

## Part 4: Objectivity and Private Law



# § 6 The Role for Remedial Discretion in Private Law Adjudication

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## *I. Introduction*

Inquiring about objectivity in law necessarily implies to inquire about subjectivity. One of the most dignified forms of subjectivity is discretion, a legally sanctioned form of subjectivity.<sup>1</sup> Discretion, in a broad sense, is ubiquitous in adjudication. Albeit bound by rules of procedural and

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1 See, for the distinction of discretion and arbitrariness, HLA Hart, ‘Discretion’ (2013) 127 *Harv L Rev* 652, 656.

substantive law, adjudicators enjoy considerable discretion in the conduct of the proceedings or the interpretation and application of substantive rules. It is thus not surprising that discretion has been in the focus of legal theory for quite some time.<sup>2</sup> This debate, most prominently associated with the controversy between Hart and Dworkin,<sup>3</sup> revolves around the relationship between rules, principles, and judicial discretion in the face of hard cases and open-textured rules.<sup>4</sup> The scope of this contribution is more modest. It is only concerned with one of the most overt forms of judicial discretion: remedial discretion. Remedial discretion describes the power of adjudicators to choose and calibrate remedies. While other forms of judicial discretion with respect to the interpretation of legal texts or the construction of legal concepts are often hidden behind methodology or judicial philosophies, remedial discretion can be openly exercised with little attempt to conceal its discretionary nature. In this context, discretion is a feature, not a bug. In its most basic form, it comes down to the question of whether the judge deems the remedy to be appropriate in the particular case. This over-simplistic description of remedial discretion serves as a starting point to distinguish remedial discretion from other forms of discretion in adjudication. These other forms of discretion include discretion on how to conduct the proceedings, decisions *ex aequo et bono* as are recognised in some arbitral laws or rules,<sup>5</sup> the construction and development of legal rules by adjudicators, including discretion in judicial law-making,<sup>6</sup> the application and concretisation of open legal terms such as negligence, good faith and reasonableness<sup>7</sup> or the judicial control of the exercise of discretion by administrative entities or third parties. The focus here is solely on discretion in the choice and calibration of remedies.

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2 See eg Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624, 638; Barry Hoffmaster, 'Understanding Judicial Discretion' (1982) 1 *Law and Philosophy* 21, 55; see, monographically on German private law, Barbara Stickelbrock, *Inhalt und Grenzen richterlichen Ermessens im Zivilprozeß* (Otto Schmidt Verlag 2002).

3 Dworkin (n 2) 624; see on this issue: Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges' (1975) 75 *Colum L Rev* 359; Scott J. Shapiro, 'The Hart-Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007) 22.

4 Greenawalt (n 3) 363 ff; Shapiro (n 3) 22.

5 See, eg, Article 28 (3) of the UNCITRAL Model Law on International Commercial Arbitration.

6 Dworkin (n 2) 638; Greenawalt (n 3) 363 ff.

7 Francesco Parisi, *Liability for Negligence for Judicial Discretion* (2nd edn, UC Berkeley 1992) 393.

Discretionary remedies are recognised in English equity, even if historical interpretations of the role of discretion differ.<sup>8</sup> Although the discretionary nature of equitable remedies is not controversial as such, recently a debate has ensued about the role of discretion in the choice of remedies in different common law jurisdictions.<sup>9</sup> Proponents of what has been labelled *discretionary remedialism*<sup>10</sup> defend the judicial discretion in the choice and calibration of private law remedies.<sup>11</sup> According to this argument, while the question of liability should be rule-based, the adjudicator should enjoy discretion in the choice of the order she makes in response to the liability.<sup>12</sup> The debate has brought some of the obvious, yet sometimes neglected problems of remedial discretion, such as rule of law concerns or adverse consequences of indeterminacy, back into the focus of the discussion.<sup>13</sup>

In contrast to most common law jurisdictions, at least German private law does not recognise a general concept similar to remedial discretion. Rather, relief is granted as a matter of right as a consequence of the establishment of certain legal requirements.<sup>14</sup> Judicial discretion is confined to and hidden behind the interpretation and application of the legal requirements without extending to a separate decision on the choice or calibration of the remedy. Nevertheless, remedial language has crept into international instruments. For instance, the Convention on Contracts for the International Sale of Goods (CISG) operates a distinction between obligations and remedies.<sup>15</sup> The international prevalence of the term ‘remedy’ is accompanied by an academic interest in the concept in civil law

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8 See, for instance, Peter Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 UW Austl L Rev 1, 9; contra Simon Evans, ‘Defending Discretionary Remedies’ (2001) 23 Sydney L Rev 463.

9 Birks (n 8) 1; Evans (n 8) 463; Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish, Richard Nolan, Janet O’Sullivan & Graham Virgo, Restitution, Past, Present and Future – Essays in Honour of Gareth Jones (Hart 1998) 251, 274.

10 See for this term Birks (n 8) 1.

11 Evans (n 8) 463; Finn (n 9) 274.

12 Evans (n 8) 463.

13 Birks (n 8) 15; Matthew Harding, ‘Equity and the rule of law’ (2016) 132 Law Quarterly Review 278, 289.

14 Franz Hofmann and Franziska Kurz, ‘Introduction to the ‘Law of Remedies’’, in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 9.

15 See, for instance, Articles 45, 61 CISG; see for further examples from EU law and soft law, Franz Hofmann, *Der Unterlassungsanspruch als Rechtsbehelf* (MohrSiebeck 2018) 100 ff.

jurisdictions.<sup>16</sup> Despite this newly found interest in remedies, the question of discretion in remedial decisions has received relatively little comparative attention.<sup>17</sup> It is the purpose of this paper to shed some light on the idea of discretionary remedies from a comparative perspective. Based on this analysis, it will discuss whether a greater role for remedial discretion is desirable in civil law jurisdictions.

The paper will define remedial discretion for the purposes of this contribution (II.), before it will outline some examples of remedial discretion in English law and try to identify functional equivalents in German law (III.). Based on this comparison, it will add some remarks on the merits of remedial discretion (IV.).

## *II. Remedies, Discretion, and System-building: Some Classifications*

Unlike the German unitary concept of *Anspruch* that includes both the right and the relief sought but excludes matters of procedure and enforcement, common law systems traditionally draw a distinction between right and remedy.<sup>18</sup> The word remedy can be understood in very different ways.<sup>19</sup> In a judicial context, it is commonly understood to describe the relief a person can seek from a court in reaction to an infringement or threatened infringement of a right.<sup>20</sup> This definition is confined to judicially obtained remedies to the exclusion of so-called self-help remedies.<sup>21</sup> It implies that a remedy requires a right it can vindicate.<sup>22</sup> At the same

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16 Helge Dedek, 'From Norms to Facts: The Realization of Rights in Common and Civil Private Law' (2010) 56 (1) McGill Law Journal 77; Hofmann & Kurz (n 14) 9; Hofmann (n 15) 13 ff; Ruth Sefton-Green, 'Why are Remedies not a Legal Subject in Civilian Law' in Alexandra Popovici, Lionel Smith & Régine Tremblay (eds), *Les intraduisibles en droit civil* (Thémis 2014) 255.

17 But see for a comparative discussion including discretion Dedek (n 16) 104; Hofmann (n 15) 35–49, 77–83.

18 Dedek (n 16) 81.

19 See Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 Oxford Journal of Legal Studies 1, 9 ff, who identifies five different possible meanings.

20 Andrew Burrows, *Remedies for torts, breach of contract and equitable rights* (4th edn, Oxford University Press 2019) 3; but see for a different definition, Rafael Zakrzewski, *Remedies reclassified* (Oxford University Press 2005) 43 ff.

21 Burrows (n 20) 4; see for a broader definition Paul S. Davies, 'Remedies in English Private Law' in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 27, 32.

22 See, on the relationship between right and remedy from a comparative perspective, Dedek (n 16) 86.

time, the court is not necessarily bound to order one specific remedy in reaction to an actual or threatened infringement of such a right.<sup>23</sup> The definition is difficult to apply to civil law jurisdictions. For the purposes of this paper, the civilian analogue will be understood to be the legal consequences of a cause of action, ie which kind of relief a party can obtain and to what extent a court can calibrate or moderate the extent of that relief.

Based on this understanding, the paper is interested in those remedial decisions that vest judges with discretion as to the choice or the calibration of the remedy. Even more so than ‘remedy’, the term discretion comes in many varieties and can be understood very differently, depending on the context.<sup>24</sup> As a starting point, discretion can be described as a power ‘to choose between two or more alternatives, when each of the alternatives is lawful’.<sup>25</sup> Going beyond this broad definition, it seems possible to distinguish different forms of discretion. Ronald Dworkin, for example, has identified three types of discretion.<sup>26</sup> The first weak form of discretion denotes a value judgment that does not follow from the mechanical application of rules. The second weak form of discretion describes a final decision that is not subject to further review. The third form of discretion, labelled as strong discretion by Dworkin, allows the adjudicator to decide without being bound by any rules or standards.<sup>27</sup> For the purposes of remedial discretion, this distinction is useful to identify two different meanings of discretion. The first and the third type refer to the indeterminacy of the decision and the extent to which the adjudicator is bound to render a certain decision.<sup>28</sup> While, at first sight, there seems to be a categorial difference between the value judgment and an entirely unbound decision, these two types of decisions can also be understood as two points on the spectrum of indeterminacy of judicial decision-making.<sup>29</sup> This is especially true for

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23 Evans (n 8) 474.

24 See, eg, Dworkin (n 2) 624; Stephen M Waddams, ‘Judicial Discretion’ (2001) 1 Oxford U Commw LJ 59.

25 Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 7; Zakrzewski (n 20) 85.

26 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 32, 33, 69.

27 Dworkin (n 26) 69.

28 See, for a distinction between indeterminacy and limited review, Waddams (n 24) 60 ff.

29 Evans (n 8) 482; Greenawalt (n 3) 366; Zakrzewski (n 20) 87; see concerning the remedial constructive trust, Ying Khai Liew, ‘Reanalysing institutional and remedial constructive trusts’ (2016) 75 (3) Cambridge Law Journal 528, 531.

the exercise of discretion in the choice and calibration of remedies. The discretion can be limited to value judgments that determine which remedies are available but can also combine value judgments with a broader discretion to choose among different remedies or to make discretionary determinations as to quantum. Almost never, however, will adjudicators be completely free in their discretion without having to take account of the legal framework, broad standards, guiding considerations or existing precedent.<sup>30</sup> Even in cases of rather broad discretion, the exercise of their discretion has to remain within the confines of the law and respect the rationale of the provision or principle and, more generally, must not be arbitrary.<sup>31</sup>

The second form of discretion identified by Dworkin does not relate to the indeterminacy but to the limited review of a decision.<sup>32</sup> In this sense, discretion denotes a pocket of sovereign power of the adjudicator. At least in theory, the lack of an appellate review can be distinguished from the indeterminacy of the decision, as also fully determinate decisions can be final and not subject to review, while wholly indeterminate decisions can be subject to full review.<sup>33</sup> Despite the different meanings, remedial discretion in a proper sense will combine these two aspects of discretion, that is a level of indeterminacy and a limited review, at least to some extent. The distinction offers a framework that can help to measure the extent of remedial discretion and understand or question the rationales for discretion in remedial decisions.

Finally, a further distinction as to the jurisprudential guidance on the exercise of remedial discretion seems helpful. This distinction can be drawn between discretionary remedies that are shaped and further developed by precedent on the one side and other discretionary remedies that do not develop into coherent systems of well-settled criteria on the other.<sup>34</sup> The former category can be called system-oriented exercise of discretion.<sup>35</sup> In system-oriented discretionary decisions, the exercise of dis-

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30 Evans (n 8) 485; Harding (n 13) 293.

31 Evans (n 8) 485; Waddams (n 24) 60.

32 Dworkin (n 26) 69.

33 Greenawalt (n 3) 365; Waddams (n 24) 61.

34 See for a similar point Kit Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right' (1998) 57 Cambridge LJ 301, 317; see also Harding (n 13) 292, who argues that all judicial decision-making is system-oriented.

35 Harding (n 13) 294; see, similarly, Zakrzewski (n 20) 88, with the terms 'rule-building' and 'rule-compromise' discretion, citing Carl Schneider, 'Discretion and rules: a lawyer's view' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press 1992) 64.

cretion is placed in the broader context of the private law system, takes note of other decisions and further shapes the criteria for future cases.<sup>36</sup> A prerequisite for such a system-oriented exercise of discretion is normally the existence of at least a limited review of the discretionary decision by an appellate or supreme court in order to ensure coherence and provide precedent for future discretionary decisions. The latter category, ie the not-system-oriented discretion, describes discretionary decisions that are not developing into a coherent system of criteria but rather remain highly indeterminate and perhaps even incoherent. The reasons for such a lack of systemisation can be manifold. One of the reasons could be a lack of a sufficient reasoning, ambiguity of the legislative rationales, and a limited review by superior courts. The lack of systemisation may, however, also be purposeful if the discretion is intended to be exercised exclusively with regard to the individual circumstances of the case.<sup>37</sup> According to the aforementioned dimensions of discretion, the non-system-oriented remedies will therefore typically combine a high degree of indeterminacy with a limited appellate review.

### *III. ‘Remedial’ Discretion: Some Comparative Observations*

The comparative part will begin with remedial discretion in English law in the first subpart (1.) and will then turn to German private law in the second subpart (2.), before adding some brief comparative remarks (3.).

#### *1. Remedial discretion in English law*

This subpart will give a short overview of remedial discretion in equitable remedies (a.) and of some examples of statutory discretion (b.) before briefly recapitulating the recent debate on discretionary remedies (c.).

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36 Harding (n 13) 294.

37 Zakrzewski (n 20) 88: ‘rule-failure discretion’, citing Schneider (n 35) 62.

*a. Remedial discretion in equitable remedies*

Equitable remedies, such as specific performance, injunctions or account of profits, are traditionally described as discretionary.<sup>38</sup> However, as has been noted frequently, this discretion has long been transformed from a conscience-based decision to one that is based on precise criteria and precedent.<sup>39</sup> In most cases, the decision on equitable remedies will be as predictable as a decision on non-discretionary remedies at law.<sup>40</sup> This development is perhaps most obvious in the case of specific performance. In contrast to most civil law systems, specific performance has traditionally not been the standard remedy in case of breaches of contract in English law.<sup>41</sup> Rather, under the common law, the obligor is primarily entitled to damages suffered as a consequence of the breach.<sup>42</sup> Specific performance was developed as a supplementary equitable remedy, discretionary in nature and only to be awarded exceptionally if, due to the circumstances of the case, damages were not an adequate remedy for the obligor.<sup>43</sup> Today, specific performance, albeit still discretionary in name, does not depend on the free exercise of discretion by the adjudicator but rather on the satisfaction of certain well-settled criteria.<sup>44</sup> Although the success of an application for specific performance is thus largely guided by precedent, there are a few remnants of the discretionary nature of specific performance, most notably in the court's determination whether damages are actually adequate in a given case.<sup>45</sup> Another criterion that leaves room for the exercise of equitable discretion can be seen in the qualification that the order of specific performance may be refused if it would cause severe

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38 Steven Elliott, 'Introduction' in John McGee & Steven Elliott (eds), *Snell's Equity* (34th edn, Thomson Reuters 2020) 14-002.

39 Elliott (n 38) 14-002; Harding (n 13) 289.

40 Burrows (n 20) 402; see for a discussion of discretionary elements in common law remedies, David Wright, 'Discretion with Common Law Remedies' (2002) 23 *Adelaide Law Review* 243.

41 Ewan McKendrick, *Contract Law* (13th edn, Red Globe Press 2019) 421.

42 McKendrick (n 41) 421.

43 Burrows (n 20) 402; Edwin Peel, *Treitel on the Law of Contract* (14th ed, Sweet & Maxwell 2015) 21-016; Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020) 672.

44 Birks (n 19) 16; Burrows (n 20) 402; Peel (n 43) 21-029.

45 Jens Kleinschmidt, 'Article 9:102 (1)' in Nils Jansen & Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) para 22; see also McKendrick (n 41) 422: 'the law is at an uncertain stage here'.

hardship for the defendant.<sup>46</sup> This balancing exercise between well-settled criteria and the remaining discretion for the judge in the individual case was recently acknowledged by Lord Neuberger in *Coventry v Lawrence*.<sup>47</sup> Concerning the discretion in the order of an injunction (or damages in lieu of the injunction), Lord Neuberger expressly approved Millet LJ's observation<sup>48</sup> that 'reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion' and that 'none of them is a binding authority on how the discretion should be exercised'.<sup>49</sup> At the same time, Lord Neuberger emphasised that it is important for courts to lay down criteria for the exercise of the discretion, not to entirely fetter it but to make it predictable.<sup>50</sup> This statement illustrates that, while discretionary remedies are awarded according to criteria developed by long-standing case law, a pocket of true discretion remains for judges in the decision of individual cases.<sup>51</sup> The equitable remedies are thus an illustration of the system-oriented exercise of discretion described above, in that an initially broad discretion is curtailed by the development of rule-like criteria and guidance in case law.<sup>52</sup>

#### *b. Statutory discretion*

Apart from the traditional discretionary remedies in equity, remedial discretion can also be based on particular statutes vesting the courts with the exercise of remedial discretion.<sup>53</sup> Iterations of such statutory discretion

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46 *Patel v Ali* [1984] Ch 283; Burrows (n 20) 431; Janet O'Sullivan, 'Specific Performance' in John McGee & Steven Elliott (eds), *Snell's Equity* (34th edn, Thomson Reuters 2020) 17-045; Peel (n 43) 21-030.

47 *Coventry v Lawrence* [2014] UKSC 13 [121]; Hofmann & Kurz (n 14) 9.

48 *Jaggard v Sawyer* [1995] 1 WLR 269, 288.

49 *Coventry v Lawrence* [2014] UKSC 13 [120].

50 *Coventry v Lawrence* [2014] UKSC 13 [121].

51 Hofmann & Kurz (Fn 14) 9; Zakrzewski (n 20) 92.

52 But see Zakrzewski (n 20) 93: discretionary remedies in equity as an example of rule-failure discretion.

53 See on this distinction, Birks (n 19) 24.

can, for example, be found in family,<sup>54</sup> succession<sup>55</sup> and company law.<sup>56</sup> Instead of settling the availability of the remedy abstractly, the statute vests the court with discretion as to whether to grant the remedy or not in specific cases. The focus here will be on one of the most important examples of judicial discretion: the family provision in English succession law.

While the prevailing narrative of English succession law has for a long time focused on the freedom of testation, testators only enjoyed unrestricted freedom of testation for a relatively short period of time.<sup>57</sup> Today, testamentary freedom is curtailed by the power of courts to order a family provision under the Inheritance Act 1975 in order to protect family members and other dependants of the deceased from her testamentary dispositions or from the insufficiency or absence of an intestate share.<sup>58</sup> Unlike the compulsory portion of German law that provides claims for fixed quota of the hypothetical intestate share,<sup>59</sup> the family provision is a discretionary system, aspiring to uphold testamentary freedom and achieve more individualised justice in hard cases at the same time.<sup>60</sup> Pursuant to s 2 of the Inheritance Act 1975, a court may, 'if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as

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54 Part II of the Matrimonial Causes Act 1973; see, for a comparative perspective, Anne Röthel, 'Familiäre Vermögensteilhabe im englischen Recht: Entwicklungen und Erklärungsversuche' (2012) 76 *RabelsZ* 131, 136.

55 Sections 2, 3 of the Inheritance Act 1975.

56 Section 1157 (1) Companies Act 2006, providing for the discretion of the court to relieve, wholly or in part, a corporate officer from liability 'on such terms as it thinks fit'; see eg *Re D'Jan of London Ltd*, [1993] B.C.C. 646, 649; see, for a comparative perspective, Philipp Scholz, *Die existenzvernichtende Haftung von Vorstandsmitgliedern in der Aktiengesellschaft* (Jenaer Wissenschaftliche Verlagsgesellschaft 2014) 326; see also Section 996 Companies Act 2006.

57 Roger Kerridge, 'Family Provision in England and Wales' in Kenneth GC Reid, Marius J De Waal & Reinhard Zimmermann, *Comparative Succession Law III: Mandatory Family Protection* (Oxford University Press 2020) 384, 389; Richard Oughton, *Tyler's Family Provision* (3rd edn, Butterworths 1997) 3; Brian Sloan, *Borkowski's Law of Succession* (4th edn, OUP 2020) 289.

58 See, for comparative accounts of the family provision in England, Kerridge (n 57) 384 ff; Röthel (n 54) 147; Reinhard Zimmermann, 'Zwingender Angehörigen-schutz im Erbrecht. Entwicklungsdimensionen jenseits der westeuropäischen Kodifikationen' (2021) 85 *RabelsZ* 1, 40 ff.

59 See s 2303 (1) BGB.

60 Oughton (n 57) 45; see for an overview of the legislative discussions, Marion Trulsen, *Pflichtteilsrecht und englische family provision im Vergleich* (MohrSiebeck 2004) 21 ff.

to make reasonable financial provision for the applicant', make a variety of orders, including orders of periodical and lump sum payments or of transfer of property.<sup>61</sup> The Act limits the scope of applicants to certain dependants, most importantly current and unmarried former spouses as well as children of the deceased.<sup>62</sup>

The court has discretion concerning two different questions. In a first step, it needs to determine whether a reasonable financial provision has been made.<sup>63</sup> This test is supposed to be an objective value judgment that is, in principle, focused on the situation of the applicant and not (exclusively) on the decisions of the testatrix.<sup>64</sup> In a second step, if no reasonable provision has been made, the court can choose different orders from the proverbial 'toolbox' in s 2 Inheritance Act 1975.<sup>65</sup> In both of these exercises, the court must take certain general as well as applicant-specific criteria into account that are set out in s 3 of the Inheritance Act 1975, although s 3 Inheritance Act 1975 neither institutes a hierarchy amongst the criteria nor contains directions as to the weighting of different considerations.<sup>66</sup> Additionally, s 3 (1) (g) of the Inheritance Act 1975 encourages the court to consider any other matter it may deem relevant, thereby opening the door widely for all kinds of submissions by imaginative plaintiffs.<sup>67</sup>

The extent of discretion in the determinations under ss 2, 3 of the Inheritance Act 1975 is well illustrated by the notorious *Ilott v The Blue Cross* saga.<sup>68</sup> In this case, that prompted six judgments in ten years,<sup>69</sup> the mother of the applicant had in her will divided her estate between different animal charities without considering her daughter from whom she had been estranged for most of her daughter's adult life.<sup>70</sup> After the daughter had been awarded a provision of £50,000 of the net estate of £486,000 by

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61 Inheritance Act 1975, s 2 (1) (a), (b), (c).

62 Inheritance Act 1975, s 1 (1).

63 Kerridge (n 57) 394; Zimmermann (n 58) 44.

64 *Ilott v The Blue Cross* [2017] UKSC 17 [16] (Lord Hughes).

65 Sloan (Fn 57) 306.

66 Kerridge (n 57) 394; Sloan (n 57) 316.

67 Mary Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1985-1986) 60 *Tul L Rev* 1165, 1187.

68 *Ilott v The Blue Cross* [2017] UKSC 17; see on this decision Kerridge (n 57) 399 ff; Brian Sloan, 'Ilott v The Blue Cross (2017): Testing the Limits of Testamentary Freedom' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019) 301; see for comparative analysis, Francesca Bartolini & Francesco Patti, 'The freedom to disinherit children' (2018) 2 *ZEuP* 428; Zimmermann (n 58) 45 ff.

69 Sloan (n 68) 308 ff.

70 *Ilott v The Blue Cross* [2017] UKSC 17 [4].

the District Judge, who characterised the deceased's decision as capricious and unfair as well as harsh and unreasonable, the judgment was reversed by the High Court on appeal. The High Court argued that, in light of the earning capacity of the daughter, a significant justification for the order of a family provision was lacking. This decision was, in turn, reversed by the Court of Appeal which ordered a new hearing before the High Court. Upon reversal, the High Court upheld the initial conclusions of the District Judge in a judgment that was again reversed by the Court of Appeal which increased the provision to £143,000 coupled with an additional option to claim up to £20,000.<sup>71</sup> Finally, the Supreme Court restored the first order issued by the District Judge that had awarded £50,000 to the plaintiff.<sup>72</sup> As Lady Hale emphasised in her concurring opinion, it is striking to see the variety of tenable solutions under ss 2, 3 of the Inheritance Act 1975, not only with respect to the question of reasonable provision but also to the order chosen by the court under s 2.<sup>73</sup>

*Ilott v Blue Cross* has reinforced the impression that courts have thus far not been able to develop coherent supplementary criteria in order to render decisions under ss 2, 3 Inheritance Act 1975 predictable and consistent. Unlike the traditional equitable remedies that are granted and denied according to firmly established criteria, court orders under s 2 of the Inheritance Act 1975 are still truly discretionary and the exercise of the discretion does not seem to be system-oriented in terms of the above classification. As pointed out by Lady Hale, this leads to the puzzling result that in *Ilott v The Blue Cross* it would have been entirely consistent with the Inheritance Act 1975 to either award no family provision at all, to award a family provision of £50,000 or to award a family provision of more than £143,000.<sup>74</sup> This is arguably less a failure on the part of the courts but rather a consequence of the chosen discretionary regime that aims to provide a flexible mechanism for the administration of individualised justice in an area of law in which strongly held political and moral intuitions are prevalent.<sup>75</sup>

The example of the family provision shows that discretion does not necessarily develop in a system-oriented manner if courts are not able to formulate guidelines or rules of thumb for standard cases. This is, however, not simply a consequence of the statutory nature of the discretion. For

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71 [2016] 1 All ER 932[62-64] (Arden LJ).

72 *Ilott v The Blue Cross* [2017] UKSC 17 [48].

73 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).

74 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).

75 *Ilott v The Blue Cross* [2017] UKSC 17 [66] (Lady Hale).

instance, s 25 of the Matrimonial Causes Act 1973 institutes a list of different considerations similar to s 3 of the Inheritance Act 1975 that courts shall consider and weigh in their decision on financial provision after divorce. Despite this broad discretion, it has been noted that courts tend to share matrimonial property equally between spouses after divorce.<sup>76</sup> While courts retain full discretion to stray from the principle of equal division of property,<sup>77</sup> it can serve as a starting point and anchor for the court's reasoning and lead to a system-oriented exercise of discretion under the Matrimonial Causes Act 1973.

*c. Remedial constructive trusts and 'discretionary remedialism'*

Despite its long history in equity and the manifold contemporaneous examples, discretion in the choice and calibration of remedies has been controversial recently.<sup>78</sup> In a debate that was initially sparked by the controversy over remedial constructive trusts,<sup>79</sup> the general role for discretion in the law of remedies came into focus.<sup>80</sup> A remedial constructive trust is defined as a constructive trust that is not created by the operation of law (so-called institutional constructive trust), but by the order of the judge in the exercise of her discretion as a 'just response' to a certain conduct.<sup>81</sup> Proponents of the remedial constructive trust and, more generally, of what has been labelled as discretionary remedialism defend the role of discretion in the choice of remedies.<sup>82</sup> Acknowledging with candour that this kind of judicial discretion exists, it is argued, is preferable to

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76 Jens Scherpe, 'The Financial Consequences of Divorce in a European Perspective' in Jens Scherpe (ed), *European Family Law, Vol. III: Family Law in a European Perspective* (Edward Elgar 2016) 146, 171.

77 Röthel (n 54) 138; Scherpe (n 76) 171.

78 Birks (n 8) 1; Evans (n 8) 463; see for a comparative perspective on the debate, Hofmann (n 15) 44f.

79 See the much-debated decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714-715 (Lord Browne-Wilkinson).

80 Birks (n 8) 1; Birks (n 19) 1.

81 Lord Neuberger, 'The remedial constructive trust – fact or fiction', Speech at the Banking Services and Finance Law Association (<https://www.supremecourt.uk/docs/speech-140810.pdf>, 1 October 2020) [8]; see, for a critical review of this distinction, Liew (n 29) 528.

82 Evans (n 8) 463; Finn (n 9) 274.

holding on to the (unrealistic) notion of the judge finding the law.<sup>83</sup> This approach was criticised with great fervour by *Peter Birks*, with respect to remedial constructive trusts but also more fundamentally regarding the foundations of discretionary remedialism.<sup>84</sup> He objects to a greater role for discretion on the basis that outcomes would become unpredictable and settlements arbitrary and that, more importantly, citizens would be deprived of their dignity while courts would jeopardize their authority in pluralistic societies.<sup>85</sup> The discussion about the role of remedial discretion in constructive trusts is still open. In contrast to jurisdictions like Canada and Australia,<sup>86</sup> English law has thus far refused to recognise the remedial constructive trust.<sup>87</sup> The main reason for this reluctance has been the perception that remedial constructive trusts give judges too wide a discretion than is advisable in respect to proprietary rights,<sup>88</sup> although it seems at least plausible that the discretion could be exercised in a system-oriented manner.<sup>89</sup>

The above examples have shown that remedial discretion is not simply a label or a terminological remnant of equity jurisdiction. While it is certainly true that many remedies that are discretionary in name follow criteria that are firmly established in case law, there are still important pockets of discretion in the choice and calibration of these remedies. English law also still knows remedial decisions that are truly discretionary, for example the family provision under the *Inheritance Act 1975*. Although the discretionary nature or the extent of the discretion are criticised by some,<sup>90</sup> English law seems generally confident to vest judges with discretion to choose the appropriate remedies in important areas of law.<sup>91</sup>

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83 Evans (n 8) 489.

84 Birks (n 19) 23: ‘nightmare trying to be a noble dream’.

85 Birks (n 19) 23 f.

86 See, for an overview, Ying Khai Liew, *Rationalising Constructive Trusts* (Hart 2017) 245 ff.

87 *Bailey v Angove’s PTY Ltd* [2016] UKSC 47 [27] (Lord Sumption); *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 [84] (Etherthon LJ).

88 *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 [84] (Etherthon LJ)

89 Liew (n 86) 255.

90 Birks (n 8) 15; contra Harding (n 13) 292 ff.

91 *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).

## 2. Remedial discretion in German law

The situation is different in German private law. Although it is possible to distinguish subjective rights and the resulting claims,<sup>92</sup> there is no firm and clear distinction between right and remedy.<sup>93</sup> Rather, rights are judicially claimed as *Anspruch*,<sup>94</sup> a term that includes the relief sought but excludes procedural questions, particularly the enforcement of the court order.<sup>95</sup> The question of the existence and extent of remedial discretion loses thus some of its precision when applied to German law (a.). The inquiry will therefore, turn to provisions of German law that, at least at first glance, allow courts to exercise discretion in choosing or moderating legal consequences (b.-d.).

### a. No theory of remedial discretion in private law (yet)

As noted above, there is no established concept of remedy in German private law and, likewise, there is no concept of remedial discretion. Discretion, in general, is not a concept that pervades private law.<sup>96</sup> Limitations on the availability of relief in specific situations are not understood as remedial restrictions but rather as restrictions of the right itself.<sup>97</sup> Recently, there have been attempts to establish a distinction between a ground right and a remedial right inspired by the common law right and remedy-dichotomy.<sup>98</sup> On that basis, it has been argued that an equivalent of remedial discretion can be found in the weighing of interests in the proportional

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92 Jan Felix Hoffmann, ‘Remedies in Private Law from a German Perspective’ in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 45, 48, distinguishing property and remedial rights; Hofmann (n 15) 173, 181, who distinguishes *Stammrechte* and *Rechtsfolgenrechte*; see, for a detailed discussion of further classifications, *ibid* 173 ff.

93 Hoffmann (n 92) 48.

94 See, for a definition of *Anspruch* (translated as claim), s 194 (1) BGB: ‘The right to demand that another person does or refrains from an act (claim) is subject to limitation’.

95 See, generally for the comparison between *Anspruch* and remedy, Franz Hofmann, “Anspruchsdenken” und “Remedydenken” im deutschen Privatrecht’ (2018) Juristische Schulung 833; see also Hoffmann (n 92) 47.

96 Hofmann (n 15) 77.

97 Hofmann (n 15) 81-83; see also Hoffmann (n 92) 57, who argues that therefore there is no need to introduce discretionary remedial rights.

98 Hofmann (n 15) 173 ff; 462 ff.

enforcement of certain property rights.<sup>99</sup> It remains to be seen whether such a theory of remedial discretion will gain widespread recognition.<sup>100</sup>

Judges are sometimes tasked with the equitable quantification of the claim.<sup>101</sup> To allow an equitable quantification in individual cases, the German Civil Code operates with open terms like ‘appropriate’ (*angemessen*) or ‘equitable’ (*billig*).<sup>102</sup> It is noteworthy, however, that most of these issues relate to problems of quantification of the claim, something that is inherently fact-dependent and difficult to fix in an abstract manner. The judge is thus not so much determining which remedy is appropriate but rather how the claim should be quantified. Consequently, while it is possible to describe this operation as remedial discretion, there seems to be an important difference whether a judge has discretion to grant or moderate a remedy or is simply tasked with quantification. The discretion in the family provision, for example, not only pertains to quantum but also to the basic question whether a provision is granted and, if so, in what form.<sup>103</sup> Additionally, a notable feature of some of these quantifications is that the precise determination of the sum is guided by uniform tables. These tables, albeit not legally binding, are widely followed for the allocation of maintenance<sup>104</sup> and for damages for pain and suffering.<sup>105</sup> If courts wish to deviate from the tables, they are generally expected to justify the deviations.<sup>106</sup> A reference to valuations in the tables does, however, not entirely relieve the court from the exercise of discretion in a particular

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99 Hofmann (n 15) 223 ff; 462 ff., particularly for injunctive relief.

100 See Hofmann (n 15) 211 ff, 462 ff; see, for a critique of this approach, Christian Berger, ‘Franz Hofmann: Der Unterlassungsanspruch als Rechtsbehelf’ (2021) 221 AcP 732, 735 f.

101 Anne Röthel, *Normkonkretisierung im Privatrecht* (Mohr Siebeck 2004) 171.

102 See, with further examples, Röthel (n 101) 45, 171.

103 Section 2 of the Inheritance Act 1975.

104 See for child maintenance, Düsseldorfer Tabelle 2020 ([https://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer\\_Tabelle/Tabelle-2020/Duesseldorfer-Tabelle-2020.pdf](https://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2020/Duesseldorfer-Tabelle-2020.pdf), 1st October 2020).

105 See on these tables, Oliver Brand, ‘§ 253 BGB’ in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2020) para 56; Hartmut Oetker, ‘§ 253’ in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limpert (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 37.

106 Oberlandesgericht Bremen, Decision of 16 March 2012 – 3 U 6/12, (2012) Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht 858, 859; Oetker (n 105) para 37, with further references.

case. It still has to justify why the individual case is comparable to the standard case as described in the table.<sup>107</sup>

*b. Contract concretisation and adaptation*

Exceptionally, however, judicial discretion may play a role in the contract concretisation and adaptation. The first example of judicial discretion concerns the control and modification of unilateral determinations by one of the parties.<sup>108</sup> Pursuant to s 315 (3) BGB, judges may control the exercise of discretion by a party to a contract if the contract stipulates that one of the parties can unilaterally determine the content of the contractual obligations. If the determining party is bound to make the determination in an equitable manner ('nach billigem Ermessen'), such determination is only binding on the other party if it is indeed equitable. If not, the court must determine the content of the obligation in its judgment. On appeal, the court's determination is only reviewed as to whether the court went beyond the confines of its discretion or misconceived of the notion of discretion.<sup>109</sup> Section 315 (3) BGB thus institutes a two-pronged test: the court first has to find that the party's determination is unequitable and can then, in a second step, impose its own equitable determination.<sup>110</sup> From a theoretical point of view, the court's discretion is only a place-holder for a gap in the contract or the unequitable exercise of discretion by one party and, consequently, has to be exercised in conformity with the contract and its purpose.<sup>111</sup> Compared to the abovementioned examples in English law, it is, at least in theory, a rather modest form of discretion as its source ultimately is the (presumed) will of the parties that dictates how the court should fill the contractual gap.<sup>112</sup>

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107 Oberlandesgericht München, Decision of 24 July 2015 – 10 U 3313/13, (2015) BeckRS no 13775; Oetker (n 105) para 37.

108 See for unilateral determinations by third parties, s 319 (1) BGB.

109 Bundesgerichtshof, Decision of 24 November 1995 - V ZR 174/94, (1996) Neue Juristische Wochenschrift 1054; Felix Netzer, '§ 315 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 89.

110 Markus Würdinger, '§ 315' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 52.

111 Volker Rieble, '§ 315' in *Julius v. Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2015) para 398; Würdinger (n 110) para 52.

112 Rieble (n 111) para 398 ff; Würdinger (n 110) para 5.

A second form of judicial discretion consists in the judge's role in the adaptation of a contract. Two provisions come to mind. The first provision is s 313 (1) BGB, pursuant to which the judge may adapt the contract if the circumstances that were the basis of the transaction have significantly changed. The second provision is s 343 BGB, pursuant to which the judge may reduce a disproportionately high penalty to a reasonable amount. Like s 315 (3) BGB, these provisions allow to adapt a contract in situations in which the contractual stipulations of the parties are or have become unbearable for one of the parties. This judicial moderation of the contract is, however, to be exercised in light of the rationale of the respective rules. For the adaptation of the contract under s 313 (1) BGB, it is universally recognised that the judge should not interfere with the contractual risk allocation.<sup>113</sup> If such risk allocation is lacking, the court should limit itself to the interference strictly necessary to remedy the imbalance caused by the unforeseen change of circumstances and to restore the balance according to the hypothetical will of the parties.<sup>114</sup> In other words, the adaptation is not dependent on what the court thinks is appropriate in general but rather on the question how the bargain between the parties can be restored in light of the circumstances.<sup>115</sup> In a similar fashion, the reduction of the contractual penalty pursuant to s 343 BGB, although a discretionary decision of the court, should not reduce the penalty further than necessary, ie uphold the penalty as far as the parties could have stipulated it in the contract.<sup>116</sup>

At a high level of abstraction, the different examples of a judicial moderation of the contract pursuant to s 313 (1) and s 343 (1) BGB or of the determination of the content of the contract pursuant to s 315 (3) BGB have in common that the discretion is to be exercised in a fashion that is as consistent with the contractual stipulations as possible. At least in theory,

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113 Thomas Finkenauer, '§ 313' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 61; Sebastian A E Martens, '§ 313 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 61.

114 Lars Böttcher, '§ 313' in Barbara Grunewald, Georg Maier-Reimer & Harm Peter Westermann (eds), *Erman BGB, Kommentar* (16th edn, ottoschmidt 2020) para 41; Martens (n 113) para 139.

115 Böttcher (n 114) para 41.

116 Volker Rieble, '§ 343' in Julius v. Staudinger *Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2015) para 109; Bernhard Ulrici, '§ 343 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 85.

they are narrow exceptions to the general principle of *pacta sunt servanda* in order to save one of the parties from the unbearable consequences of the contract without vesting the judges with any additional discretionary power. Of course, in practice, judges enjoy considerable freedom in the determination of what is equitable in a particular case as long as they tie their reasoning to the hypothetical will of the parties.

c. *Good faith*

In a discussion of judicial discretion in German private law, the obvious provision to analyse is s 242 BGB.<sup>117</sup> The principle of good faith and fair dealing enshrined in s 242 BGB pervades German private law and applies to the creation as well as to the exercise and the modification of rights.<sup>118</sup> Despite this broad scope, it does not justify individualised and discretionary decisions in specific cases. Rather, the court has to develop the principle in a way that it may be applied consistently to a multitude of cases.<sup>119</sup> Keeping this in mind, it is hardly surprising that s 242 BGB is now compartmentalised in specific groups of cases, such as abuse of rights or the prohibition of contradictory behaviour.<sup>120</sup> Within these groups of cases, the existing case law is quite differentiated and resembles a system of rules initially inspired by good faith that are applied by the courts.<sup>121</sup> Even if courts wished to go beyond the established jurisprudence, they would be expected to justify their decision as an abstract rule rather than as an exercise of its discretion in the particular circumstances of the case at hand.<sup>122</sup> The court engages in the construction and development of law by virtue of s 242 BGB as a general clause rather than exercising

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117 Dedeck (n 16) 106; Jan Peter Schmidt, ‘Article 1:201’ in Nils Jansen & Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) para 27; see for French law, Sefton-Green (n 16) 282 ff.

118 Schmidt (n 117) para 29.

119 Claudia Schubert, ‘§ 242’ in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 24.

120 Dirk Looschelders and Dirk Olzen, ‘§ 242’ in *Julius v. Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2019) para 122, 210; Schubert (n 119) para 139 ff.

121 Marietta Auer, ‘Good Faith: A semiotic approach’ (2002) European Review of Private Law 279, 296 f; Schmidt (n 117) para 28.

122 Schubert (n 119) para 24.

discretion in individual cases.<sup>123</sup> Therefore, the principle of good faith does not seem to be an entry point for remedial discretion for the purposes of this paper. This does of course not mean that discretion plays no role in its application, although it is the discretion involved in the interpretation and development of the law rather than remedial discretion in individual cases.<sup>124</sup> From a functional perspective equitable principles and remedial discretion on one side and the principle of good faith on the other may fulfil similar tasks in a private law system, ie to provide second-order adjustments to strict rules of law that are potentially blind for nuances of exceptional cases.<sup>125</sup>

#### *d. The quantification of damages*

Another potential example for remedial discretion is s 287 of the German Code of Civil Procedure.<sup>126</sup> Pursuant to this provision, the court determines the quantum of a damages claim freely at its conviction. It has discretion to choose the evidence it deems necessary for this determination.<sup>127</sup> The emphasis on the free decision and discretion as to the relevant evidence may, however, be misleading regarding the scope of the court's discretion. The provision is part of the regulation of the standard of proof. It exempts the questions of the amount of damages and the causal link between the wrong and the damage from the stricter standard of s 286 ZPO.<sup>128</sup> Accordingly, the plaintiff does not need to prove the precise amount of damage but merely has to furnish the relevant facts that allow the judge to make an estimate.<sup>129</sup> The discretion of s 287 ZPO is thus more an alleviation of proof than a substantial discretion of the court.<sup>130</sup> Consequently, if the amount of damages is not in dispute or if the precise amount is proven, the court has no discretion but must award

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123 But see Looschelders & Olzen (n 120) para 122.

124 Dedeck (n 16) 107.

125 Dedeck (n 16) 107.

126 Hofmann (n 15) 43; Stickelbrock (n 2) 377 ff.

127 Reinhard Greger, ‘§ 287’ in Zöller (ed), *Zivilprozessordnung* (33rd edn, ottoschmidt 2020) para 6; Hanns Prütting, ‘§ 287’ in Thomas Rauscher & Wolfgang Krüger (eds), *Münchener Kommentar zur ZPO* (6th edn, CH Beck 2020) para 23.

128 Greger (n 127) para 1; Prütting (n 127) para 1.

129 Prütting (n 127) para 28.

130 Greger (n 127) para 1; Prütting (n 127) para 4; Stickelbrock (n 2) 380.

the amount.<sup>131</sup> The discretion is thus significantly weaker than substantial discretion in the choice and calibration of remedies because the question for the court is not which remedy is appropriate but one of factual estimation.<sup>132</sup> Similar provisions exist in other civil law jurisdictions. French law, for example, albeit its strict theoretical adherence to the principle of full compensation (*tout le dommage, rien que le dommage*),<sup>133</sup> allows the trier of facts to make a sovereign determination on quantum (*pouvoir souverain des juges du fond*).<sup>134</sup> The Swiss law of obligations not only contains a provision similar to s 287 ZPO but also allows judges to reduce damages if full liability would leave the obligor in a position of hardship.<sup>135</sup> Analogous forms of this discretionary reduction of damages have been discussed but not adopted in Germany.<sup>136</sup>

### 3. Comparison

The short overview of remedial discretion in English law and German law has shown that, despite the different taxonomies, English law seems generally more willing to vest judges with discretion to calibrate the consequences of liability. Even if the traditional equitable remedies have developed into rule-like remedies, judges enjoy considerable discretion in other remedial decisions. Despite the recent debate on the remedial constructive trust and the limits of judicial discretion, that is still too recent

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131 Bundesverfassungsgericht, Beschluss vom 8.12.2009 - 1 BvR 3041/06 (2010) Neue Juristische Wochenschrift 1870 [13]; Prütting (n 127) paras 1, 3.

132 Greger (n 127) para 1.

133 Yvaine Buffelan-Lanore & Virginie Larribau-Teynere, *Droit civil, Les Obligations* (16th edn, Sirey 2018) para. 2518 ; see also Cass. Civ. 2<sup>e</sup>, 28 mai 2009, n° 08-16829.

134 Cass. Civ. 2<sup>ème</sup>, 11 sept. 2003, Bull. civ. II n° 249; Jacques Boré & Louis Boré, *La cassation en matière civile*, (5th edn., Dalloz 2015) para 67.158; Viney/Jourdain/Carval, *Les conditions de la responsabilité*, n° 248-1.

135 See Article 44 (2) Swiss Code of Obligations; see for the determination of damages, Article 42 (2) Swiss Code of Obligations.

136 See, for a discussion of a 1967 draft to introduce a clause allowing for the reduction of damages, Scholz (Fn 56) 326; see also Claus-Wilhelm Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht' (1987) 42 Juristenzeitung 993, 1001; see, on that discussion with further references, Hartmut Oetker, '§ 249' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 14, 15.

for a comparative evaluation,<sup>137</sup> there seems to be no general reluctance to vest judges with remedial discretion. Rather, judicial discretion is regarded as an apt mechanism to achieve fairness between the parties.<sup>138</sup> Criticism mostly relates to the extent of discretion, its incoherent exercise or a lack of guidance on the relevant criteria but, for the most part, not to the general idea of remedial discretion.<sup>139</sup> The situation is different in German law. German private law only exceptionally grants judges the authority to vary or moderate the legal consequences of liability. Judges enjoy other hidden types of discretion in the administration of justice, particularly with respect to the application of rather open-textured standards. Beyond these value judgments, German private law appears to be rather reluctant to grant judges the authority to overtly exercise discretion in the choice and calibration of legal consequences. The examples of judicial moderation of legal consequences are recognised as exceptions and are mostly designed to concretise or adapt a contract that is or has become unbearable for one of the parties.

In the following part, this paper will therefore try to add some remarks on the merits of remedial discretion in order to discern whether civil law jurisdictions should allow for more judicial discretion in the choice and calibration of legal consequences of liability.

#### *IV. Some Remarks on the Merits of Remedial Discretion*

This part will begin by critically assessing some of the assumptions of remedial discretion (1.), before it will briefly address some of the rule of law concerns (2.).

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137 Dedeck (n 16) 88.

138 *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).

139 See on the family provision, Oughton (n 57) 46. The most extensive form of criticism is expressed by Birks, which is however not exclusively directed against judicial discretion but rather against the prevailing understanding of the right-remedy-taxonomy, Birks (n 19) 19 ff.

## 1. The uneasy case for remedial discretion

The main argument for remedial discretion is that the judge will be well-positioned to choose the appropriate remedy.<sup>140</sup> She can weigh the competing interests in the individual case and tailor the remedy accordingly. This idea of a more individualised (or substantive)<sup>141</sup> justice in the choice of the remedy is the essence of what has been labelled *discretionary remedialism*.<sup>142</sup> This promise of tailor-made discretionary remedial justice relies on two assumptions that shall be challenged here.

The first and perhaps most important assumption is that the fact-driven decision by the judge is more likely to produce a just outcome than an abstract determination of the appropriate remedy by the legislator or the highest court. This assumption relies on the judge's ability to gather the relevant facts and ignore the irrelevant ones. Despite differences in the fact-finding process in different jurisdictions, it seems generally fair to say that the judge will only obtain some of the relevant information, notably information that is provided by the parties. This information may be sufficient in purely commercial cases that turn on commercial interests of the parties. However, it may not be sufficient if the judge needs to make an *ex post* value judgment on a reasonable provision in light of the complex family relationships of a deceased testatrix.<sup>143</sup> In these cases, it will be difficult for courts to obtain all the relevant information, particularly since one of the protagonists is deceased and will not be able to contribute pertinent information.<sup>144</sup> More generally, it is doubtful whether courts can possess the requisite information about other cases. One of the prerequisites for a sound exercise of discretion seems to be the capacity to compare and contrast the case at hand to other cases in order to discern which cases are typical and which are extraordinary. In other words, the exercise of discretion involves locating the case's position on the spectrum of possible cases. Admittedly, most courts will have anecdotal knowledge of other cases and will certainly have an intuition as to whether a case is extraordinary or not. This intuition may however be misleading as it will be based on the peculiarities of the region the court is based in or simply on the personal

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<sup>140</sup> See, for an emphatic statement of this idea, *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).

<sup>141</sup> Evans (n 8) 463.

<sup>142</sup> Birks (n 8) 1.

<sup>143</sup> Trulsen (n 60) 164.

<sup>144</sup> This does not mean that the judge of first instance is never in a better position to render a value judgment, see Waddams (n 24) 68.

background of the judges and their socialisation.<sup>145</sup> The inferences drawn from other cases may also give a distorted view since they are largely a function of which cases proceed to trial.<sup>146</sup> In light of the limited information on the case at hand and on comparable cases, it therefore seems preferable to restrict the judge's freedom in the determination of remedies by the establishment of specific criteria or uniform tables, especially if the determination involves the evaluation of complex relationships, as is the case for the family provision.

The second assumption regarding remedial discretion is that judges can exercise their discretion, even in the absence of rule-like criteria, as neutral actors, unswayed by conscious or unconscious biases. In an ideal world, a judge is a disinterested arbiter. In practice, although data are scarce and very jurisdiction-specific, it seems reasonable to assume that judges are influenced by cognitive biases, personal sympathies, political preferences, socialisation, and other cultural affiliations.<sup>147</sup> While this is true not only for the exercise of remedial discretion but generally for the interpretation, application, and development of the law, the exercise of discretion is a particularly delicate issue since important checks on personal preferences can be absent or limited in discretionary decisions on remedies, most

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145 See, for instance, Gillian Douglas, 'Family Provision and Family Practices – The Discretionary Regime of the Inheritance Act of England and Wales' (2014) 4 (2) Oñati Socio-legal Series 222, 241: 'judges (...) are using their own experiences of family practices and norms'.

146 See on the tendency that family provisions are only applied for in cases of large estates, Röthel (n 54) 153; see on potential compromise and contrast biases in judicial decision-making Doron Teichmann & Eyal Zamir, 'Judicial Decision-Making: A Behavioral Perspective' in Eyal Zamir & Doron Teichmann (eds), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press 2014) 665, 670.

147 See, for an overview on judicial preferences in common law decision-making, Ben Depoorter and Paul H. Rubin, 'Judge-Made Law and the Common Law Process', in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions* (Oxford University Press 2017) 130, 132; see, for the sympathy effect, Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, 'Heart versus Head: Do Judges Follow the Law or Follow Their Feelings' (2015) 93 Tex L Rev 855, 898 ff; Holger Spemann and Lars Klöhn, 'Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges' (2016) 45 Journal of Legal Studies 255, 277; no sympathy effect was observed in: Daniel Klerman and Holger Spemann, 'Law matters – Less than we thought', Discussion Paper No 1015, 01/2021, <https://ssrn.com/abstract=3439526> (4 August 2021).

notably the effect of feeling bound by a strict rule and the review and potential reversal by an appellate court.<sup>148</sup>

## 2. *Unfettered power? Remedial discretion and the rule of law*

Judicial discretion is always, at least potentially, in conflict with the rule of law. The basic premise of the rule of law is that the judge is bound by the law and applies it indiscriminately. More specifically, clarity of the law and predictability of decisions also form part of the concept of rule of law.<sup>149</sup> Similar concerns have also been voiced in the English debate lately, despite the long history of remedial discretion in equity.<sup>150</sup> As a general matter, there seems to be nothing fundamentally wrong with judicial discretion in adjudication. It is universally recognised that legal systems will work with open or vague terms whose application in specific cases may be uncertain. It is the institutional role of the judge to apply the law and within its boundaries exercise discretion. The rule of law problem is thus not one of principle but one of degree.<sup>151</sup> From a rule of law perspective, however, judicial discretion needs to be, at least to some extent, fettered by statutory rationales and criteria and must not be arbitrary. Despite its considerable tolerance for indeterminacy, the concept of rule of law is therefore not compatible with a decision that is justified by a recourse to the judge's conscience or notion of fairness. It lies in the nature of both the notion of discretion as well as the concept of rule of law that this is not a bright line test. Hence, on the spectrum of remedial discretion, only those remedial decisions are problematic that are not guided by sufficient criteria or that are guided by too many contradictory criteria that potentially allow judges to justify any decision of their liking. An initial lack of criteria may be compensated by a general framework for the exercise of the discretion that allows judges to work out the criteria over time and build up case law in a 'system-oriented' manner.<sup>152</sup> Accordingly, an initially wholly indeterminate remedy may develop into a remedy based on differentiated

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148 See, for the observation of a weak effect of a strict rule, Klerman & Spemann (n 147) 23.

149 See, eg for Article 20 of the *Grundgesetz*, Grzesick, 'Article 20' in Maunz/Dürig (eds), *Grundgesetz, Kommentar* (90th suppl, CH Beck 2020) para 58; see also Berger (n 100) 735 f.

150 Birks (n 8) 15, contra Harding (n 13) 278.

151 Stickelbrock (n 2) 246 f.

152 See on the role of system-oriented decision-making, Harding (n 13) 293.

case law that offers sufficient guidance and predictability, as has been the case for the equitable remedies. It is, however, equally possible that the jurisprudence is not system-oriented, but erratic or even contradictory, so that parties may not be able to predict whether the remedy will be granted and, if so, to what extent. The English family provision seems to be developing in that direction, as there is a plethora of criteria that judges can rely on, but their scope and variety is so broad that it is difficult to see how they meaningfully curtail the judge's discretion in a specific case.<sup>153</sup> This is especially problematic if discretionary decisions that are not system-oriented concern significant matters of societal and distributional importance. If such decisions, as the highly political question of mandatory family protection in succession law, are left to the individual discretion of judges with a high level of indeterminacy and limited review, the right to participate in the family estate will depend on the luck of the (judicial) draw. The point here is not necessarily an institutional one, ie that it should be Parliament who enacts hard and fast statutory rules in these matters.<sup>154</sup> The point is rather that, from a rule of law perspective as well as in conformity with the principle to treat like cases alike, a legal system has to be consistent and predictable in its fundamental distributive decisions. At least for the participation of family members in the inheritance this implies a basic and reliable decision of who should participate in the inheritance and why. As the development of the family provision has shown, wide judicial discretion does not seem to be the instrument of choice in such morally and politically fraught matters.

## V. Conclusion

Remedial discretion is merely one of many examples of the inevitable balancing exercise between legal certainty and predictability on the one side and equitable outcomes in individual cases on the other. On the spectrum of remedial discretion, different jurisdictions may find themselves at different points between strict enforcement of remedies as a matter of right and wide discretion for judges in the choice and moderation of the remedies. The analysis has shown that there are different types of

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153 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).

154 Trulsen (Fn 60) 167; see also Patrick S Atiyah, *Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 679; see for this discussion in this volume, Victor Jouannaud, 'The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private Law: A Constitutional Limit to Judicial Development of the Law?' (§ 7).

remedial discretion. If remedial discretion is exercised in a system-oriented manner, courts will incrementally develop a set of rule-like criteria and ensure legal certainty over time. Such a systemisation can be observed for the traditional equitable remedies or, as civilian analogue, for the jurisprudence on s 242 BGB. The remaining pockets of discretion can be used as a second-order corrective device for exceptional cases without sacrificing much predictability in most cases. The system-oriented exercise of remedial discretion may, however, fail. The prime example of such failure in this paper has been the English family provision. The absence of systemisation will lead to unpredictable outcomes for parties. More importantly, a legal system should not delegate questions of paramount societal importance to the individual assessment of judges. For instance, the mandatory participation of family members in the familial inheritance, as a question of distributive justice and societal importance, should not depend on the luck of the judicial draw.

