



RESEARCH ARTICLE

**CORRECTIVE JUSTICE AND ITS
SIGNIFICANCE ON THE PRIVATE LAW**

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ABSTRACT

This article attempts to explore corrective justice and its significant role in private law. There are many justice perspective on private law, but corrective justice is part of the view that have significant role in the work of private law. Breaking the private property right charges someone to take responsibility. To what extent private law rules responsibility of the someone. Corrective justice can be measurement to take responsibility. Corrective justice can be traced back to Aristotle's ideas of justice and Kant's ideas of rights. Hans Kelsen sharply criticized the concept of corrective justice for only proposing formal ideas without touching anything substantial. Apart from this criticism, corrective justice remains very important in private law studies because it provides solutions between two private actors in which one benefits from the losses experienced by the other. So far,

the dispute settlement mechanism in private law gives the winning party a full share, while the loser does not receive any share at all. Corrective justice offers a quantitative measure that balances what the defendant is deducting and what is added to the claimant's loss. The application of this principle encourages the creation of equal punishment between the disputed parties.

Keywords: Corrective Justice; Private Law; Dispute Settlement

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INTRODUCTION

AS A UNIFYING theoretical concept¹, the idea of corrective justice has made a significant contribution to private dispute settlement. Corrective justice can be traced back to Aristotle's² and Henry Weinrib's concept of justice where the latter combines Aristotle's corrective justice with rights in the perspective of Immanuel Kant.³ Meanwhile, the idea of corrective justice was sharply criticized by Hans Kelsen because it was only proposing formal ideas without touching anything substantial.⁴ Weinrib's idea of corrective justice in the internal perspective of private law has also received sharp criticism from several scholars.⁵ Apart from these various criticisms, corrective justice remains very important in private law studies because it provides solutions between two private actors in which one benefits from the losses experienced by the other. So far, private dispute settlement gives the winning party a full share, while the loser does not receive any share at all. Corrective justice offers a quantitative measure or measure those balances what is deducted from the defendant and what is added to the claimant who incurs a loss. Thus, there is an equivalence to punish according to the mistakes of the disputing parties. This equivalence departs from the idea that

¹ Ernest J. Weinrib, *Civil recourse and Corrective Justice*, 39 FLORIDA STATE UNIV. LAW REV. 273–297 (2011).

² ARISTOTLE, *ARISTOTLE: NICOMACHEAN ETHICS* (Roger Crisp ed., 2014).

³ ERNEST J WEINRIB, *THE IDEA OF PRIVATE LAW* (2012).

⁴ Hans Kelsen, *What is Justice?*, in *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 1–26 (1973).

⁵ John Gardner, Ernest Weinrib & Alan Brudner, *The Purity and Priority of Private Law*, 46 UNIV. TOR. LAW J. 459 (1996); John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW PHILOS. 1–50 (2011); Zoë Sinel, *Concerns about Corrective Justice*, 26 CAN. J. LAW JURISPRUD. 137–155 (2013).

the parties contribute to the losses incurred, either the claimant or the defendant.

Even though there are other cases such as divorce suit, acts against the law and default are the other two things which frequently used by the disputing parties in filing a lawsuit in court. However, this article focuses on the first thing. A lawsuit occurs because the claimant feels that he has suffered losses as a result of the defendant's actions. On the other hand, the defendant benefits from the claimant's loss. The private justice mechanism tries to solve this problem by correcting the control over an asset or property that is done unfairly or by way of against the law.⁶

There are two approaches in the normative view of private law. The first is a rights-oriented view and the second is a goal-oriented view. The former tends to consider private law as means to hold the legal right against the other. The latter oriented to the function of the private law in society. If someone devastated the property right, the perpetrator must be charged, even the charge will harm economic condition. Goal-oriented view saw law to maintain the economic condition.

A rights-oriented view is manifested in corrective justice especially by considering that this type of justice places fundamental equality between the parties. Both are equal in obtaining rights. Rather than being an end, a goal-oriented view sees rights and rights holders as means to an end. Proponents of a rights-oriented view regard law as a right in itself, whereas those who otherwise regard law as a means of achieving rights. The rights-oriented view emphasizes distributive justice rather than corrective justice. These

⁶ Marc A. Loth, *Corrective and Distributive Justice in Tort Law*, 22 MAASTRICH. J. EUR. COMP. LAW 788–811 (2015).

are two views with two different principles of justice.⁷ The difference between these two views is also known as the difference between the formalist-orthodox views represented by Henry Weinrib and the functionalist views represented by legal scholars who use an economic analysis framework of the law.

This article will then discuss Aristotle's and Immanuel Kant's ideas of corrective justice as well as the criticisms expressed by Hans Kelsen on corrective justice. The next section will discuss the significance of the idea of corrective justice in understanding private relations in private law.

CORRECTIVE JUSTICE

THIS SECTION describes corrective justice as proposed by Aristotle and Henry Weinrib's elaboration of this concept. Aristotle proposed corrective justice as a specific concept of justice. Aristotle's corrective justice seeks to overcome inequality in society after the implementation of the distribution of resources. This imbalance in distribution causes one party to benefit while the other is disadvantaged. Corrective justice tries to restore the proportion due to one party being harmed by the other party. Because there are parties who are disadvantaged and benefited in this private relationship, corrective justice seeks to explain the causes of unequal relationships. Meanwhile, Henry Weinrib developed the idea of corrective justice to explain the emergence of the private relationship between disputing parties because it has resulted in losses on the one

⁷ Hoggard, N. W. (2019). Corrective justice and liability for misstatements (Order No. 28048816). Available from ProQuest Dissertations & Theses Global. (2411858660). Retrieved from <https://search.proquest.com/dissertations-theses/corrective-justice-liability-misstatements/docview/2411858660/se-2?accountid=17242>

hand and gains on the other. Weinrib detached himself from Aristotle's initial framework of corrective justice along with his tendency to develop ideas about the relationship between loss and gain between disputing parties in a private relationship and his efforts to restore the relationship in order to present equality in the perspective of corrective justice.

Corrective Justice According to Aristotle

Corrective justice is frequently juxtaposed with its counterpart, distributive justice. While there are many scholars assume that the two are inseparable, there are others who think that they are two different things.⁸ This article does not take these two matters any further.

Corrective justice can be traced back to Aristotle's (350 BC) view of justice in *Nicomachean Ethics V*. In his book, Aristotle discusses two main concepts of justice, namely distributive justice and corrective justice. The latter concept sees justice as an arithmetic idea where the benefits that a person gets in an unfair way on the one hand (hereinafter referred to as the defendant) will result in the loss of another person on the other side (hereinafter referred to as the claimant). Therefore, the profits that the defendant receives in an unfair way must be reduced to be added to the claimant.

In *Nicomachean Ethics V*, a person can be held responsible for his/her unfair behavior. Aristotle considers injustice as something that violates law and equality or fairness. On the other hand, justice is

⁸ For further discussion of these different views, see: Stephen R. Perry, *On The Relationship Between Corrective Justice and Distributive Justice*, in *OXFORD ESSAY IN JURISPRUDENCE* 237–263 (Jeremy Horder ed., Fourth Ser ed. 2000); Andrew I. Cohen, *Corrective vs. Distributive Justice: the Case of Apologies*, 19 *ETHICAL THEORY MORAL PRACT.* 663–677 (2016).

considered as lawful, equal and fair. A person who is fair, in a legal sense, will do good. However, Aristotle distinguishes between justice and virtue. Virtue is related to one's moral state while justice is related to one's relationship with other people. Virtue can be interpreted as a certain degree of someone's moral intrinsic in humans, while justice is a person's virtue in treating others in the view of others. Justice is not judged from one's subjective judgment in treating others but from one's treatment of others in other people's judgments.⁹

Justice does not equal obedience to the law. The obedience to the law takes the someone on the fear. Justice thought being the law aims ultimately at the instantiation of the virtues in the citizen it governs. In other words, there is no similarity between justice and the actions committed even though the perpetrator feels that his actions are in accordance with the rule of law. By realizing that law is not always perfectly applicable, Aristotle considers that justice is not synonymous with law. Justice is needed to balance imperfections in the application of law. According to Aristotle, true justice comes from a wise disposition in treating others. Meanwhile, injustice is a bad practice towards others. Furthermore, Aristotle stated that the practice of virtue is identical to the practice of law because the law commands certain acts of virtue and legal injustice as certain bad practices.¹⁰ In Aristotle's point of view, law does not provide justice because it still has to be practiced in concrete cases. The law achieves a degree of justice in legal practice when it can provide a sense of justice for the parties. Thus, the next discussion is related to how legal practice can bring both sides to the table.

According to Aristotle, there is universal justice that generally places a person legitimately and fairly. Furthermore, there is special justice which deals with one's honor, property and protection that can

⁹ ARISTOTLE, *supra* note 2.

¹⁰ Roger Crisp, *Introduction*, in ARISTOTLE: NICOMACHEAN ETHICS vii–xxxv (2014).

be separated from a person. This condition allows a person to experience injustice due to the actions of other people who separate the things he owns. This separation caused him to suffer losses. This condition prompted Aristotle to continue his view of special justice. It divides special justice into two forms, distributive justice and rectification justice. According to Aristotle, distributive justice deals with the distribution of welfare among community members. This justice uses a geometric formulation. According to the proposition of geometric justice "*what each person receives is directly proportional to his or her merit*".¹¹

Rectification justice, in Aristotle's point of view, is justice that provides a corrective principle in individual transactions such as buying and selling, guarantees, leases and so on. Corrective justice plays an important role in improving transactions. There are two forms of transactions, namely voluntary transactions, and involuntary transactions. The first was carried out publicly, while the latter, such as theft, adultery, and deception were carried out in secret.¹²

Several scholars have tried to understand Aristotle's concept of corrective justice. Young, for example, equates corrective justice with restorative justice because it seeks to restore (*restoring*) inequality between parties when one party commits an act that is detrimental to the other. According to Young, when someone makes a mistake, inequality is created, and corrective justice tries to correct this inequality by taking the gain that the perpetrator gets and then returning it to the victim. Young, interpreted justice as equality based

¹¹ ARISTOTLE, *supra* note 2. pp. 83-1130b

¹² *Id.* p. 85

on the idea that the position of the victim must be equal before correction can be made.¹³

Young's view was regarded as problematic standard interpretation because compensation cannot be completely equal in value. In short, Brickhouse understands the interpretation of corrective fairness standards as compensation.¹⁴ A person who commits a murder cannot be corrected by simply compensating the victim's family because the loss of a person's life cannot be fully recovered by replacing it in material form. According to Brickhouse, whatever is corrected after a crime does not necessarily return something that is identical or of equal value.

Aristotle thought of corrective justice like a model of arithmetic proportions.¹⁵ In voluntary transactions, we do not differentiate between the parties whether a person is good or evil. The normative meaning of corrective justice is seeing something from the damage or loss that occurs, equal treatment among the parties and questioning whether someone has done an act that causes harm to others. Therefore, corrective justice must treat the parties equally. It is the duty of the judge to ensure that these parties are treated equally.¹⁶ The equal is a mean by way of arithmetical proportion between the greater

¹³ Charles M. Young, *Aristotle's Justice*, in *THE BLACKWELL GUIDE TO ARISTOTLE'S NICOMACHEAN ETHICS* (Richard Kraut ed., 2006). pp. 186. For further discussion and comparison concerning the practice of justice in broader context, please *also see* Karsudin Karsudin and Irma Cahyaningtyas, *Government Policy on Child Crime Through the Concept of Diversion as a Solution Amid the Spread of Covid-19*, 5 *LEX SCIENTIA LAW REVIEW* 1-18 (2021); Nnawulezi Uche, and Bosede Remilekun Adeuti, *Examining the Reproductive Rights in the Wake of COVID-19 Pandemic in Nigeria*, 2 *INDONESIAN JOURNAL OF LAW AND SOCIETY* 29-58 (2021).

¹⁴ Thomas C. Brickhouse, *Aristotle on Corrective Justice*, 18 *J. ETHICS* 187–205 (2014). pp. 192

¹⁵ ARISTOTLE, *supra* note 2. pp. 87-1132a

¹⁶ The principle of equality before the law, the principle of freedom of contract, the principle of abuse of circumstances.

and the less. This proportion assumes that there are two parts that have the same quantity. A certain amount of this part is taken to be given to another section so that there is a bigger part and a lesser part. Therefore, some parts exceed the average of one part. This process allows us to ascertain what to take from the party that gets the more shares and what to add to the lesser share. We must add to the party that has the lesser share where the average among them exceeds him and take from the largest of the three averages.

Arithmetic lines represent the loss and gain of an action as an unequal part. It is the duty of the judge to make this arithmetic line equal to the punishments given to all parties. The purpose of punishment is to reduce unfair benefits in order to create equality. Meanwhile, the meaning of equality is the average between less and more. The advantages and disadvantages are less and more on the opposite side. Thus, according to Aristotle, correction of injustice or more precisely inequality is the average improvement of losses and gains.¹⁷

Corrective Justice According to Henry Weinrib

Weinrib's corrective justice is a further development of Aristotle's concept of corrective justice. According to Aristotle, corrective justice serves to maintain the distribution of wealth. Thus, according to Weinrib, the equality which is presupposed in corrective justice is the proportional equality of distributive justice. Therefore, according to Weinrib, corrective justice does not only reaffirm distributional equality which is disrupted as a result of actions that harm others. Corrective justice also provides insight in explaining the

¹⁷ ARISTOTLE, *supra* note 2. p. 88

relationship between the advantages and disadvantages that occur between two disputing parties.

According to Weinrib, the advantage of Aristotle's idea of justice lies in his mathematical formalism. The fairness function is believed to be the same as a mathematical equation that connects one term to another by means of the sign "equal to" or "mean", depending on the mathematical operations performed. Mathematical operating systems introduce differentiation that relates various elements in different ways. Thus, the perceived justice has different ways of regulating the relationship between one person and another.¹⁸

Weinrib provides a fairly easy explanation in understanding Aristotle's concept of justice as a "mean". According to him, justice can be understood if we focus on external things. Its main virtue related to the external effects. We can consider ourselves wise, but our virtue cannot be measured internally because only other people can judge our virtue. This is because our actions have an impact on other people around us. We never really feel or understand the impact of our actions except from someone else's point of view. In the example of character given by Aristotle, a person who runs away from war not only has a flawed character but also harms others. Virtue falls within the realm of justice, According to Weinrib, when justice is viewed from an interpersonal point of view.

Thus, although Aristotle sees both justice in holdings and the justice that is coextensive with virtue as other-directed, he draws a distinction between them. In the justice that is coextensive with virtue, equality plays no role: the external standpoint is merely grafted on to a virtue already intelligible in terms of a single person. In contrast, equality is the defining

¹⁸ Ernest J. Weinrib, *Corrective Justice*, in *THE IDEA OF PRIVATE LAW* 56–83 (2012).

feature of justice in holdings, because justice in holdings is intrinsically other-directed.¹⁹

Justice as an interpersonal view, however, is not a single answer. One person's view of justice can be excessive for others. This means that one's view of justice is very relative to the views of others. Departed from the idea of equality as the mean described by Aristotle, Weinrib provides an answer to this relativity. According to him, equality is a relational concept because something considered to be equal not with itself, but only with others. On the other hand, equality is the 'mean' because it relies on unfair excesses due to overemphasizing comparisons with others.²⁰ Weinrib emphasizes justice as equality rather than virtue because virtue is intrinsic to a person while equality tends to direct one's view to something external.

One of the quite controversial concepts about Aristotle's corrective justice is the improvement of fairness of the interaction or transaction between two parties. Aristotle did not provide a sufficiently convincing explanation of this matter so that this concept opens different interpretations of voluntary and involuntary transactions or interactions.²¹

¹⁹ *Id.* 60

²⁰ *Id.* 61. Some different practices in Indonesian context, Justice transformed in various types and method based on culture, social condition, as well as the society development itself. Please see Pane Erina and Adam Muhammad Yanis, *Reconstruction of Mining Policies on Justice in Lampung Province*, 8 BESTUUR 139-151 (2020); Linda Sudiono, *The Vulnerability of Women in Dealing with Covid-19 Pandemic: Feminist Legal Theory Approach*, 7 HASANUDDIN LAW REVIEW 241-259 (2021). Bambang Sugiri, Nurini Aprilianda, and Hanif Hartadi, *The Position of Convict as Justice Collaborator in Revealing Organized Crime*, 8 PADJADJARAN JURNAL ILMU HUKUM 255-274 (2021).

²¹ Brickhouse, *supra* note 14.

Weinrib looks at the bipolar nature of interactions and transactions in corrective justice between two parties. According to him, Aristotle himself described these two parties as active and passive. Corrective justice looks at whether someone has benefited and someone has suffered a loss. The interaction between these two parties has resulted in the emergence of the claimant as to the injured party and the defendant as the beneficiary. Hence, this creates a condition where both the perpetrator and the victim share an imbalance. This profit-loss relationship causes the disturbance of corrective justice.²²

Apart from providing an explanation of who is disadvantaged and who is benefiting, corrective justice bipolarity also provides an alternative for improvement. The defendant became aware that the profit he was getting came from the losses suffered by the claimant. The main actor in this repair process is the judge.

According to Weinrib, Aristotle compared a judge with a geometer. A judge draws back the centerline so that it can be a starting point in drawing lines that shift from a spherical planet. In the initial condition, some parts have shifted to be smaller, and some parts have become bigger. The judge drew a narrow line in order to match the original conditions. By drawing a line into two equal parts, *the judge vindicates quantitative equality*.²³ Weinrib's concept of corrective justice bipolarity provides many ideas in explaining the interaction between the claimant who suffered losses and the defendant who caused the loss. Corrective justice can also be used to correct violations of quantitative equality because the bipolar notion of loss provides an understanding of the claimant's losses that correlate with the defendant's gain. The bipolar conception of the judicial process also

²² Weinrib, *supra* note 18.p. 64

²³ *Id.* p. 65

justifies the quantitative equality of the complainants and recovers the gains and losses of the parties concerned.²⁴

Aristotle's view of justice received criticism from Hans Kelsen. In his article entitled *What Is Justice*, Kelsen criticizes Aristotle's because he only thinks about justice formally and defines unfair behavior based on the social order that existed in positive morals and law. Aristotle tries to build a scientific concept of justice by using formal science. For Kelsen, Aristotle's attempt to define absolute justice in a rational, scientific, or quasi-scientific manner was futile.²⁵ Aristotle claims to discover the scientific concept of justice by applying the mathematico-geometric method. Aristotle's model of justice, according to Kelsen, is like a measuring rod who can draw the midpoint line by supposing that the two endpoints are known. To know evil, it is assumed that we already know what virtue is. Aristotle's virtue is the opposite of vices. Meanwhile, goodness is what is considered good by the existing social order. Crime is presumed to be an act that is self-evident based on the moral tradition of the nation at a certain time. Thus, according to Kelsen, Aristotle had left good and evil to an authoritative order that defined them. For Kelsen, this view serves to maintain the existing order in society.

According to Kelsen, the mean-formula offered by Aristotle has a tautological character. This can be seen from the application of virtue to justice. According to Aristotle, the just conduct is the mean between doing injustice and suffering it. According to Kelsen, the formula about virtue formulated in the 'middle line' between injustice and suffering does not make sense to be used as a metaphor because both are equally injustice. A person who commits injustice automatically causes others to suffer. Thus, Aristotle cannot use the mean-formula to determine crime or injustice because he only

²⁴ *Id.* p. 66

²⁵ Kelsen, *supra* note 4. p. 19

presupposes injustice as something that is self-evident. Furthermore, Kelsen argues that Aristotle's view of justice is formalistic because the assessment of injustice is defined and enforced based on the existence of an established social order and his judgment is based on moral and legal positivism.²⁶

THE SIGNIFICANT ROLE OF CORRECTIVE JUSTICE IN THE PRIVATE LAW SYSTEM

Intrinsic and Extrinsic Perspectives in Private Law

AN UNDERSTANDING of corrective justice needs to be seen in the scope of the idea of private law. There are at least two views that can be used in looking at private law and the operation of corrective justice in it. The first view looks at private law from an internal or intrinsic perspective. Meanwhile, the second view looks at private law from an external or extrinsic perspective. Henry Weinrib represents the first view, which according to Sinel was characterized by the term's formalism or orthodoxy. This view sees that private law aims for itself because it has an internal structure for the concept, doctrine

²⁶ See *Id.* p. 20. Some corrective justice implementations have different perspectives and practices, please also see Mochammad Abizar Yusro, *Shareholders Lawsuit: Fraud on Minority Law Enforcement to Invent Corrective Justice During the Covid-19*, 8 LAW RESEARCH REVIEW QUARTERLY (2022); Maulana Fahmi Idris, *Access to Justice for Disability in the Perspective of John Rawls Theory (Case of Demak Regency Indonesia)*, 2 JOURNAL OF LAW AND LEGAL REFORM 391-400 (2021); Irma Yuliawati, *Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Draft and Article 70 Law Number 11 of 2012 Concerning Juvenile Criminal Justice System*, 2 JOURNAL OF LAW AND LEGAL REFORM 603-622 (2021).

and character of legal reasoning. Whereas the opposite view, characterized by the term functionalist, see private law as aimed at serving social purposes.

Sinel considers that the orthodox view of civil law is due to the fact that private law is seen more from the internal side and ignores the external side. Weinrib became one of the targets of Sinel's criticism. Sinel clearly included Weinrib in the footnote of his 2013 article where he quoted Weinrib's statement in the idea of private law "*one must understand private law from an internal perspective*".

Weinrib clearly admits that his viewpoint of private law theory is indeed based on an internal understanding of private law. Even the idea of private law that he conveyed departed from his criticism of the functionalist view. He understood that the functionalists wanted to use private law to serve social purposes. This view, according to Weinrib, is considered incomplete because he views that civil law has its own concept, distinctive institutional arrangement, and its own mode of reasoning. These aspects are internal components of the private law structure that have not been able to map out extrinsic goals as expected by the adherents of the functionalist. Weinrib confidently stated that "*the only thing to be said is that the purpose of private law is to be private law*".²⁷

Weinrib's ideas of formalism embedded its root in Kant's practical ratio. Weinrib understands Kant's practical ratio as a conception of free will. Practical ratio is related to the purposive behavior of human being in dealing with others. Man's goal is a mental representation of his desire to become a reality. Practical ratio expresses the rationality that is inherent in every human purposeful behavior. When man uses his practical ratio, he will think about the consequences of his actions in the conception of causality.²⁸

²⁷ WEINRIB, *supra* note 3. pp. 4-5

²⁸ Ernest J. Weinrib, *Kantian Right*, in THE IDEA OF PRIVATE LAW 84-113 (2012). p. 91

Weinrib criticizes the functionalist idea of understanding civil law because this idea considers civil law as an autonomous entity. Meanwhile, he himself considers civil law as autonomous law.²⁹ Functionalists consider that the independence of legal discipline for other disciplines will cause law to be like a parasite for economic, political, moral and other disciplines. Weinrib also considered that the functionalist view had mixed politics and law so that legal justification was not much different from political justification. Although functionalists realize that law has its own conceptions and terms, they consider it as a consequence that justifies social interests. Therefore, conceptions and legal terms are not considered something rigid for functionalists. Finally, Weinrib thinks that functionalists do not differentiate between private and public. For functionalists, the law is public. State legal authorities have goals and write these goals in a code of law whose objectives are mutually agreed upon.³⁰

Weinrib brings formalism to private law by looking at it from an internal perspective.³¹ The functionalist view, which is influenced by legal and economic analysis, will assume that every private suit must be settled by testing the efficiency of the actions of the parties. Efficiency is a measure of whether an action can be judged or not. On the other hand, from an internal perspective, Weinrib considers that a civil lawsuit is an attempt to resolve the violation of rights committed by the defendant. Private law from an internal perspective affirms the claimant's right to wrongdoing or negligence committed by the defendant.³² In general, Weinrib considers that the internal

²⁹ Weinrib criticisms of the functionalism could be seen in: WEINRIB, *supra* note 3. pp. 6-10

³⁰ Ernest J. Weinrib, *The Autonomy of Private Law*, in THE IDEA OF PRIVATE LAW 204–231 (2012).

³¹ Kritik Weinrib atas fungsionalisme dapat dilihat dalam: WEINRIB, *supra* note 3. p. 6-10

³² *Id.* p. 11

perspective in private law has a double conception, private law as explanandum and explanan, as objects and as a way of understanding.³³

Weinrib's ideas of formalism have sparked debate with functionalists.³⁴ To begin his project of critique of the internal understanding of private law, Sinel departed from the difference between the internal and external understanding of civil law. Sinel uses different terms to replace the terms internal and external. He prefers to use the terms intrinsic and extrinsic. Thus, these two terms can be used interchangeably to convey the same meaning.

The intrinsic or internal approach in private law is understood as a perspective that evaluates civil law according to its own provisions. Private law is understood by being explained through its own concept and not through an 'external reference'.³⁵ It is quite clear that Sinel conceptualizes an intrinsic or internal perspective as an understanding of the rights and obligations that are at the core of the private law relationship.

In contrast, an external or extrinsic perspective approaches private law from an external perspective. Institutions and concepts are evaluated and made to be understood from the outside. In the end, an extrinsic perspective will provide an understanding that private law is not only related to the legal rights and obligations of the parties but also sees the settlement of civil cases apart from this legal relationship.³⁶

³³ *Id.* p. 16

³⁴ Sinel, *supra* note 5; Gardner, *supra* note 5; Gardner, Weinrib, and Brudner, *supra* note 5.

³⁵ Sinel, *supra* note 5. p. 138

³⁶ *Id.* p. 140

Corrective Justice in Private Law

In private law, corrective justice provides an adequate picture in operationalizing case settlement. According to Weinrib, corrective justice is a form of private relations because it integrates three aspects, namely unity, kind and character. The correlation between loss and gain is a form that represents the unity of the private law relationship. Because losses and advantages are not two independent things, they are related to one another. Taking this viewpoint, Weinrib treats corrective justice as a single normative unit. Corrective justice also defines different forms of private relations. Corrective equivalence of losses and gains is an operational category that differs from a series of equivalent proportions. Profits and losses are correlated in an interaction relationship between disputing parties.

In contrast to distributive justice that cannot provide equality in the relationship between losses and benefits, corrective justice provides a distinctive justification structure in explaining the bipolar relationship between two parties in a private dispute. Private character aspects of corrective justice are derived from procedural and doctrinal expressions of the bipolarity relationship of the parties. The representation of bipolarity in terms of losses and gains related to each other indicates a relationship between obligations and rights.³⁷

Corrective justice can also provide ideas for legal scholars to resolve private disputes between the parties. According to Weinrib, corrective justice has a very close relationship with the private case's settlement.³⁸ Weinrib's argument overthrows Ben Zipursky's argument which states that there is no relationship between civil dispute resolution and corrective justice. Weinrib's rebuttal to

³⁷ Weinrib, *supra* note 18. pp. 75-76

³⁸ Weinrib, *supra* note 1.

Zipursky's article departs from Zipursky's view which states that an unlawful act that causes harm to a person provides a legal position for someone to file a lawsuit against the perpetrator or the defendant. This is based on the assumption that a private suit against someone must depart from a violation of rights. Unfortunately, this idea is not strong enough to understand the correlative relationship between the claimant and the defendant if it is based solely on violations.

Weinrib bases his critique on Zipursky's argument by describing a series of transactional relationships between the parties in a private dispute. This series of relationships can be concluded as structural, substantial and constitutional relationships. The structural relationship shows that the parties are structured in a correlative relationship from their normative position as the claimant (the injured person) and the defendant (the person who benefits from the claimant's loss) who both experience injustice. This correlative structure is expressed through the rights of the claimant and the responsibilities or obligations of the respondent. The claimant's right is the claimant's juridical manifestation to be free to determine himself in his relationships with other people. Finally, the constitutional issue is related to the legal order that guarantees the rights and obligations that must be upheld by law enforcement agencies, in this case the court whose function is to articulate and implement the responsibilities of the parties because there is a correlation between the two. For Weinrib, these three structures are important features of private law in its normative practice.³⁹

These three concepts with different terms from Weinrib are the normative basis for someone to apply for private liability. A person can file a lawsuit against another person if he can prove that a claimant is a person who has a legal relationship with the accused

³⁹ *Id.* p. 273-275

person. This legal relationship provides legal standing for the claimant to bring the defendant before the court. Without any legal relationship, the lawsuit filed by the claimant is considered an error in the persona. This legal relationship can be proven by filing legal issues that underlie the legal relationship of the claimant and defendant. If in a legal issue of sale and purchase, the claimant must show that the defendant is the person who bought or sold goods to the claimant.

Furthermore, in this legal relationship, there are rights and obligations borne by both parties. For example, in the practice of buying and selling, a buyer is obliged to make payments to the seller. The seller is entitled to receive payment from the buyer either in cash or in installments. On the other hand, the seller is obliged to deliver the goods to the buyer after the price and payment mechanism have been agreed by both parties. This structure is regulated in contract law which enforces treaty doctrines such as freedom of contract and prohibition of abuse of circumstances. Violation of legal doctrines can result in the invalidation of covenants.

Finally, constitutional issues related to dispute resolution forums. This rule is a formal procedure designed to resolve private disputes between the two parties. A dispute can be settled if there is an official forum that has institutional legitimacy to resolve the dispute. A person cannot bring up a dispute settlement problem in a forum where the decision has no binding force. The dispute resolution forum must have a binding decision so that the parties submit and obey the decisions issued.

Liability for a person for damages committed against the law has been accepted as a common view in the understanding of corrective justice in private law. However, this view was challenged by Zoe Sinel. He considers this view as an orthodox corrective justice thought in civil law because it obscures fundamental conventions.

According to Sinel, the orthodox view does not consider the defendant's initial action in respecting the claimant's rights.⁴⁰

Weinrib's corrective justice is a concept of accountability as a consequence of a correlative relationship between two parties. This relationship has created two conditions, one party gets an advantage and another party gets a loss. Corrective justice seeks to restore this condition in order to avoid imbalance between the two parties.⁴¹ Weinrib seems to contribute to a causal relationship between the losses incurred by one party and the gains derived from the other. This causal relationship does not only focus on actions but also on the process of transfer of assets because there are parties who are injured and there are parties who are benefited. A causal relationship seems insufficient to hold one party accountable since this relationship focuses more on deeds. There is a possibility that someone's actions have a cause and effect for someone's loss, but there is no condition that there is a party who benefits. As in an act without error, even though there is a loss, the absence of a mistake makes it impossible for a person to be held liable.

Weinrib itself distinguishes between factual and normative advantages and disadvantages. This distinction is an implication of using Kant's idea of rights and Aristotle's corrective justice.⁴² Both are used to build the concept of private liability when there are conditions between two parties claiming profit and loss. Profits and losses are factually related to changes in the condition of the claimant's property ownership. Meanwhile, profit and loss from the normative point of view refer to the difference between the assets owned by the parties and what should be owned by both parties according to the norms

⁴⁰ Sinel, *supra* note 5.

⁴¹ Ernest J. Weinrib, *Restitutionary damages as corrective justice*, 1 THEOR. INQ. LAW 47–83 (2000).

⁴² Ernest J. Weinrib, *Correlativity*, in THE IDEA OF PRIVATE LAW 114–144 (2012).

governing the interaction of the parties.⁴³ In short, the advantages and disadvantages of the factual side do not have legal consequences, but rather moral ones. On the other hand, gains and losses from the normative side have legal consequences that give rise to legal liability for a person.

From the above explanation, corrective justice is useful to justify private liability for someone who raises profit and loss conditions from a normative side. Corrective justice embodies the norms that govern the conditions for fair interaction. The advantages and disadvantages must be seen from what should be owned and what should not be from a normative point of view. According to Weinrib, normative advantage occurs when the ownership of one's assets is greater than what it should be according to the norm. Meanwhile, normative loss occurs when a person's property ownership is smaller than what it should be according to the norm.

This conclusion accords with corrective justice's being a justificatory structure. The gains and losses have the same character as the structure they define they refer to the norm that figures in the process of justification. Accordingly, the gain and loss are the excess over and the shortfall from one's due.⁴⁴

The absence of a beneficiary party makes it possible for someone who is responsible for causing a loss to not be able to compensate for the loss because the defendant does not have assets that can compensate for the losses incurred. Conversely, corrective justice bases private liability on a person. For example, there is an addition of property and wealth acquired by someone in an illegal way. On the other hand, there was someone who suffered an unfair

⁴³ *Id.* p. 115

⁴⁴ *Id.* p. 117

loss. This relationship of increase and loss is what we want to correct so that someone is not harmed unfairly, and someone gets an increase in property unfairly as well.

The same concept also described by Weinrib about correlativity in understanding corrective justice to justify one's mistakes. In *The Idea of Private Law*, Weinrib gives a different term. He uses the terms unifying, bipolar and expressive to replace the terms' structure, substance and constitutional. In *The Idea of Private Law*, Weinrib argues that the correlation between profit and loss requires justification in the framework of corrective justice. According to Weinrib, this correlation must be unifying, bipolar and expressive of transactional equivalence. Correlation must be tied to the normativity of profit and loss. The relationships must depend on each other and rest on the same norms. Meanwhile, the bipolar nature of correlation must exist because normative advantages and disadvantages must link one party to another as something that can be justified. Furthermore, it is expressive because the correlation must express transactional equality where the parties realize the advantages and disadvantages based on their preferential position.⁴⁵

Therefore, corrective justice in Weinrib's view provides a justification for the injured party to file a lawsuit against the beneficiary. This claim can be justified as long as there is correlation between the claimant and defendant. The claimant considers that the defendant has received additional assets which should have belonged to the claimant.

⁴⁵ *Id.* p. 120. In fact, there are similarities of the three concepts of correlativity offered by Weinrib with different terms. Because he wrote at different times, Weinrib is considered to revise the old with the new. *Civil Recourse and Corrective Justice* was written in 2011, while his book *The Idea of Private Law* was written in 2012, a year after the publication of his paper about corrective justice. Therefore, the latter term will be used here.

The claimant's lawsuit can be justified if there is a normative correlation of gains and losses. This correlation can be checked from the nature of the bond (unifying) between the claimant and the defendant. This commitment can be interpreted as a legal relationship between the claimant and the defendant. In the case of agreement, it is very easy to determine the legal relationship between the claimant and the defendant because they base this legal relationship on the basis of the agreement. However, in cases of illegal acts, this legal relationship can be seen from the actions of the claimant and defendant. An act is considered against the law if the act has direct consequences for the claimant's loss.

The bipolar correlation between the parties can be seen from the rights and obligations of the parties. In a written agreement, the rights and obligations of the parties can be seen from the achievements that must be made by the parties who are bound in the agreement. If a party does not perform, either on purpose or negligently, there are rights that are not fulfilled and obligations that are not carried out. In the case of illegal acts, rights and obligations can be based on the appropriateness of a person to do and not act which has a correlation with the benefit for the maker and the loss for someone.

The nature of appropriateness can be seen from the expressions of the parties in an equal transaction relationship from the perspective of the community. Although it will be problematic in cases of illegal acts by the authorities, because the relationship between the claimant and the defendant, in this case the state, is in an unequal relationship.⁴⁶ In a community life, every member of society has references and guidelines in interacting and transacting with one

⁴⁶ For the problem of unequal relations in acts against the law, see: Peter Cane, *Tort Law and Public Functions*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 148–168 (2014).

another. This relationship is sometimes not legal in nature, but it has become a community habit to avoid fraudulent acts that can harm others. Fraud sometimes escapes the rule of law, so it is very narrow to understand the relationship of rights and obligations only to a written legal relationship. Thus, society's habit of avoiding fraudulent acts that can harm others can be considered as the norm. Violation of the norm of not cheating can be a basis for someone who feels aggrieved by this fraudulent act to file a lawsuit.

CONCLUSION

CORRECTIVE JUSTICE provides a philosophical foundation for private law scholars to think about private liability. Private law regulates private relationships between parties in carrying out equal interactions and transactions. Corrective justice prohibits a person from adding undue wealth. If his wealth increases, it means that the wealth he gets comes from something that he shouldn't have. On the other hand, there is a person who loses the wealth he should have. Corrective justice tries to solve this injustice by taking one's wealth which should not be earned. Meanwhile, a person who experiences an unnecessary loss, by corrective justice, will gain additional wealth from someone's wealth which should not belong to him. Taking someone's wealth which is obtained from something that should not be owned can be justified if there is a correlation between the disputing parties. This correlation can be justified if there is a bonding relationship that unites, bipolar and expressive between the two parties. Without these three correlations, it is unjustifiable to take one's property to add to others.

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