical maverick such as Justice Holmes; it is, more generally, associated with the pragmatic way of thinking typical of the common law. Sir Nicolas Browne-Wilkinson VC wrote in *Kingdom of Spain v. Christie, Manson & Woods Ltd.* in 1986:

In the pragmatic way in which English law has developed, a man’s legal rights are in fact those which are protected by a cause of action. It is not in accordance, as I understand it, with the principles of English law to analyse rights as being something separate from the remedy given to the individual.<sup>25</sup>

If one approaches, on the other hand, private law through a theory of rights, one would probably subscribe to the point of view that remedies should be available when a *right* exists that entitles the claimant to relief. In other words: *ubi ius, ibi remedium*. The right defines the remedy, and courts would ideally follow and confirm substantive rights—in other words, do what Professor Smith calls “rubber-stamping.”<sup>26</sup> We could think of a “rights monism” that dispenses with “remedy” as a meaningful category altogether; when “rights” alone matter, “remedy” can be seen as a non-technical term to describe every response of the legal system to some sort of grievance in need of “cure,” be it substantive or procedural in nature. Peter Birks has argued against such a use of the terminology—wherever the law grants a right, it should be called by its proper name. In matters terminological, “right” should prevail over “remedy.”<sup>27</sup> In search of a remaining technical meaning of “remedy,” thus acknowledging a theoretical dichotomy or “dualism”<sup>28</sup> of right and remedy, it is only natural to define “remedy” narrowly in a way that leaves matters of substance to the concept of “right” and relegates “remedy” to its factual

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<sup>25</sup> *Kingdom of Spain v. Christie, Manson & Woods Ltd.* [1986] 1 W.L.R. 1120, at p. 1129.

<sup>26</sup> Stephen Smith, “Rights and Remedies: A Complex Relationship,” *supra* [Smith, “Relationship”].

<sup>27</sup> Birks, *supra* note 13 at p. 19–22.

<sup>28</sup> Hammond, *supra* note 24 at p. 91.



implementation. Stephen A. Smith and Rafal Zakrzewski, accordingly, define “remedies” as “court orders.”<sup>29</sup>

When trying to make sense of the common law of contracts from this latter, rights-based perspective, the first question would therefore be: which kind of right does a contract give rise to? At first sight, it seems that the contractual rights would somehow correspond with the promises the parties made—that the original, *primary* right arising from a contract is a right to the promised performance. If you indeed believe in something like such a primary obligation to perform a contract, you have to wonder why the typical remedy is *not* specific performance, but the award of damages. In contrast, the pragmatist only bothers with rights that are defined through actual remedies; there is no point in theorizing a right to performance in cases where the law does not grant specific performance as a remedy.<sup>30</sup>

However, he who believes in the existence of rights prior to and independent of a remedy has to clarify *why* the common law refuses to “rubber-stamp” the primary right. Professor Smith,<sup>31</sup> provides a sophisticated explanation: *private* rights that citizens hold against each other are separate and distinct from the *rights citizens hold against courts*. The latter are, according to Professor Smith, governed by the law of court orders, which belongs to the domain of *public law*. In this realm, concerns and considerations that reach beyond the private rights relationship between the disputants can be taken into account, such as the costs involved in administering a certain remedy. The question of whether a court should issue a decree of specific performance is, according to Smith, such a matter of the law of court orders—or, if you will, the law of remedies. The particular nature of the public law regime governing the relationship between the court and the citizen, asking for enforcement of his contractual right, allows for a certain discretion of the court to enforce—or as Smith calls it, “replicate”—the primary right to performance, or to refuse it.

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<sup>29</sup> Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005), at p. 43; see also Stephen A. Smith, *Introduction to Contract Theory* (Oxford: Oxford University Press, 2004), at p. 388 [Smith, “Contract Theory”].

<sup>30</sup> See note 23.

<sup>31</sup> Smith, “Relationship” *supra* note 26, *passim*.

### III. THE CIVIL LAW

Let us contrast this with the “classical” view of the civil law. As is well known, one of the prominent differences between common and civil contract law is the fact that in the civil law—and this holds true for all civilian jurisdictions I am familiar with—specific performance of a contract is granted as *a matter of right*.<sup>32</sup> Professor Jukier, in her contribution to this collection, elaborates in great detail on specific performance as the presumptive remedy for breach of contract in Quebec; I am only using the example because of its notoriety to highlight the more deep-seated structural differences between the common and the civil law approaches.

When a paradigmatic civil law judge, operating in a framework of a civilian law of procedure (which excludes Quebec), grants specific performance, she would be working from the following three assumptions:

1. The decision whether specific performance should be granted or not is a matter of the private rights-relationship between the parties, i.e. a matter of *substantive private law*, not to be governed by a specific “law of court orders.”

2. The court, therefore, has no discretion as to consider concerns or considerations that do not arise from the rights-relationships between the parties.

3. If the court comes to the result that a valid contract exists, that there are no defenses etc., the court will enforce and thereby confirm what is understood as the primary right to performance—it *rubber-stamps* the primary right, it does not replicate it, nor does it see “specific performance” as a “remedy” apart from a simple confirmation of the primary right.

This example should help us better understand the rights-based approach of the civil law.

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<sup>32</sup> Louis J. Romero, “Specific Performance of Contracts in Comparative Law: Some Preliminary Observations” (1986) 27 C. de D. 785, at p. 792ff.

## A. RIGHTS AND ACTIONS

Civilian private law discourse is traditionally centred upon the notion of the subjective right.<sup>33</sup> All allocative decisions that private law is supposed to make—what belongs to whom and who owes what to whom—can eventually be expressed through a discourse of rights (entitlements, obligations, duties and so forth). These decisions are perceived as decisions of substantive law.

How to now bridge the gap between norms and facts? Since those who are on the negative side of a “subjective right”—those under a duty or an obligation—do not always comply with their duties and, except for narrowly defined cases of self-help, the state holds the monopoly on the use of force, the state has to provide for an institutional system that ensures the enforcement and execution of subjective rights. Whereas subjective rights define the relations of private individuals and therefore amount to substantive “private law,” the body of law governing the administration of enforcement and execution procedures is rather a matter of “public law.”<sup>34</sup> Substance and procedure are to be strictly kept apart; procedure is relegated to the ancillary function (*fonction auxiliaire*) of enforcing and executing substantive rights:<sup>35</sup> the action is “*humble servante du droit subjectif substantiel*.”<sup>36</sup>

Except for certain cases such as dissolving marriage through a constitutive act, a judicial decision does not *create* a new legal situation,<sup>37</sup> but rather announces how the pre-existing legal relationship between the

<sup>33</sup> On the following, see, for the German civil law, the splendid summary rendered by Wolfgang Zöllner, “Materielles Recht und Prozessrecht” (1990) 190 *Archiv für die Civilistische Praxis* 471 [Zöllner]. For France, see Serge Guinchard, Frédérique Ferrand and Cécile Chainais, *Procédure Civile: Droit interne et communautaire*, 29th ed. (Paris: Dalloz, 2008), at para. 86ff [Guinchard and Ferrand].

<sup>34</sup> See e.g. René Morel, *Traité élémentaire de procédure civile*, 2d ed. (Paris: Sirey, 1949), at p. 6ff.; see, however, for a more subtle distinction Loïc Cadiet and Emmanuel Jeuland, *Droit judiciaire privé*, 5th ed. (Paris: Litec, 2006), at para. 11 [Cadiet and Jeuland].

<sup>35</sup> Gérard Cornu and Jean Foyer, *Procédure civile* (Paris: Presses Universitaires de France, 1958), at p. 6 [Cornu and Foyer]. The role of procedure as a “servant” of substantive law is also underlined by Cadiet and Jeuland, *ibid.* at para. 8f.; and by Henry Solus and Roger Perrot, *Droit judiciaire privé*, t. 1 (Paris: Sirey, 1961), at para. 15.

<sup>36</sup> Henri Motulsky, *Écrits: études et notes de procédure civile* (Paris: Dalloz, 1973), at p. 100 [Motulsky]. See also Cornu and Foyer, *ibid.* at p. 11.

<sup>37</sup> And even in cases in which it does, it does so because substantive law ascribes this function to the judicial decision.

parties has to be properly understood.<sup>38</sup> Therefore, within the grid of the strict taxonomic separation of substantive law and procedure, the dichotomy that matters from the perspective of someone intent on enforcing her rights is not that of right and remedy, but that of right and action.

It goes without saying that this description is, of course, an oversimplification. Furthermore, we must of course not forget that the common law tradition, as previously mentioned, separates between substance and procedure as well, and is even familiar with the imagery of “servility”; as Collins M.R. famously remarked, “the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress.”<sup>39</sup> Yet, as we have already seen, when it comes to the relationship of rights and remedies, it seems harder to equate those rules that do the good “work of justice” with rules of substantive law (as opposed to rules of procedure)—in other words, the separation of substance and procedure tends to, as Geoffrey Samuel puts it, “break down,”<sup>40</sup> when common lawyers try to analyze what happens when a court administers a remedy.

Let us assume that, in contrast, the axiomatic starting point of the civil law is indeed a paradigm of “rubber-stamping”; the role of the court, and of the law of procedure, is mainly to grant official verification to the existence of subjective rights. The body of public law that governs the bringing of an action has nothing to say as to the justification of the underlying substantive claim; the substantive law, *vice versa*, is purged from all procedural implications.

It becomes obvious why the civilian is challenged to ascribe a technical meaning to the notion of “remedy”—within the rights-actions framework, there is no room for “remedy” as a technical term that combines features of substance and procedure. This explains the absence of an exact equivalent in French terminology. André Tunc has suggested

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<sup>38</sup> A theorist might want to engage in a discussion of the question whether the “nature” of the pre-existing right changes due to the approval of the court by means of “novation” etc. The court order does command special respect, different rules of prescription apply etc. For the English common law, see Birks, *supra* note 13 at p. 15.

<sup>39</sup> *Re Coles and Ravenshear* [1907] 1 K.B. 1, at p. 4.

<sup>40</sup> Samuel, “Legal Remedies” *supra* note 9 at p. 40.

the use of the non-technical term *remède* as a translation for “remedy.”<sup>41</sup> German civil law parlance also lacks an equivalent of “remedy”—*Behelf* or *Rechtsbehelf*<sup>42</sup> might be used as a non-technical term that could describe both a substantial entitlement as well as the possibility to have this right enforced in court. In that sense, *remedium* only has a place in civil law thinking in its broadest and most non-distinct denotation: the idea of *remedium* as “cure” that refers to any response of the legal system to a grievance—a definition explicitly rejected by Birks for the common law usage.<sup>43</sup> However, since the continental civil law does not think in terms of the Blackstonian rights/wrongs/remedies taxonomy (if a *right* is invaded, there is a *wrong*, which will be rectified by granting a *remedy*)<sup>44</sup> the realization of a right is not so much seen as remedying a wrong, as a “cure” that is being granted, administered by a court. *Rechtsbehelf*, for example, differs from “remedy” also insofar that it denotes something one avails oneself of: it is the *means* one uses to help oneself (*sich behelfen*) in order to obtain relief, rather than the cure (or remedy) itself. We can summarize that “remedy” as a technical term does not fit well in the civilian dichotomy of substance and procedure, of right and action. Given this clear-cut separation of substance and procedure, the civil law has no room for an overlapping grey area that could amount to the “legal subject”<sup>45</sup> of remedies.

## B. POTENTIAL EXPLANATIONS

How do we account for this difference? Without postulating a simple relation of causality, we can link the position of the civil law tradition to the idiosyncrasies of its historical development. Again, we can only attempt to describe the tendency of the “mainstream.” In the civil law tradition, with its prolific production of scholarly writing, there are many examples of views deviating from this mainstream; I shall mention only a few.

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<sup>41</sup> André Tunc, “Preface” in C. Lambrechts, ed., *Code de Commerce Uniforme des États-Unis* (Paris: Armand Colin, 1971), at p. 17.

<sup>42</sup> For example, as a translation of “remedy,” in the official German language version of the CISG (Bundesgesetzblatt 1989 II, 588). However, *Rechtsbehelf* is more commonly found in procedural terminology, signifying any means of realizing a right within the framework of orderly procedure.

<sup>43</sup> Birks, *supra* note 13 at p. 19ff.

<sup>44</sup> Blackstone, *supra* note 13 at p. 23ff.; Birks, *supra* note 13 at p. 5.

<sup>45</sup> Waddams, *supra* note 16.

### i. CIVIL LAW AS AN ACADEMIC TRADITION

Let us start with the most general, and possibly most banal, observation. It is common comparative law textbook fare that the development of the civil law has, at least since the renaissance of Roman law in the High Middle Ages, coincided with the rise of the university and has been driven by learned law professors.<sup>46</sup> “The teacher-scholar is the real protagonist of the civil law tradition,” as John H. Merryman put it, “[t]he civil law is a law of the professors.”<sup>47</sup> Those civil law scholars were by no means mere bloodless men of the ivory tower, disconnected from practice: one of the effects of scholars’ role as the protagonists of legal development has always been their relative closeness to practice. As a matter of course, judges look at scholarly writing and accept it as authority; from the Middle Ages onwards, even towering academic figures such as Bartolus and Baldus regularly rendered their expert opinions in civil suits.<sup>48</sup> Nevertheless, it is easy to imagine that because civilian discourse was propelled by scholars and teachers, its tendency has been far less outcome-oriented or “pragmatic” than the judge-driven discourse of the common law. This learned discourse, which became more and more infatuated with reason and the idea of law as normative system,<sup>49</sup> tended to approach the rights-remedies conundrum from the angle of rights, rather than from the angle of practical outcomes, or remedies.

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<sup>46</sup> See e.g. Stephan Kuttner, *The Revival of Jurisprudence in Renaissance and Renewal in the Twelfth Century*, ed. by Robert L. Benson and Giles Constable (Cambridge: Harvard University Press, 1982), at p. 299ff.

<sup>47</sup> John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3d ed. (Stanford: Stanford University Press, 2007) [Merryman and Pérez-Perdomo]. See also Hein Kötz and Konrad Zweigert, *An Introduction to Comparative Law*, 3rd ed., trans. by Tony Weir (Oxford: Oxford University Press, 1998); R.C. van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002), at pp. 44–48 (“The English Bench is Paramount” at p. 44 as opposed to “The Continental Professor is Paramount” at p. 45). But see, on tendencies of a “new pragmatism” in French civil law, bringing about a more important role of the judge as well: William Barnès and Marie-Anne Frison-Roche, “Le souci de l’effectivité du droit” D. 1996, chr. 35, at p. 301.

<sup>48</sup> For an introductory overview, see e.g. Peter G. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), at p. 38ff. [Stein, “Roman Law”].

<sup>49</sup> See e.g. Roger Berkowitz, *The Gift of Science* (Cambridge, Mass.: Harvard University Press 2005), at p. 17ff.

## ii. THE SEPARATION OF SUBSTANCE AND PROCEDURE AND THE “SUBJECTIVE RIGHT”

The trajectory of this development might nonetheless be somewhat surprising, given that the continental civil law developed within the framework of Roman law. Roman law—classical Roman law, that is—is said to be an “actional law”;<sup>50</sup> lacking a clear-cut distinction between substance and procedure, it does not separate substantive right or claim on the one hand and procedural implementation or realization on the other. Substantive entitlement was determined by the availability of a procedural remedy and took the form of the respective *actio*.<sup>51</sup> What mattered was the availability of a *formula*—indeed, *ubi remedium, ibi ius*.<sup>52</sup> However, from the Middle Ages onwards, there are two important, intertwined developments: firstly, on a doctrinal level, the tendency to disentangle substance and procedure;<sup>53</sup> and, secondly, on a more foundational level, the development of the concept of the “subjective right” in the sense of a personal entitlement that expresses a growing awareness of the individual.<sup>54</sup>

It is not a coincidence that both the ascendancy of the “subjective right” and the growing rift between substance and procedure culminate in the heyday of individualism and find their most radical formulation in nineteenth century German Pandectist scholarship, which influenced legal thought in all continental jurisdictions, including France.<sup>55</sup> Individualist

<sup>50</sup> Reinhard Zimmermann, *The Law of Obligations* (Oxford: Oxford University Press, 1996), at p. 6 [Zimmermann, “Obligations”].

<sup>51</sup> Horst Kaufmann, “Zur Geschichte des aktionenrechtlichen Denkens” (1964) 15 *Juristenzeitung* 482. See also Bernhard Windscheid, *Die Actio des roemischen Civilrechts, vom Standpunkte des heutigen Rechts* (Düsseldorf: Julius Buddeus, 1856), at p. 3 [Windscheid].

<sup>52</sup> Zimmermann, “Obligations,” *supra* note 50 at p. 6.

<sup>53</sup> Peter G. Stein, “Donellus and the Origins of the Modern Civil Law” in J.A. Ankum et al., eds., *Mélanges Felix Wubbe* (Fribourg: University Press Fribourg, 1993) 439 at p. 446ff.; Zöllner, *supra* note 33 at p. 472.

<sup>54</sup> Michel Villey, *La formation de la pensée juridique moderne* (Paris: n.p., 1975), at p.p. 225-262 [Villey, “Pensée juridique moderne”]; Michel Villey, “L’idée du droit subjectif et les systèmes juridiques romains” (1946) 24 *Rev. hist. dr. fr. & étran.* 201. See also, however, Brian Tierney, “Villey, Ockham and the Origin of Individual Rights” in John Witte and Frank S. Alexander, eds., *The Weightier Matters of the Law, Essays on Law and Religion: A Tribute to Harold J. Berman 1* (Atlanta: Scholars Press, 1988) at p. 1ff.

<sup>55</sup> See e.g. Franz Wieacker, *A History of Private Law in Europe*, trans. by Tony Weir (Oxford: Clarendon Press, 1995), at p. 350.

philosophy and “will theory,” its legalistic expression, put the power of the individual in the very centre of nineteenth century private law ideology, and figure prominently in the key works of scholars such as Savigny, Puchta and Windscheid.<sup>56</sup> Private law demarcates spheres of individual freedom. This sphere of individual freedom is synonymous with the “subjective right”; it is, again in Savigny’s words, “the power of the individual person, the realm where his will reigns supreme.”<sup>57</sup>

Bernhard Windscheid, who later became one of the “fathers” of the German Civil Code, pushed the theoretical separation of substance and procedure to its doctrinal peak. He describes the relationship between the “subjective right” and its procedural implementation as follows:

“[T]he Right is the Prius, the action the subsequent, the Right is what creates, the action what is created. The Right assigns each individual the sphere in which his will posits law [*Gesetz*] for all other individuals; if the individual is not respected in this sphere, he may complain to the state, the guardian of rights [and/or law: *Recht* also means “law” in the objective sense], and the state will help to obtain what is his. The legal order [*Rechtsordnung*] is an order of Rights [*Ordnung der Rechte*].”<sup>58</sup>

In France, codification had cemented the *external* separation of the subject matters of substantive private law (*Code civil*, 1804) and civil procedure (*Code de procédure*, 1806). The *Code de procédure*, the “younger sister” of the *Code Napoléon* and not quite as innovative, exerted major influence in Europe.<sup>59</sup> Yet, *internally*, subjective right and action as the right’s procedural implementation were still seen as a unity. The position put forward by Demolombe is paradigmatic: the action is not

<sup>56</sup> On ‘will theory’ as an expression of 19<sup>th</sup> century ‘legal consciousness,’ see Duncan Kennedy, “Two Globalizations of Law & Legal Thought: 1850–1968” (2003) 36 *Suffolk U.L. Rev.* 631, at p. 637. Whether this ‘legal consciousness’ is rooted in Kantian or Hegelian philosophy is still a matter of contention; see, for an introduction, Helge Dedek, *Negative Haftung aus Vertrag* (Tübingen: JCB Mohr (Paul Siebeck), 2007), at p. 101. See also James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), at p. 227.

<sup>57</sup> Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. 3 (Berlin: Veit und Comp, 1840), at para. 59 (“...die der einzelnen Person zustehenden Macht, ein Gebiet, worin ihr Wille herrscht”).

<sup>58</sup> Windscheid, *supra* note 51 at p. 3.

<sup>59</sup> C.H. van Rhee, “Introduction” in C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Antwerpen: Intersentia, 2005), at p. 6. The CPC 1806 incorporated major parts of the Royal Ordinances on Civil Procedure of 1667.



only a procedural vehicle for the implementation of the substantive right. Very similar to Savigny's formula of the action being "the right in a state of defense," Demolombe writes:

[L']action enfin, c'est le droit lui-même mis en mouvement; c'est le droit à l'état d'action, au lieu d'être à l'état de repos; le droit à l'état de guerre, au lieu d'être à l'état de paix.<sup>60</sup>

The strict separation of right and action had its breakthrough only in the twentieth century, championed by the works of Vizioz<sup>61</sup> and Motulsky,<sup>62</sup> who also adopted the language of labeling procedure as the "servant" of the substantive law.

This master/servant imagery does not only have doctrinal implications, it speaks, on a more foundational level, to the supremacy of private law over public law, which is another hallmark of civilian thinking.<sup>63</sup> Procedure is an institution of public law that merely implements the preceding, prior subjective private law rights. Legal philosopher Hans Kelsen pointed out how nineteenth century legal thought understood this precedence of the subjective right over the procedural framework of its realization to be "logical" as well as temporal; the subjective rights of private individuals were thus endowed with metaphysical, ontological significance, above and beyond the positive law. While the "objective"—public—law(s), forms of government and procedures of enforcement, are ever changing, the subjective rights of the individual are pre-positive, almost natural, and therefore the very centre of the liberal, private-law based legal philosophy of the 19<sup>th</sup> century.<sup>64</sup>

### iii. JUDICIAL IMAGES: THE "MOUTHPIECE OF THE CODE"?

Furthermore, the theoretical precedence of rights over actions ties in with the civilian paradigm of the judge "finding" law rather than

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<sup>60</sup> Charles Demolombe, *Cours de Code civil*, t. 5 (Bruxelles: Stienon, 1854), at para. 338.

<sup>61</sup> See Cadiet and Jeuland, *supra* note 34 at para. 317.

<sup>62</sup> Motulsky, *supra* note 36.

<sup>63</sup> Which, again, is not to say that the common law is not familiar with the image of the "servant": *supra* note 36.

<sup>64</sup> Hans Kelsen, *Reine Rechtslehre* (Tübingen: JCB Mohr (Paul Siebeck), 1934), at pp. 40–44.

“making” it. This paradigm provides that in order to “find” the law, “norms,” which in a private law context are mostly derived from codal provisions, are “applied” to the “facts” at hand. The norms are applied in what amounts to a syllogistic operation—they, not the judge, decide the case.<sup>65</sup> The process of “application” by the judge *ex post* only reveals what has been the “true” substantive relationship between the parties from the outset.

This, again, is an axiom rather than an actual belief held by judges and other legal actors. However, even nowadays, the paradigm persists that the judge *applies law* and does not “make it.” The style in which French judges still draft their judgments stands witness to how this paradigm is upheld: the brevity and peremptory phrasing follows the aesthetics of the judge as the mere “mouthpiece”<sup>66</sup> of the code.<sup>67</sup> And even though judges themselves might not *truly* believe in this stylized view of adjudication, the practice is upheld to keep up this very appearance.<sup>68</sup> Therefore, it is unsurprising that the methodological “mainstream”—leading treatises etc.—still maintain that “judge-made law”<sup>69</sup> is indeed not law at all: case-law, *jurisprudence*, even if it is *constante* (*ständige Rechtsprechung*) is accepted as an authority in the sense that as a matter of *fact*, lower courts are likely to adhere to the path chosen by higher courts, and practitioners to phrase their arguments accordingly. It is not, however, a “source of law,” since it is only an interpretation of the positive norms.<sup>70</sup>

<sup>65</sup> Merryman and Pérez-Perdomo, *supra* note 47 at p. 36.

<sup>66</sup> Charles de Montesquieu, “Introduction” in Charles de Montesquieu, ed., *De l’esprit des lois* (Paris: n.p., 1748), at p. xiii.

<sup>67</sup> John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968), at p. 407ff [Dawson].

<sup>68</sup> Cf. Mitchel de S.-O.-l’E. Lasser, “Judicial (Self-) Portraits: Judicial Discourse in the French Legal System” (1994) 104 *Yale L.J.* 1326, who contrasts the “official,” at p. 1334ff. and the “unofficial” French portrait of the civil judge at p. 1343ff.

<sup>69</sup> It is very telling that probably the most widely used and most frequently cited German treatise on legal methodology uses the term “judge-made law” (“*Richterrecht*”) only in quotes to emphasize that it is not a “source of law”: Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3d ed. (Berlin: Springer, 1995), at pp. 252, 253, 255, 258.

<sup>70</sup> Larenz and Canaris, *ibid.* at 252–261; Dawson, *supra* note 67 at p. 400ff.; Barry Nicholas, *The French Law of Contract*, 2d ed. (Oxford: Oxford University Press, 2005), at pp. 12–19; Jean Carbonnier, *Droit civil*, t. 1 (Paris: Presses Universitaires de France, 2004), at para. 31 (“*La jurisprudence apparaît ainsi comme l’habitude des*

Besides the fact that this conceptualization of the role of the judge links back to our earlier point that the judge in the civil law is simply not as important a figure as in the common law tradition,<sup>71</sup> it is easy to see how this fact is, on a theoretical level, connected to the idea of sanctioning pre-existing rights rather than creating rights through granting a remedy. If the judge, rather than making “law,” “finds” the “law” (in an objective sense), she also “finds” the parties’ “subjective rights.”

#### IV. DISCRETIONARY AWARDS: SOME COMPARATIVE REMARKS

This civilian model has an obvious open flank. Even if one believes in a precedence of “rights” over “actions” (or “remedies,” if you will), one has to wonder about the practicability of the strict conceptual separation. Private law “rights” are not ends in themselves; of what use, after all, are “rights” without “remedies,” substantive entitlements without any means of realization, if people do not comply with them? Does it not make sense to keep an eye on the possible enforcement of a right while discussing its substantive merits?

Even if there are no obvious *theoretical* objections against creating rights without remedies, even if civilians are said to be less “pragmatic” than the common lawyer, it is not the case that civilians have been completely impervious to arguments of practicality. If we want to understand how a “right” actually operates and fulfills its purpose, it is inevitable to assume a more holistic, or, as we called it earlier, a more “monist” perspective, a perspective that includes procedural implementation and enforcement. What is first disentangled and divided by a theory of strict separation between substance and procedure has to be reunited in order to comprehend the legal process; civilian authors have therefore criticized the dichotomy of substance and procedure as impractical and artificial.<sup>72</sup> The postulate of the primacy of substantive law over procedure, which entails that substantive rights somehow “exist” before the judge can “find” them and see to their proper enforcement,

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*Tribunaux*”). See also Claire L’Heureux-Dubé, “By Reason of Authority or by Authority of Reason” (1993) 27 U.B.C.L. Rev. 1, at p. 9ff.

<sup>71</sup> See Part II.B.i., above.

<sup>72</sup> Zöllner, *supra* note 33 at p. 482ff.; Guinchard and Ferrand, *supra* note 33 at para. 88. Marie-Anne Frison-Roche, “La procédure de l’effectivité des droits substantiels” in Florence Benoît-Rohmer and Constance Grewe, eds., *Procédure(s) et effectivité des droits* (Bruxelles: Nemesis, 2003), at p. 1; Gérard Cornu and Jean Foyer, *Procédure civile* (Paris: Presses Universitaires de France, 1958), at p. 12.

obviously marginalizes what judges actually do and is counterintuitive to any insight of even an undogmatic legal realism. The artificiality of the theoretical assumption becomes particularly conspicuous in cases where the judicial decision involves an obvious degree of latitude.

In the common law, working from the paradigm of a strong, law-creating judge, it seems clear that there are situations in which the availability of a remedy—of a court order—is partly or even entirely within the discretion of the court. Equitable remedies are the most obvious example. Historically, the role of equity in English law has been named as one of the reasons for its preference of remedies over rights.<sup>73</sup> For a modern rights-based approach such as that of Professor Smith, discretionary orders are examples of why the theory of rubber-stamping eventually fails to explain the rights-remedies relationship.<sup>74</sup>

The civilian approach, in contrast, stands true to its “rubber-stamping” approach even in cases that seem to involve judicial discretion. For the civilian there is no such thing as discretion when it comes to the adjudication of substantive rights. Institutionally, the civil law has simply not retained any equivalent to the equitable jurisdiction of the Court of Chancery. Of course, comparatists would bring up the concept of “good faith” (*bona fides*, *bonne foi*, *Treu und Glauben*) as a “functional” equivalent; and to be sure, on a *substantive* level, both equity and good faith serve to temper and correct, respectively, the results of the strict application of “hard and fast” rules.<sup>75</sup> However, according to the civilian purist conceptualization of the separation of powers, all judicial decisions as to the substantive law have to be made as a matter of right; there is no room for discretion in the sense of a residue of a judicial prerogative to arbitrariness. Thus, in procedural terms, “good faith” is not connected to a notion of judicial discretion that equals the discretionary power that is associated with equity in English law. The idea that the judge finds law and *reveals* the rights existing between the parties implies that there can be no legal vacuum to be filled by judicial discretion. This legalistic belief in norms and rights as the foundation of all justice is anathema to

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<sup>73</sup> Atiyah, *supra* note 7 at p. 21f.

<sup>74</sup> Smith, “Damages,” *supra* note 19 at p. 44f.

<sup>75</sup> Martin J. Schermaier, “Bona Fides in Roman Contract Law” in Reinhard Zimmermann and Simon Whittaker, eds., *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000), at p. 63ff.

the idea of equity as a judicial freedom, equity as famously characterized by Roscoe Pound as “justice *without* law.”<sup>76</sup>

## V. SUMMARY AND CONCLUSION

Let us return to the question before us and briefly—and in rather broad brushstrokes—summarize our findings:

1. The civil law focuses, and has done so for a long time, on “rights,” and not on “remedies.”

2. The civil law distrusts the idea of a strong judge. Judges are supposed to find law, not to make it.

3. Combined with a historically engrained separation of substance and procedure, this view has brought about a theory of adjudication that equals what Professor Smith has called “rubber-stamping”: a theory of confirmation of rights.

4. There is, therefore, no room for a distinct “law of remedies” that falls in between substance and procedure. “Remedy” is not a technical term, not a meaningful category in the civil law.

The lesson to learn from this is that we should take terminological differences very seriously. Indeed, as Denis Tallon observed, they are always indicative of larger and more deep-seated differences.<sup>77</sup> The positions of the civil and the common law traditions are defined by their historically determined conceptualization of the relationship between substance and procedure, right and remedy, right and action. It is this insight that makes us realize that the pure civilian position can hardly be upheld in an environment where the substantive law is civilian, but the law of procedure is of common law origin; where judges have to interpret a code, but have the importance and self-image of common law judges.<sup>78</sup> Our inquiry has briefly outlined the terminological as well as the theoretical disparities between the common and the civil law traditions. This helps us to understand the tension that is inevitable when both

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<sup>76</sup> Roscoe Pound, “The Decadence of Equity” (1905) 5 Colum. L. Rev. 20.

<sup>77</sup> Tallon, *supra* note 2.

<sup>78</sup> Daniel Jutras, “Culture et droit processuel: Le cas du Québec” (2009) 54 McGill L.J. 273 at p. 286.

traditions clash, as is the case in Quebec.<sup>79</sup> The unavoidable tension is illustrated by cases such as *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, where the court struggled with the primacy-of-rights approach of the civil law and the connotations evoked by the term “injunction” (Art. 751 *Code de procédure du Québec*), which the court kept referring to as an “equitable” remedy.<sup>80</sup> In recent years, however, judges in Quebec have been increasingly willing to interpret and develop Quebec civil law within its larger context of the civilian tradition, as shown by the evolving case law on good faith. It seems to be in line with this development that in its approach to specific performance, Quebec law, as Professor Jukier has shown, has assigned the “injunction” a function as a “servant” of the substantive right to performance, and not that of an “equitable remedy” in the common law sense.<sup>81</sup>

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<sup>79</sup> *Ibid.* at p. 273ff. Jutras describes the Quebec legal culture of procedure as a hybrid that is characterized by a plurality of different legal cultures rather than a homogenous mixture. He identifies, for example, a prevalent North-American—rather than Continental-European—professional culture, and at the same time a “normative culture” that is characterized by a resurgence of the Quebec Civilian heritage at 288ff.

<sup>80</sup> *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 (C.S.).

<sup>81</sup> See e.g. Rosalie Jukier, “The Emergence of Specific Performance as a Major Remedy in Québec Civil Law” (1987) 47 R. du B. 47.