

Private Law and the Remedial Imagination

The Relationship between Rights and Remedies

1

The Question:

- Do the common law and civilian traditions differ in their approach to the relationship between rights and remedies, and if so, how?

2

The Problem

■ Denis Tallon:

"The French reporter is confronted with a terminological difficulty which, as always, reflects a more fundamental problem:
what is a remedy?"

→ Differences as to
terminology & epistemology

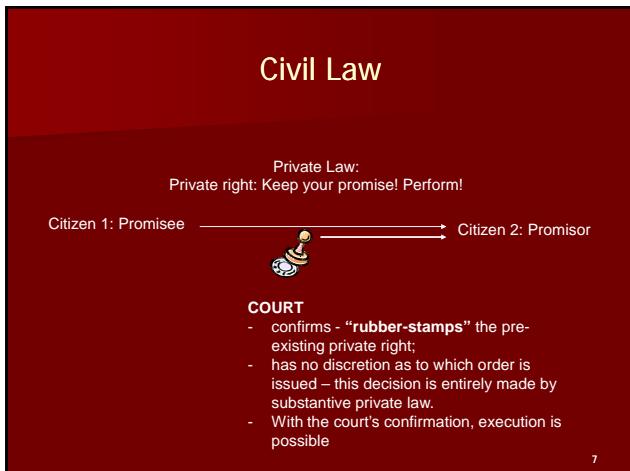
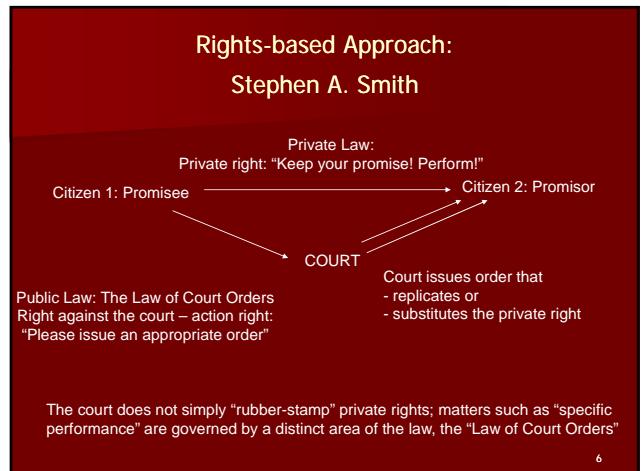
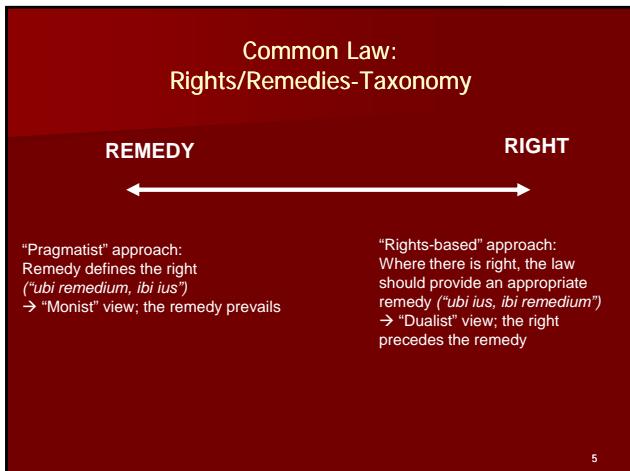
3

Rights & Remedies in the Common Law: The "Pragmatist" Tradition

- "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."

Sir Nicolas Browne-Wilkinson VC,
Kingdom of Spain v. Christie, Manson & Woods Ltd. [1986] 1 W.L.R. 1120 at 1129.

4



Civil Law

Factors that might explain the differences:

- Civil law traditionally less “pragmatic” - propelled by scholars rather than by judges
- The rise of the “subjective right” and the separation of substance and procedure as intertwined developments, starting in the High Middle Ages
- Weaker position of the judge: judges do not make law, they find law

9

Civil Law

- “[T]he Right is the *prius*, the action the subsequent. [...] The Right assigns each individual the sphere in which his will posits law for all other individuals; if the individual is not respected in this sphere, he may complain to the state, the guardian of rights , and the state will help to obtain what is his. The legal order is an order of Rights.”

Bernhard Windscheid, 1856

10

Civil Law

Factors that might explain the differences:

- Weaker position of the judge: judges do not make law, they “find law”
- Case law is seen as a persuasive authority, but it is not accepted as a “source of law” (at least not by the theoretical mainstream)

11

Civil Law

Particularly problematic -

- situations that involve judicial discretion
- E.g. equitable remedies (in the common law), awards of damages for non-pecuniary loss
- Even in such cases, the civil law clings to the paradigm of “rubber stamping”!
- Strong distrust of judicial discretion leads to theoretical assumptions that do not reflect what judges actually do

12

Civil Law

- Contrary to traditional common law discourse, civil law discourse focuses, and has done so for a long time, on "rights", and not on remedies.
- The civil law distrusts the idea of a strong judge; judges are supposed to find law, not to make it.
- Together with an historically engrained strict separation of substance and procedure, this has led to a theory of adjudication that equals what Steve Smith has called "rubber stamping"
- 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.

13

Civil Law

In Quebec, tension is inevitable:

- Substantive private law in the French tradition, codified and centered upon the idea of the "*droit subjectif*"
- Procedure that is rooted in the common law tradition,
- Judges whose powers and self-image equals those of common law judges

14