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REMEDIES

Ruth Sefton-Green[*]

Examining remedies from a transsystemic viewpoint is no easy undertaking. It involves putting a legal concept under the microscope, one side of which reveals a complex mosaic, whereas the other side appears blank, or missing. How can we cross to the other side and what effect does this have on our original perception?

Remedies and Rights

In private law, remedies have been depicted in the common law as a judicial solution to a cause of action: a means of legal redress arising out of a dispute about rights. In contrast, civilian law has no concept of remedies. In civilian law, rights intrinsically involve a bipartite relationship between private parties. In the common law, remedies create a tripartite relationship between the parties and the judge. Remedies and rights thus form an indissociable couple deriving from Roman law, yet their relationship in modern law is infinitely complex. From a contemporary viewpoint, the ancient question of whether remedies or rights come first permutates into an inquiry about how remedies and rights actually fit together. Whereas the question of remedies without rights is inconceivable to a civilian, seeming to open the doors to purely discretionary judicial remedialism, a common lawyer might not see it this way for a series of institutional and epistemological reasons. Conversely, the question of rights without remedies could be equally problematic, depending on one's viewpoint. A civilian may be less concerned than a common lawyer by unenforceable enumerated rights. If this is true, this tells us something about jurists' attitudes towards rights and duties, as well as the function of remedies. This insight is only partially a product of comparative inquiries;

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it is also a result of the growing perception that private law rights are increasingly constitutionalized, or rights-based. Injunctions to prevent publication of confidential information or an award to grant non-pecuniary damages for infringement of personality rights are good illustrations of this phenomenon, known to common law and civilian systems alike.

Remedies and Procedure

A pragmatic common law approach to problem-solving precedes, both historically and logically, the enumeration of rights and correlative duties belonging to the civilian perspective. The focus on remedies in the common law emphasizes that, historically, private law evolved out of the interstices of procedure. Institutions of private law are not exclusively substantive, paramount, and conceptually distinct from questions of procedure. This dual perception shapes the way we think about private law. For instance, specific performance, first recognized by the courts of equity, enabled the common law tradition to articulate a value attached to performance in exceptional and limited circumstances. Conceiving of specific performance as a remedy in this way is different from attributing it with status as a primary remedy for non-performance of contract, on the basis that it is the only true way of compelling contracting parties to respect their undertakings and perform the contract. In French law, for example, specific performance is an institution of contract law, necessary to fulfill the goal of contracting—that is, to ensure performance, even if, since the Reform of the Law of Contracts of 2016–18, it is awarded subject to the criteria of either impossibility or proportionality. These two visions of the function of specific performance in relation to the law of obligations are fundamentally different, regardless of the specific rules concerning the availability of specific performance in various jurisdictions.

Remedies and Wrongs

The understanding that remedies correct wrongs or put things right again is inherent in the concept of remedies as a means of redress. The role thus attributed to remedies is predicated on a deep and perhaps unarticulated understanding that the law must react when something has gone wrong; that a solution must be found. However, the relationship between remedies and rights represents a small fraction of the picture. Among the pieces of the puzzle looms the spectre of wrongs. Although attempts to dissociate remedies and wrongs has coloured a twenty-first century view of remedies, the intuition that remedies are also relevant to not-wrongs (for example, unjust enrichment), impacts both our meta understanding of rights and the role of morality in private law. If rights can exist without wrongs, remedies may lose their function, as understood up until now by some common law jurists. For those who fear discretionary

remedialism, this blessing in disguise would have the net effect of converting the judicial granting of remedies into a more automatic exercise of ratifying rights. This change in the way remedies are perceived is a product of transsystemic insight.

Damages

Damages, when not agreed, form part of judicial remedies and deserve a special mention for several reasons. First, judicial and juridical attitudes towards damages may differ, depending on the relationship between specific relief and other remedies, which may or may not be perceived as a measure of equivalence or substitution. This kind of distinction has no echo in the world of extra-contractual obligations, since the obligation to repair an injury arises by the very existence of the infringement. Second, the measure and quantum of damages is treated as fact or law in various legal systems and the prior characterization has implications towards the respective importance scholars may or may not attribute to this particular remedy, along with other consequences. Third, damages raise the question of the finality of remedies: is corrective, commutative, or distributive justice called into play? Fourth, damages interlock with types of harm. What kinds of damage or injury need to be protected, and why? What value is placed on material, bodily, economic, and moral injury; in what circumstances, and why?

Nature and Relationship Between Judicial and Self-Help Remedies

Even though historically remedies are closely related to the function of adjudication, not all remedies are judicial in nature. "Remedies" is also a term used, at least in the common law, to relate to a different order of self-help or agreed remedies. Indeed, some French legal scholars have suggested that the term *remèdes* could be used to denote self-help remedies in contract law. Once the true nature of remedies is clarified, it becomes less obvious that judicial and self-help remedies form one and part of the same category, though traditionally the common law has lumped them together. Self-help remedies are most relevant to contracting parties, in particular the extent to which they can provide for the destiny of their contractual arrangements. Some civilian measures use self-help remedies as a halfway house to test whether the contract can survive or not (for example, *refusing* or withholding performance), whereas others are linked to measures of expediency, such as time and money (for example, substituting performance of the obligation).

Categorizing the nature of remedies in different legal systems is revealing of a whole array of underlying philosophical, moral, and economic values. Termination of contract used to be primarily a judicial remedy in France, for instance, attenuated by the presence of *clauses résolutoires,*

but is deeply rooted as a self-help, extra-judicial remedy in the common law. However, the difference is less stark since the Reform of 2016–18, which has recognised the self-help, extra-judicial remedy of termination as well. The fact that termination is judicial or not helps us understand the priority given to maintaining the bond of contractual obligations, or conversely allowing a party to exit out of a contract relatively easily. The stance taken by each legal system allows us to understand more deeply the respective value placed on performance and *pacta sunt servanda* (though the linkage is not logically inseparable), as well as the question of to whom the contract belongs, the judge or the parties. In this respect, it is noticeable that defaulting parties are given a second chance to perform in civilian law, either through notice of default, a self-help remedy, or by the judge in the form of a *délai de grâce*. Does this mean civilian law is more sympathetic towards non-performance, and is it that the common law's harsher attitude is dictated by other considerations, such as a greater need for legal certainty? The subtle shifting from a bipartite to tripartite relationship is not shared by common law and civilian jurisdictions, nor as between civilian jurisdictions. This observation enables us to see that the judicial or extra-judicial nature of remedies cuts deep and affects the understanding we have of obligations, and of course, of rights.

Other examples corroborate this insight. Whereas civilian law allows contracting parties to provide conventionally for specific performance in the event of breach, the common law does not, considering this to be an ouster of jurisdiction. Likewise, penal clauses are allowed in civilian law though not in common law jurisdictions, thus mirroring a punitive dimension also found in some civilian judicial responses for contractual non-performance. Self-help remedies often collide with judicial remedies, in that they may become subject to post hoc judicial scrutiny, either by virtue of general principles in civilian systems relating to morality (for example, good faith and abuse of right), or to ensure compliance with black or grey lists of abusive clauses, which exist in many systems regardless of their legal tradition. The existence of self-regulatory or alternative dispute regulatory controls outside the judicial province also needs mentioning, since the existence of such control mechanisms deeply affects the linkage between judicial and self-help remedies.

Who Can Exercise Remedies in Contract? Criteria of Standing, Mutuality, and Unilaterality

An examination of who has standing to exercise certain remedies reinforces the premise that the contract does not belong exclusively to the parties in civilian law. Sometimes third parties outside the contractual sphere have standing, namely in the form of an action in absolute nullity, though the common law is unaware of such niceties. Nullity itself belongs to the imperium of the courts. However, the common law differentiates

between the void and voidable: a distinction unknown to civilian law and no doubt tied up with the historical complexity of equitable and common law remedies, which still continue to pull their weighty chains today. In the common law, the mutuality of availability of a remedy (for instance, the mutuality of availability of specific performance) has been considered a decisive factor in some circumstances. Conversely, the unilateral character of a remedy must not be confused with its extra-judicial nature. In the common law, termination of contract is a self-help, but not unilateral remedy, although this is often misunderstood. French law, for example, was generally suspicious of self-help remedies, until the Reform of 2016–2018, which has recognised many self-help remedies available to contracting parties.

Remedies traverse the whole of private law, which common lawyers do not conceive of holistically because certain areas of private law seem so unconnected. Remedies in the common law may be better understood, after a comparative inquiry, as a tool for categorizing the various parts of private law. Equity in the common law has successfully bridged the gap on many occasions, with remedies for breach of fiduciary obligations or trust, or injunctions for the protection of property rights being good examples. Yet, civilian law has not benefitted from the corrective mechanisms of equity, although judicial remedialism exists even if not recognized as such. Do judges recognize the violation of rights and simply ratify them when granting remedies or do they purport to correct wrongs? Is this dichotomy relevant or misguided today if we think transsystemically? Are remedies essential and inherent to the process of adjudication? If so, the category of self-help remedies needs to be excluded and renamed; or remedies themselves need renaming.

The need to rename arrives after a realization that reordering is necessary. The need to reorder arises after a comparative and transsystemic moment, when an initial world picture is shaken into a thousand fragments and needs to be reassembled. Renaming and reordering are not imperatives: they form part of the continuous process of the action and reflection of comparison in law.