# Private Law and the Remedial Imagination

The Relationship between Rights and Remedies

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## The Question:

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

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## 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

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## 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.

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## Common Law: Rights/Remedies-Taxonomy

**REMEDY** ⟷ **RIGHT**

"Pragmatist" approach:
Remedy defines the right
*("ubi remedium, ibi ius")*
→ "Monist" view; the remedy prevails

"Rights-based" approach:
Where there is right, the law should provide an appropriate remedy *("ubi ius, ibi remedium")*
→ "Dualist" view; the right precedes the remedy

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## Rights-based Approach: Stephen A. Smith

Private Law:
Private right: "Keep your promise! Perform!"

Citizen 1: Promisee → Citizen 2: Promisor

COURT

Public Law: The Law of Court Orders
Right against the court – action right:
"Please issue an appropriate order"

Court issues order that
- replicates or
- substitutes the private right

The court does not simply "rubber-stamp" private rights; matters such as "specific performance" are governed by a distinct area of the law, the "Law of Court Orders"

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## Civil Law

Private Law:
Private right: Keep your promise! Perform!

Citizen 1: Promisee → Citizen 2: Promisor

**COURT**
- confirms - **"rubber-stamps"** the pre-existing private right;
- has no discretion as to which order is issued – this decision is entirely made by substantive private law.
- With the court's confirmation, execution is possible

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## Civil Law

- "Subjective Right" – *"droit subjectif"* is paramount
- Strict theoretical separation of substance and procedure / **right and action**
- Ideally, the court **finds and confirms** pre-existing subjective rights:
  → "Rubber-stamping"

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## 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

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## 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

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## 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)

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## 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

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## 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.

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## 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

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