Private Law and the Remedial Imagination

The Relationship between Rights and Remedies

The Question:

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

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

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.”

Common Law: Rights/Remedies-Taxonomy

**RIGHT**

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

**REMEDY**

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

Rights-based Approach:

Stephen A. Smith

**Private Law:**

- Citizen 1: Promisee
- Citizen 2: Promisor

**COURT**

- Private right: "Keep your promise! Perform!"
- Public Law: The Law of Court Orders
- Right against the court – action right: "Please issue an appropriate order"

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"

Civil Law

**Private Law:**

- Citizen 1: Promisee
- Citizen 2: Promisor

**COURT**

- Confirms - "rubber-stamps" the pre-existing private right;
- 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

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"
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

“[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

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
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.

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