

## COMMENTS ON ERNEST WEINRIB'S IDEAS OF "CORRELATIVITY AND PERSONALITY"

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**ABSTRACT:** This article aims to explain some of the core concepts that tort law philosopher Ernest Weinrib has expounded in his latest book *Corrective Justice* (2012). The article concentrates on the first chapter of the book, "Correlativity and Personality", in which Weinrib lays down the core of his conceptual and normative argument about corrective justice. Understanding these core concepts may be of interest for any scholar delving into Weinrib's *oeuvre* for the first time, and might bring a renewed interest for those in the tort law field already familiar with his contentions about the relationship between tort law and corrective justice.

**Keywords:** Corrective justice . Correlativity . Personality. Private law. Tort law.

**RESUMO:** Este artigo tem por objetivo apresentar os conceitos fundamentais desenvolvidos pelo filósofo da responsabilidade civil Ernest Weinrib em seu último livro, *Corrective Justice* (2012). O artigo concentra atenções ao primeiro capítulo do livro, "Correlativity and Personality", no qual Weinrib expõe o cerne dos seus argumentos conceituais e normativos acerca da justiça corretiva. Compreender estes conceitos fundamentais é importante para qualquer estudioso que investigue a obra de Weinrib pela primeira vez e pode ainda renovar o interesse daqueles especialistas em responsabilidade civil já familiarizados com as suas posições acerca da relação entre responsabilidade civil e justiça corretiva.

**Palavras-chave:** Justiça corretiva . Correlatividade. Personalidade. Direito privado. Responsabilidade civil.

**CONTENTS:** Introduction; The juridical conception of corrective justice: correlativity and personality; Critique and final remarks; References.

### INTRODUCTION

Ernest Weinrib is a fundamental author in the Anglo-Saxon private law and theory of law (jurisprudence) debate that has strongly influenced the development of contemporary scholarship in the field known as "philosophy of private law".<sup>1</sup> Although he has been developing

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<sup>1</sup> On the importance of Ernest Weinrib's scholarship to the development of philosophy of private law, see: HORDE, Jeremy. Can the Law Do without the Reasonable Person?, *University of Toronto Law Journal*, v. 55, n. 2, p. 253-269, 2005; RIPSTEIN, Arthur. Editor's Note. *University of Toronto Law Journal*, Special Issue: Understanding Law on Its Own Terms: Essays on the Occasion of Ernest Weinrib Killam Prize, v. 61, n. 2, p. i-vi, 2011. On the contribution of his most recent book *Corrective Justice*, see also: RECENT

his ideas since the late 1980's – at first exploring the philosophical foundations of tort law<sup>2</sup> – the most methodical and comprehensive exposition of his views can be found in *The Idea of Private Law* (1995). The cornerstone of his position is that corrective justice is the internal normative structure that informs liability in private law.<sup>3</sup>

Ernest Weinrib's last book, *Corrective Justice*<sup>4</sup>, is a remarkable attempt to defend views that were previously stated in *The Idea of Private Law*<sup>5</sup>. He reaffirms that his views on corrective justice are applicable to tort law – as his previous book maintained – but goes on to show how they are applicable to areas of law other than tort law, including contracts, unjust enrichment, the law of restitution and property law, as well as how they relate to the institutional framework within which private law operates and to the law of remedies. The book also includes a chapter on how corrective justice is present in Jewish Law and its solution to the problem of unrequested benefits, further reinforcing his argument that corrective justice is a useful theoretical tool for the comparison of legal doctrine across different legal systems. There is also a final chapter where Weinrib critically examines legal education in the common law system with suggestions on how reform it. His contention is that legal education is dominated by instrumentalist approaches that do not reflect the practice of private law; otherwise better and correctly understood under a corrective justice framework

When faced with Weinrib's provocative and puzzling assertions – such as “The purpose of private law is to be private law”<sup>6</sup> or “Private law is just like love”<sup>7</sup> – few scholars took the time to understand what he was trying to convey.<sup>8</sup> In this new book his contentions appear to be that he was not taken entirely seriously when he asserted that corrective justice is the *idea* that informs all private law, and not only tort law; that the very understanding of what corrective justice means was also wrongly understood and finally, that corrective justice was not just an abstract and

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publications. *Harvard Law Review*, v. 127, p. 486-488, 2013. Available at: <[http://harvardlawreview.org/wp-content/uploads/pdfs/vol127\\_11152013recentpublications.pdf](http://harvardlawreview.org/wp-content/uploads/pdfs/vol127_11152013recentpublications.pdf)>. Access on: 19 jan. 2020.

<sup>2</sup> Weinrib's first complete attempt to present a theory of law dates back to 1988 in WEINRIB, Ernest J. Legal Formalism: on the immanent rationality of law. *Yale Law Journal*, v. 97 p. 949-1016, 1988. In the following years he published his first complete assessments of the internal logic of tort law in WEINRIB, Ernest J. *The Monsanto Lectures: Understanding Tort Law*. *Valparaiso Law Review*, v. 23, n. 3, p. 485-526, 1989; and WEINRIB, Ernest J. Thinking about Tort Law. *Valparaiso Law Review*, v. 26, p. 717-722, 1992.

<sup>3</sup> There are a few dissertations discussing Weinrib's work in Brazil. See: DRESCH, Rafael de Freitas Valle. *Fundamentos da responsabilidade civil pelo fato do produto e do serviço no direito brasileiro: um debate jurídico-filosófico entre o formalismo e o funcionalismo no direito privado*. 2005. 155 f. Masters dissertation (Master of Laws) – Federal University of Rio Grande do Sul (UFRGS), Porto Alegre, 2005; BARBIERI, Catarina Helena Cortada. *Fundamentos Teóricos da Responsabilidade Civil*. 2008. 144f. Masters dissertation (Master of Laws) – University of São Paulo (USP), São Paulo, 2008; BARBIERI, Catarina Helena Cortada. *O formalismo jurídico de Ernest Weinrib e seus reflexos na teoria da responsabilidade civil*. 2012. 266f. Doctoral dissertation (Doctor of Laws) – University of São Paulo (USP), São Paulo, 2012. For Weinrib's work translated to Portuguese, see: WEINRIB, Ernest J. A teoria do formalismo jurídico. Trad. Catarina Helena Cortada Barbieri. In: RODRIGUEZ, José Rodrigo. (Org.). *A justificação do formalismo: textos em debate*. São Paulo: Saraiva, 2011.

<sup>4</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012.

<sup>5</sup> WEINRIB, Ernest J. *The Idea of Private Law*. Cambridge, MA: Harvard University Press, 1995.

<sup>6</sup> Idem. Ibidem. p. 5.

<sup>7</sup> Idem. loc. cit.

<sup>8</sup> Critiques of Weinrib's approximation between law and love are found in: GARDNER, John. Review: The purity and priority of private law. *The University of Toronto Law Journal*, v. 46, n. 3, p. 459-493, 1996; RABIN, Robert L. Review: Law for law's sake. *The University of Toronto Law Journal*, v. 46, n. 3, p. 2261-2283, 1996.

detached philosophical notion that had no bearing in the legal doctrine and doctrinal analysis, as well as in how one should structure legal education.<sup>9</sup>

As it is possible to picture from the large range of themes and erudite references incorporated into this book, in many respects, *Corrective Justice* is an even more ambitious book than *The Idea of Private Law*. It extrapolates from private law, discussing how corrective justice can help us understand a few selected topics in public law, specially the State's duty to support the poor. Finally, as mentioned above, the book also attempts to discuss and criticize the pervasiveness of instrumentalist approaches in the study of law and how reinserting corrective justice in legal education may help us integrate what Weinrib sees as a disjuncture between the university study of law and the practice of law.

Despite its vast array of topics, *Corrective Justice* is the book presents, these comments will focus exclusively on the first chapter of the book, "Correlativity and Personality", in which Weinrib lays down the core of his conceptual and normative argument about corrective justice. It is largely a restatement of the arguments he has been developing since *The Idea of Private Law*. Therefore, understanding these core concepts may be of interest for any scholar delving into Weinrib's *oeuvre* for the first time, and might bring a renewed interest for those in the tort law field already familiar with his previous contentions about the relationship between tort law and corrective justice.

## **THE JURIDICAL CONCEPTION OF CORRECTIVE JUSTICE: CORRELATIVITY AND PERSONALITY**

In "Correlativity and Personality", Weinrib's goal is to exhibit why a corrective justice approach to the understanding of private law – which he names *the juridical conception of corrective justice* – is superior to other approaches. The underlying contention is that instrumentalist approaches,<sup>10</sup> such as economic analysis of law, and pluralistic and distributive ones cannot correctly capture the nature of private law as a normative practice.

The aim of the *juridical conception of corrective justice* is to disclose the nature of liability, *i.e.*, the structure and the normative presuppositions of liability in private law as internal processes of justification in a fair and coherent fashion regarding the two poles of the relationship.

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<sup>9</sup> In the introduction to *Corrective Justice* Weinrib states that: "The material in this book presents what these relationally normative considerations are and how they work across various bases of liability. Over the last few decades corrective justice has become well entrenched in the theory of tort law. In this book, however, the theoretical issues raised by tort law, though present, are not dominant. The book includes treatment of the areas of contract law, unjust enrichment, restitution, and the law of remedies. It also explores the significance of corrective justice for the comparative study of law ..., for legal education, and for considering the connection between property and the state's obligation to the poor." WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 2.

<sup>10</sup> As we know from his previous works, Weinrib writes against all kinds of instrumentalist theories and any theory that assumes private law furthers or should further any particular desirable goal can be identified as instrumentalist. For that, see: WEINRIB, Ernest J. *The Idea of Private Law*. Cambridge, MA: Harvard University Press, 1995. p. 2-5.

It also provides a critical perspective internal to the realm of liability that can be used to evaluate particular institutional arrangements and legal doctrines.<sup>11</sup>

Weinrib claims that if one wants to explain the nature of liability in private law, one has to be able to explain two mutually complementary features: (i) the nature of the connection between the parties and (ii) the nature of the parties involved. That is to say, that the parties matter only because of the normative link between them and that we are only interested in the link between the parties insofar as they are normatively capable of association in terms of liability.<sup>12</sup> There are no loose ends: the parties and the connection work as a closed circuit, a unity.

One of Weinrib's fundamental premises is that law aspires for coherence – more precisely, it aspires to be an internally coherent whole – even if sometimes the only thing that can be said about legal practice and legal rules is that coherence is indeed an aspiration. Following that, Weinrib states that the two complementary ideas constitutive of the juridical conception of corrective justice and the foundation stones of a theory of liability as an internally coherent whole are correlativity and personality.<sup>13</sup>

Correlativity clarifies the most manifest aspect of private law: “that liability links plaintiff and defendant – and works out its theoretical implications”.<sup>14</sup> Personality address the moral content of legal relationships. The concept aims to express what is universally present in any particular set of rights and duties, which, according to Weinrib, is the parties' “capacity for purposiveness regardless of any particular purpose”.<sup>15</sup>

Methodologically, Weinrib claims that we should follow the general characteristic of legal thinking, which is working from particular cases to general and increasingly abstract concepts. Accordingly, the juridical conception of corrective justice is an exercise of abstracting from concrete and particular juridical relationships to the doctrinal and institutional features of private law and from there even further until the theory reaches its most pervasive and general characteristics and concepts.

The advantage of proceeding in this way is that the juridical conception of corrective justice will provide an accurate description and a critical perspective internal to the law with which we can judge justifications that do not fit within this concept – as Weinrib claims – “from the standpoint of liability itself”.<sup>16</sup>

The insight about correlativity comes from a particular reading of Book V of Aristotle's *Nicomachean Ethics* through the lens of legal formalism.<sup>17</sup> The insight about personality comes

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<sup>11</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 14.

<sup>12</sup> *Idem.* loc. cit.

<sup>13</sup> *Idem.* *Ibidem.* p. 15.

<sup>14</sup> *Idem.* *Ibidem.* p. 23.

<sup>15</sup> *Idem.* *Ibidem.* p. 24.

<sup>16</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 14.

<sup>17</sup> WEINRIB, Ernest J. Legal Formalism: on the immanent rationality of law. *Yale Law Journal*, v. 97 p. 949-1016, 1988. p. 977-979; WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 15-17.

from the natural right tradition present in Kant and Hegel's philosophy, although Weinrib draws ideas more directly from Kant's *The Metaphysics of Morals*.<sup>18</sup>

Weinrib's reading of Aristotle provides the idea that corrective and distributive justice are two *forms of justice*, that is, two abstract structures that explain relationships between people and what is considered fair and equal treatment from a solely structural (or internal) perspective. It is because legal relationships between persons can ultimately be explained by and understood in light of these two basic *forms* of justice – within which all particular contents will ultimately fit – that Weinrib claims he has a theory of legal *formalism*.<sup>19</sup> Corrective justice deals with voluntary and involuntary transactions between two parties. Injustice arises when one party has done and the other has suffered the same injustice creating an inequality between the two. Correcting the injustice and restoring the previous notional equality between the parties implies bringing them to the *status quo ante*.

The rectificatory function of corrective justice shows the connection that exists between the remedy and the wrong: the doer has done a wrong by upsetting the notional equality between the parties and the remedy has to restore that equality, usually by paying damages to the sufferer equivalent to the wrong. This is the traditional understanding of torts and contract.

Distributive justice, on the other hand, deals with the division amongst members of a community of whatever is divisible (benefits or burdens) based on a certain criterion. Injustice arises when the criterion is not applied to a person or group that therefore disproportionately enjoys a benefit or suffers with a burden in that given distribution. Equality entails applying the criterion – proportional distribution – by taking the extra benefit or burden from a person or group and redistributing to the rest of the group. While corrective justice links only two parties in a bipolar relationship to each other, distributive justice connects any number of parties by comparing their relative situation and applying the distributive criterion.

According to Weinrib, this is the realm of politics and when it comes to law, it is the realm of any part of law that aims to further particular distributive goals, such as tax law or the statutes that structure any social security scheme.

Weinrib argues that not only liability in tort law but also the whole of liability theory in private law is properly explained in terms of corrective justice since the rectifying function of corrective justice operates correlatively on both parties. The harm links both doer and sufferer and so must the remedy that will restore the notional equality between them.<sup>20</sup>

The institutional framework within which courts operate also reflects this. Courts cannot simply decide on damages for the defendant; those damages have to reconstitute the plaintiff's loss.

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<sup>18</sup> These references to Kant and Hegel's ideas can be found since his early works, such as, WEINRIB, Ernest J. Legal Formalism: on the immanent rationality of law. *Yale Law Journal*, v. 97 p. 949-1016, 1988. p. 996-999; in his most influential and criticized book WEINRIB, Ernest J. *The Idea of Private Law*, Cambridge, MA: Harvard University Press, 1995, particularly in chapter 4 ("Kantian Right") up to his most recent book: WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 12, 24, 26.

<sup>19</sup> For the first complete presentation of this idea: WEINRIB, Ernest J. Legal Formalism: on the immanent rationality of law. *Yale Law Journal*, v. 97 p. 949-1016, 1988. Although in *Corrective Justice* he has dropped references to legal formalism, the basic tenets of Weinrib's legal theory have not changed.

<sup>20</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 16.

The remedy has to simultaneously make good the wrongful loss undergone by the sufferer by removing the gain enjoyed by the doer. Because they were not joined together by chance but are instead the active and passive poles of the same injustice, the court's adjudication has to correct both sides of the injustice at the same time.

Weinrib asserts that legal reasoning in private law has to take this point into consideration and the reasons that apply to make the defendant liable have to be the same reasons that apply to make the plaintiff entitled to damages. The only considerations at play should be the ones that apply equally to both parties.

That is why negligence law is a paradigm of the operation of correlativity in tort law whereas strict liability or deep pocket doctrine are the antithesis of it within the law of torts;<sup>21</sup> and punitive damages are the antithesis of the operation of the juridical conception of corrective justice within the law of contracts.<sup>22</sup> All of these legal doctrines single out one party's position as the one that is going to be relevant for the determination of liability. Reasons that are not correlative to both parties at the same time should therefore be excluded from consideration. Consequently, that also excludes any consideration of the parties' relative virtues or any distributive consideration regarding their economic needs.<sup>23</sup>

Weinrib claims that the notion of rights and duties present in the law of obligations express correlativity perfectly. The content of the right has to be correlative to the content of the duty not to interfere with that right. When the doer interferes with a certain right it corresponds to what the sufferer should be expected to be free off. Accordingly, instead of being an alien, obscure, or even novel idea, correlativity represents with a greater level of abstraction a paradigmatic and well-known feature of this realm of law.

Thus *correlativity* is the term coined by Weinrib to elucidate the first key aspect of the structure of liability regarding the nature of the relationship between the parties: "that the liability of the defendant is always a liability to the plaintiff".<sup>24</sup> Correlativity not only has a *structural role* but also a *regulative role* in determining that only reasons and justifications that encompass both parties and accord to corrective justice should be considered, therefore rendering the law fair to both parties and internally coherent.<sup>25</sup>

*Personality* is the term used by Weinrib to elucidate the second key aspect of liability, that is the characteristics of the parties in the relationship. The question here is whether there is an abstract idea – complementary to correlativity – that explains the normative content of the parties' position; that is, the moral force that links the content of rights and duties of private law. Weinrib's answer derives from the Kantian theory of rights.

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<sup>21</sup> BARBIERI, Catarina Helena Cortada. *Fundamentos Teóricos da Responsabilidade Civil*. 2008. 144f. Masters dissertation (Master of Laws) – University of São Paulo (USP), São Paulo, 2008; BARBIERI, Catarina Helena Cortada. *O formalismo jurídico de Ernest Weinrib e seus reflexos na teoria da responsabilidade civil*. 2012. 266f. Doctoral dissertation (Doctor of Laws) – University of São Paulo (USP), São Paulo, 2012.

<sup>22</sup> BOTTERELL, Andrew. Book Review: Corrective Justice, by Ernest J. Weinrib. *Mind*, v. 123, n. 491, p. 966-970, July 2014.

<sup>23</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 19.

<sup>24</sup> Idem. *Ibidem*. p. 18.

<sup>25</sup> Idem. *loc. cit.*

Being complementary to correlativity means that the notions of rights and duties must be correlative to each other and, consequently, so must their content. As Weinrib states: “rights are not normatively significant for private law simply by virtue of the fact that they enhance the plaintiff’s welfare”.<sup>26</sup> One’s welfare might be positively affected by being ascribed a right or negatively affected by being ascribed a duty but the potential positive and negative consequences of having rights and duties cannot be mistaken for the grounds of a right or a duty. Rights, duties and welfare are distinct and personality is the abstract concept that comprehends what is “pervasively present in particular rights and duties”.<sup>27</sup>

Formulated using categories first elaborated by Kant, Weinrib explains that what is pervasively present in rights and duties is the parties’ *capacity for purposiveness* that acquires juridical relevance when externalized. Once again taking negligence law as a paradigmatic example, Weinrib points out that legal doctrine holds that, “the defendant cannot be liable in the absence of an act, defined as an external manifestation of the volition.”<sup>28</sup>

Generally speaking, purposiveness means doing something with a purpose, a motivation. It entails action derived from volition. In Weinrib’s theory, on the side of duties, purposiveness is fundamental regardless of any particular purpose, be that meritorious or not. Any expression of volition – an act – that entails a breach of duty suffices. On the side of rights, acquiring or transferring a right has to involve volition: “the acquirer’s or the transferor’s purposiveness toward the subject matter of the right.”<sup>29</sup>

Weinrib states that having a right is having a power to exercise one’s will over something. Exerting that power entails purposiveness but the specific purpose at play (acquisition, transfer or use) is irrelevant to the law because the entitlement’s validity is prescribed by law regardless of the particular needs or interests that might motivate the parties. That is why it is the exercise of purposiveness independently from any particular purpose.

Weinrib claims that *personality* – defined as capacity for purposive agency without regard to particular purposes – is a distinct characteristic to the regime of liability and determines the *conception of the person* that underlies liability and its regime of rights and duties.

From the standpoint of the doer of injustice, personality as the capacity for purposiveness contains the indispensable conditions for the ascription of responsibility for the effects of one’s action. From the standpoint of the sufferer, personality is the basis of the rights that mark out the sphere that other must treat as inviolate. Injustice occurs when this purposiveness is actualized on both sides of this relationship, through the right infringed and the correlative duty breached.<sup>30</sup>

Thus, diminution in welfare alone will not count as an injustice for the juridical conception of corrective justice unless it is the result of an infringement of a right. Personality is the most abstract conception of the parties as bearers of rights and duties and in its *regulative*

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<sup>26</sup> Idem. Ibidem. p. 22.

<sup>27</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 23.

<sup>28</sup> Idem. loc. cit.

<sup>29</sup> Idem. loc. cit.

<sup>30</sup> Idem. Ibidem. p. 25.

*role* it points out which reasons and justifications pertain to liability as a fair and coherent area of law. While correlativity points out that liability in private law operates in a structure of rights and duties, personality indicates at the most abstract level what is the nature of these rights and duties. Together they explain the moral force that internally binds the doer and the sufferer of a wrongdoing in private law.

Methodologically the juridical conception works from the particulars of legal interaction and legal doctrine to the general and abstract categories of correlativity and personality. Weinrib claims that personality is not the source from which the theory derives but it is latent in the normative practice of liability. Additionally, the juridical conception is not concerned with rational agency as such. Although Weinrib acknowledges the influence of the natural right philosophies of Kant and Hegel for the formulation of the idea of personality within the juridical conception of corrective justice, he states that one does not have to accept the philosophical account of rational choice present in these philosophies to accept the juridical conception as a correct explanation of the main aspects of liability. Weinrib holds that that the Kantian and Hegelian accounts of private law are available as a “*repository of insights*” regarding coherence within legal relationships and of how legal doctrine can achieve coherence, but not necessarily because they display a true view of what rational agency is. In his words, “the cogency or truth of rational agency is a matter for philosophy and not a matter for the theory of private law.”<sup>31</sup>

For Weinrib, what makes the juridical conception of corrective justice a superior way of explaining liability in private law “is its success in representing at an abstract level the coherence of practical reason as it operates to determine liability.”<sup>32</sup> It is Weinrib’s contention that the most accurate representation requires two complementary ideas that cohere with each other, *i.e.*, cohere internally: correlativity and personality. Coherence validates private law as a normative practice. Therefore, every fundamental aspect of private law has to meet that standard.

## FINAL REMARKS

In the conclusion of *Corrective Justice* Weinrib sums up his theoretical enterprise by affirming that, “this book has offered purity without positivism”.<sup>33</sup> As a scholar that goes beyond mere criticism of instrumentalist approaches to tort law – one of his first areas of interest in the mid-1980’s –, Weinrib attempts to rekindle legal philosophers’ interest in a certain kind of reflection about the law that he sees represented in the works of Hugo Grotius and Immanuel Kant.<sup>34</sup>

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<sup>31</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 28-35. This is why Weinrib maintains that Martin Stone’s portrayal of his theory – as seeking external validation for corrective justice through derivation of the concept of personality from rational agency – is completely mistaken. For a detailed account of this critique: STONE, Martin. On the Idea of Private Law. *Canadian Journal of Law and Jurisprudence*, v. 9, p. 235-277, 1996.

<sup>32</sup> WEINRIB, Ernest J. *op. cit.* p. 32.

<sup>33</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 343.

<sup>34</sup> For Weinrib Grotius and Kant’s legal philosophies have the attributes he seeks in his own work: treating the *Jus* as a normative sphere that can be understood and evaluated in its own terms. In Grotius, as a



In *Corrective Justice* Weinrib abandons expressions such as *formalism*, *forms of justice* (*the form of corrective justice and the form of distributive justice*) and *immanent intelligibility* that he has been using since the 1980s, and states more clearly that *the juridical conception of corrective justice* is about fairness between the parties and internal structural coherence. However, his main theoretical and methodological points have not changed.

Weinrib argues the role of a theorist is to unravel law's nature and his primary interest is to find out what is the nature of private law. For that, one needs not to look anywhere else but to private law itself, to disentangle private law's internal structure and content. In addition, because law aspires – in fact, scholars aspire – that law is a coherent set of paradigms for action, the scholar's task is to unravel the structural and substantive features that make private law internally coherent.

Fairness has an important role because private law cannot be internally coherent if it treats one of the parties unjustly. That is how Weinrib can come up with a theory of private law that can be “pure” – because it is an analysis of private law that attempts to be free of any value that could render private law a *fiat* to something else – “without being positivistic” – because it is not trying to explain how can there be valid positive law (*Lex*) but how law (*Jus*) can be fair in its own terms.<sup>35</sup>

However, if Ernest Weinrib's core ideas have been the same since the mid-1980's so do reasons for criticism. In these final remarks, I briefly focus on a set of questions that can be raised about his theoretical and methodological approaches and the consequences for the theory of private law that he proposes.

Weinrib argues that the task of theory is not semantic, that is, it is not fundamental to determine which conception of corrective justice expresses the best “terminological practice” but the true task of theory is determine in what way we can shed “greater light on the normative character of private law.”<sup>36</sup>

Therefore, we should ask ourselves if it is possible to try to disentangle the nature of the private law in the way Weinrib suggests. If law is not a matter of brute facts, is this pure non-instrumentalist description of private law's internal coherence the best way to shed light on private law?

This quest for the nature of private law appears to be disguising some sort of essentialist dimension of analysis that does not take into consideration the fact that law is a social and conceptual construction.

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separated sphere from politics. In Kant, as a separated sphere from the ethical obligations; *Lex* (positive law) is only justified as an expression of what is rightful, *i.e.*, as a matter of *Jus*. WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 342.

<sup>35</sup> Inspired by Hans Kelsen's methodological point on *The Pure Theory of Law* (1934), Ernest Weinrib asks: “... what would a pure theory of law look like if it were not positivist?... Presumably a non-positivist pure theory would focus not on the validity of law but on the reasons that are properly in play in the determination of legal controversy.” WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 342. This is not to say that Weinrib agrees with the description of law provided by Kelsen's jurisprudence. Although it is clear that Weinrib knows his work from the many citations of Kelsen's *Introduction to the Problems of Legal Theory* (1997) in the third chapter of *Corrective Justice*, his point is methodological. Kelsen's pure theory is a methodology that inspires Weinrib in his own work.

<sup>36</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 335-336.

A correct description of private law's internal rationality can be a very useful explanatory exercise but Weinrib's theory also has prescriptive goals when applying *the juridical conception of corrective justice* to legal doctrine. When discussing how particular doctrines of private law – such as strict liability in torts or punitive damages in contract law, that do not meet the standard imposed by the juridical conception of corrective justice, Weinrib seems to be claiming, albeit never explicitly or followed any specific suggestions about what to do, that those areas of private law should be reformed or excluded from private law.<sup>37</sup>

These areas of private law that are incoherent with the juridical conception of corrective justice create burdens that fall heavily in one of the parties, therefore, unjustly overloading one party. For Weinrib there cannot be any value – distributive or otherwise – that would justify such arrangements within private law. This idea is in tune with the purity that the theory aspires, including purity from the political sphere where the goals of law are discussed and decided.<sup>38</sup>

As George P. Fletcher<sup>39</sup> once stated, the problem in tort law – as in law more generally – remains one of coordination, cooperation and social solidarity and not internal analysis. These problems necessarily turn our attention – if not to validity – to what should count when creating new positive law that will help establish what the legal controversy is or should be about and what counts as good and bad reasons. Good and bad reasons are not hanging in thin air, they relate to positive law as much as they relate to the institutional framework in which courts operate.

If Weinrib's method works out from the particular of cases and legal doctrines to the most abstract conception of justice that pertains to the relationship between the parties – therefore formulating the juridical conception of corrective justice – how can his theory pay so little attention to the reasons behind law's creation and yet analyze positive law and judge it against this internal standard that arise from particular cases and doctrines?

Weinrib openly says circularity is a feature of his method and not a problem or an embarrassment to it.<sup>40</sup> If the theoretical exercise proposed by Weinrib were merely descriptive that would not be an issue. However, what is suggested is, firstly, making a backward movement – in a descriptive exercise – from particular cases and legal doctrines to the most abstract conception of justice that pertain to the relationship between the parties. Secondly, there is a forward movement from its most abstract concept – *the juridical conception of corrective justice* –

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<sup>37</sup> One accurate interpretation of Weinrib's project can be found in Sandy Steel's review, "Private Law and Justice", *Oxford Journal of Legal Studies*, vol. 33, n. 3 (2013), pp. 612-617

<sup>38</sup> This is why Weinrib can claim that "The purpose of private law is to be private law". WEINRIB, Ernest J. *The Idea of Private Law*. Cambridge, MA: Harvard University Press, 1995. p. 5.

<sup>39</sup> FLETCHER, George. Review: Corrective Justice for moderns. Reviewed work: Risks and Wrongs, by Jules Coleman. *Harvard Law Review*, v. 106, n. 7, p. 1658-1678, 1993. p. 1668.

<sup>40</sup> "First, the juridical conception of corrective justice has no embarrassment about circularity. The juridical conception can be summed up in the brazenly circular proposition that the only purpose of private law is to be private law. The juridical conception treats liability as a self-contained normative practice that it seeks to understand in terms of its internal unity. Circularity it regards as a virtue. To step outside the circle in search of a source from which to derive what is inside it risks leaving unintelligible the starting point on which the rest depends. Second, the juridical conception of corrective justice already has a means of validation ...What validates the juridical conception is its success in representing at an abstract level the coherence of practical reason as it operates to determine liability." WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 32.

back to evaluating legal doctrines and particular cases in a prescriptive exercise that compromises this second movement.

Moving from the descriptive side to the evaluative side using the tools gathered on the former of the two treats the first movement as some kind of essentialist quest that later cannot be turned into an evaluative and prescriptive exercise.

The search for the elements that best describe private law – what is inside the circle – is an exercise of choice and not a self-evident truth since in every description there is an evaluative element.<sup>41</sup> Selecting certain elements to do the descriptive job – in this case, correlativity and personality – is one exercise defensible or contestable on its own grounds. Nonetheless, it is problematic to extract prescriptive claims from the result of that.

For Weinrib circularity is not a problem because the validation of the juridical conception of corrective justice comes from “representing at an abstract level the coherence of practical reason as it operates to determine liability.”<sup>42</sup> Once again, in principle, that is not a problem if one’s theoretical ambitions are only descriptive of the nature of private law in a particular point in time.

Once one talks about incoherent legal doctrines or particular solutions to concrete cases one is taking a stand and affirming that the current main characteristics of the system – the *status quo* – are in fact the correct way to go about it in the future. That is in itself looking at the possibilities available to the creation of law. It is stepping out of the descriptive circle. If that is not what circularity means or implies it is a point that needs further clarification.

Such an insightful and complex theory presents many more aspects that could be discussed in greater length, such as the concept of personality as “*purposiveness regardless of any particular purpose*”, how correlativity and personality relate to other areas outside private law and what would explain or best describe the internal coherence of those areas if not corrective justice and so on.

In any case, Weinrib’s work is an invitation to rethink our understanding of private law – and perhaps law as a whole – from the instrumentalist view focused on what law does to the non-instrumentalist view of what law is. Considering the long-lasting influence of Hans Kelsen in Brazilian legal thinking, Weinrib’s work might be considered less mystifying in Brazil than it is has been in the world of Common Law.

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<sup>41</sup> As John Finnis states theorists inevitably make value judgments about what stays in or out of their descriptive theories. For Finnis “... there is no escaping the theoretical requirement that a *judgment of significance and importance* must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.” FINNIS, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980. p. 17, italics added). Julie Dickson names these necessary and basic judgments of what should count as elements of a sound descriptive theory “purely meta-theoretical values”. DICKSON, Julie. *Evaluation and Legal Theory*. Oxford, MA: Portland; OR: Hart Publishing, 2001.

<sup>42</sup> WEINRIB, Ernest J. *Corrective Justice*. Oxford: Oxford University Press, 2012. p. 32.

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**Received:** 24.06.2020

**Approved:** 30.11.2020

**Suggested citation:** BARBIERI, Catarina Helena Cortada. Comments on Ernest Weinrib's ideas of "correlativity and personality". **Revista IBERC**, Belo Horizonte, v. 3, n. 3, p. 88-100, set./dez. 2020.

