

UNJUSTIFIED ENRICHMENT LAW IN THE CIVIL AND COMMON LAW TRADITIONS

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Even though the world is fast becoming a global village, the legal system policies of the world still shows that the global village is still divided into a vast number of legal systems. This notwithstanding it is possible to classify the vast number into a few large groups using their origin as a basis of commonality.¹ It is generally the prevailing thought among that the justice commonality is located in factors such as historical origin, characteristic method of legal thinking and fundamental ideologies.² Following this index above it has become to classify the families into the common law, civil law and the religious legal families.³

Our discussion in the context of unjustified enrichment law in the legal families will somewhat follow from the implicit assumption that all systems are either civilian or common law in nature. Following this assumption we shall exclude the religious legal system. As a result our discussion will focus on this convenient division between civil and common law because some of the religious systems such as Turkey (the Old Ottoman Empire) have already adopted codes along the civilian tradition.⁴

II

In most of the legal families it is easy to see how rights generally arise from contract and tort. It is taken for granted. Even the layman will agree that these are event that generate obligations. But the same may not be the case with the obligation creating category - unjustified enrichment. While most persons will agree that there ought to be a law that reverses an enrichment which is unjust, they hardly can think of the unity of a subject that captures a body of laws that function in that manner. This is likely to be the position in a common law jurisdiction and to a certain degree in the religious legal system. Lawyers in most common law and religious systems know that contract and tort generate private law entitlement. Their curriculum of study make them familiar with contract and tort but not with unjustified enrichment law. But lawyers admit that outside contract and tort, private right should arise where one person is enriched or benefited at another's expense – say where money is paid by mistake. He likely will ground the basis of recovery on some notion of equity or justice.⁵ Yes, unjustified enrichment ought to be

¹ The basis of our division into the various legal families is essential in the area of private law (generally understood to be property law and the law of obligation as understood by Roman jurists and it suppose a generalization because the particular nature of the legal system is susceptible to even fundamental change through legislation and change in government. Generally on classification of legal families, see K Zeigert and H Kotz, *An Introduction to Comparative Law*, 3rd ed, Oxford, Flarendon Press, chapter 5 (translated by Tony Weir); Lawson, "The Families Affinities of Common Law and Civil Law Legal System" (1982) 6 *Hastings International & Comparative Law Review*, 85; Friedman, "Some Thoughts in Comparative Law Culture," in *Comparative and Private International Law Essay in Honor of John H Merryman*, 1990, 49.

² Zweigert and Kotz, *op cit* 68.

³ These three classifications are accepted generalization, but of Zweigert and Kotz, *op cit* who made a six-family classification – the Roman, German, Anglo-American, Nordic, Far East and Religious legal families. But we have chosen to group the German and Nordic (northern Europe) legal families as within the Roman civil tradition because of the influence of the latter on their development. Most of the legal systems in the Far East such as Japan have largely codified law, example the Japanese Civil Code and Commercial Code based largely on the German counterpart. This is what justified our treating them as within the same square as the civilian tradition. Outside the civil law, the other only fundamentally different systems are the common law and the religious legal system – the Shariah (Islamic Law) in most of the Arab countries.

⁴ As part of its reform to modernize its legal system between 1840 and 1870, Turkey adopted a code on commerce and commercial procedure that give jurisdiction over property and obligations disputes to secular courts.

⁵ Lord Mansfield in *Moses v Macferlan* (1760) 2 Burn 1005, 97 ER 676 long ago also thought that natural law and equity are the foundation that vindicates a count within the bracket of unjustified enrichment. See also Birks and Mcleod, "The Implied Contract Theory of Quasi-Contract: Civil Option Current in the Century Before Blackstone," (1986) 6 *Oxford Journal of Legal Studies*, 546.

reversed, but is there a unitary basis for these vast disparate situations that require reversing unjustified enrichment as a private legal remedy such as contract and tort? This is what tasks his taxonomy – whether a logical coherent structure exists that explains the unity of the law of unjustified enrichment.

This difficulty is unlikely to confront a lawyer trained in the civilian tradition. He can in one go explain the unity of the law of unjustified enrichment. His study of the three branches of obligations law reveals to him that private right arise from contract, torts and unjustified enrichment. He quickly captures unjustified enrichment law from the Roman roots, the “*condictio*”. The Roman *condictio* employed an abstract formula where a defendant is under an obligation to hand over money or property to another regardless of the basis or the basis of the obligation.⁶ Its development by Jurists made *condictio* the vindicating mechanism to undue any enrichment in the hands of a defendant to which he has no basis to keep. It was simply a unitary formula for the reversal of enrichment or benefit that a defendant could not keep against the plaintiff. It would appear that its early development was not necessarily rooted in a consideration of equity or natural law, though that could often characterize its use. It is from this basis that lawyers in the civil system recognize the unitary nature of unjustified enrichment law.

Happily today, unjustified enrichment law is also emerging as a recognized branch of obligations in common law jurisdictions. In its premature stage in America, the American Law Institute Commission under Austin Scott and Warren Seavay published a restatement of restitution in 1937.⁷ Textbooks on the subject remain few until Palmer broke the dearth with his volume encyclopedia.⁸ In England Lord Goff and Gareth Jones were the first to publish on the subject.⁹ Useful additions have since been made in most common law jurisdictions on the subject.¹⁰ This has been closely followed by explicit recognition of their branch of obligations law.¹¹ What was for some time unclear was whether the unity of the subject squared up only with the notion of unjust enrichment.¹² Though that was probably the prevailing view at a time, it is now clearer that unjustified enrichment law is basically captured under three unities:

- (i) restitution for the reversal of unjust enrichment, sometimes referred to as restitution in the ‘subtractive’ sense which generally penetrate remedies *in personam*.
- (ii) restitution for the disgorgement of benefits or enrichment obtained from wrongs, loosely referred to as restitution in ‘the gain’ sense, which generally ought to generate entitlement in that person, and,
- (iii) restitution for the vindication of proprietary right which is capable of generating both right *in personam* and *in rem*.

⁶ Zweigert and Kötz *op cit* p 538-9, Geoffrey Samuel “Property Notions in the Law of Obligation,” (1994) *Cambridge Law Journal* 524, Zimmermann, *The Law of Obligations: Foundation of the Civilian Tradition*, Cape Town, 1990.

⁷ American Law Institute, *Restatement of Restitution*, 1937, para 47.

⁸ George E Palmer, *The Law of Restitution*, Boston and Toronto, 1978.

⁹ Robert Goff and Gareth Jones, *The Law of Restitution*, (first published 1966, 5th ed 1998).

¹⁰ Birks, Peter, *An Introduction to the Law of Restitution*, Oxford, Clarendon Press, 1985; Burrows, Andrew, *The Law of Restitution*, London, Butterworths, 1993; Virgo, Graham, *The Principle of the Law of Restitution*, Oxford, Clarendon Press, 1988; Jackman, *The Variety of Restitution*, Sydney, 1998; Mason, Keith and Carter, J W, *Restitution Law in Australia*, 1995; Cate, Charles. *REstitution in Australia and New Zealand*, 1997; Klippen, G, *Unjust Enrichment*, 1983; Friedman, G H, *Restitution*, 2nd ed, 1992; Maddaugh, Peter and McCamus, John, *The Law of Restitution*, 1990; Emiri, O F, *The Law of Restitution in Nigeria*, Lagos, Malthouse Press, 2004.

¹¹ For recognition of restitution as an independent head of liability, see *Pavey and Matthew Pty v Paul* (1987) 162 Commonwealth LR 221; *David Securities v Commonwealth Bank of Australia* (1992) 175 Commonwealth LR 353; *Deglam v Guaranty Trust Co of Canada* (1954) SCR 725; *Morr (James) and Son Ltd v University of Ottawa* (1974) 49 Dominion IR (3rd) 666; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 3 All ER 737.

¹² For general reading on the proposition that restitution law is no longer synonymous with the unjust enrichment principle, see Birks, P, “Misnomer in Restitution: Past, Present and Future,” in Cornish W R *et al*, *Restitution: Past, Present and Future: Essays in honour of Gareth Jones*, Oxford, Hart Publications, 1998, 7; Birks, P, “The Law of Restitution at the end of an Epoch,” (1999) 29 *University of Western Australia Law Rev*, 13, 19; Virgo, Graham, “Reconstructing Restitution,” (1996) 10 *Trust Law International*, 20; Virgo, Graham, “What is Restitution About?” in Cornish, W R *et al*, *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones*, Oxford, Hart Publications, 1998.

Using these three categories as the unities that capture restitution/unjustified enrichment law in the common law we shall next attempt a comparative study between the common law and the civilian tradition.

III

The German Civil Code (BGB), like the Swiss Code of obligation devotes a special chapter to entitlement generated by unjustified enrichment. Article 812 paragraph 1 provides that a person shall be under an obligation to return an enrichment obtained without legal justification received at another expense whether obtained by transfer or otherwise and that the obligation will also arise if the legal justification subsequently ceases to exist or the transfer does not have the effect envisaged in the transaction.¹² Unlike its German and Swiss counterparts in the civil law system, the French Civil Code does not have a separate chapter on obligation of unjustified enrichment.¹³

That being the case, the code hardly contains express provision on unjustified enrichment with the exception of Article 1376 dealing with the restoration of payment of debt made by mistake. - *condictio indebit*.¹⁴

For the common law lawyer, he maybe somewhat worried whether the situation is covered by unjust enrichment law in the civilian setting as exemplified in the Codes above is properly able to capture his perceived vast areas covered by the law of restitution in the system familiar to him. It is now our business to clear up his doubt. Using this classification of the unity of the subject, we shall now attempt to show how the civilian system works in equivalence.

¹² See a similar provision in Article 62 of the BGB.

¹³ According to Zeigert and Kotz, *op cit*, 545 the reason is because the jurist, Pothier, whose writing largely shaped the French law of obligation concentrated on the *condictio in debit* and the concept of *negotiorum gestio* at the expense of their form of liability in unjust enrichment. See also Stoljar, S, *Negotiorum Gestio*, in *International Encyclopedia of Comparative Law*, 1984-1985, vol X, chapter 17.

¹⁴ Noteworthy is the fact that both concept of *condictio indebit* (payment of debt made by mistaken brief) and *negotiorum gestio* (failure of consideration) are treated together in the Code under the title of quasi-contract in article 1371ff.

1) **Restriction in the subtractive sense - restriction for the reversal of unjust enrichment.**

It is now generally accepted that restitution under this category requires the existence of

- (a) an enrichment.
- (b) an enrichment received by the defendant must be shown to be at the claimant's\plaintiff's expense.
- (c) there must exist an unjust factor that requires the reversal of the enrichment

An enrichment means any thing of value whether moveable or immoveable, money or services.¹⁵ An enrichment is also similarly understood in the Germanic legal system. Article 812 of BGB speaks of an enrichment as anything transferred without any legal justification from one person to another at the other expense. Transfer (*leistung*) of a thing may be in the form of payment of money or transfer of other things, such as real property, assignment of a right, release of document, performance of services.¹⁶

Whether or not the French Civil Code also maintains a similar analysis of what an enrichment is requires some further discussion. This is because of the unnecessary limitation of the Code's treatment of unjustified enrichment within the brackets of quasi-contract in Article 1371. By laying restitutionary claims within the bracket of *condictio indebit* – the restoration of payment made pursuant to a supposed debt¹⁷ - it will appear that an enrichment within the law can only arise in the context of a money enrichment and no more. This will exclude other forms of property transfer and non-money benefit such as services. However the French Code understanding of enrichment was expounded and expanded by the Courts of Cassation in the *Boulier* case.¹⁸ According to the principle developed in the case there exist a general enrichment claim widely covered by an action *de in rem verso*, resting directly on consideration of equity and not any codal provision. Following the interpretation, a general enrichment claim would arise were there is any impoverishment. Since an impoverishment can arise in the context of a transfer other than money, it means that it may arise from a transfer of non-money property and non-money benefit, such as pure service.

To succeed in a restitutionary claim at common law, a claimant would further need to show that there is a deprivation – that the enrichment is obtained at his expense. Put otherwise he needs to show that his minus is what translate as plus to the defendant. It is in this sense that the common law lawyer speaks of restitution by subtraction, because the enrichment subtracted from the claimant is what translates to the defendant's plus.¹⁹

The Germanic, Swiss and French continental systems recognize similar requirements. Article 812 paragraph 1 of BGB expressly requires the enrichment received to be at the claimant's expense. This is amplified in Article 62 which states that "a person who is unjustifiably enriched at the expense of another must return the enrichment". An unjust enrichment under the French Law whether under Article 1376 or the general principle developed by the courts for general enrichment claims – action *de in rem verso* - require that the defendant would have received an enrichment at the claimant's expense.²⁰

It is not sufficient for a claimant to stop at this stage if he desires to vindicate a restitutionary claim within the structure of restitution for the reversal of unjust enrichment. This is because there may well be many reasons why a person may transfer an enrichment to another. It could be because he freely chooses to do so, as where one

¹⁵ Beatson, *The Use and Abuse of Unjust Enrichment*, Oxford, Clarendon Press, 1990, 29.

¹⁶ Zweigert *et al*, *op cit*, 540-1.

¹⁷ Article 1376 of French Civil Code. See above art 1235 which provides that payment presupposes a debt.

¹⁸ (1892) DP 1.596 (1893) S. 1281 cited in Zweigert *et al op cit* 547-8.

¹⁹ See Virgo, G, above n 5.

²⁰ Dickson, "Unjustified Enrichment Claims: A Comparative Overview," (1995) 54 *Modern Law Review*, 99.

makes a gift to another as a show of affection. This is what makes it insufficient to require a reversal of an enrichment. To succeed therefore, he will need to point to an unjust factor, a factual situation that renders the retention of the enrichment in the hand of the defendant unjust. In its formative stage, Lord Mansfield attempted a classification of what constitutes unjust factors at common law.²¹ His simple classification brings together under this head payment made by mistakes, payments made pursuant to failure of consideration, cases of duress, exploitation etc. Though development of the law has closely followed the traditional category outlined by Lord Mansfield, the courts have created additional unjust factors.²² Birks,²³ in his major work on restitution chose to analyse the unjust factor as demonstrative of non-voluntary transfers that the courts will reverse. Going by his analysis every case of unjust factor is rooted in the concept of vitiated consent. For example, if a claimant's unjust basis is mistake, he says in effect that my transfer is involuntary because I worked on some wrong data which if I had known were wrong I would not have transferred the enrichment. The same can be said if the factor were a failure of consideration. The claimant in effect says that the basis for my transfer has evaporated. That is what makes it non-voluntary. Whatever the merit or otherwise of the Birks analysis, one thing stands out clear. It is that the common law on unjustified enrichment recognizes the reason why an enrichment is treated as invalid or non-voluntary. It must exhibit an unjust basis as understood from case law.

Though the Germanic system does not seem to have a category of unjust factors in the same way as the common law, it is clear from article 812 that unjust factor in its law is weaved around question of whether the legal justification for a transfer subsequently evaporates or the facts that a transfer does not have the effect envisaged in the transaction. If we were to use the analysis of Birks' non-voluntary transfer as occupying the same square as the unjust factors, can we capture the Germanic unjust factor of non-basic and a subsequent evaporation of basic with the English notion, 'I do not know of the enrichment' (ignorance); 'I do not mean you to have it' (mistake); 'I gave you on condition that did not materialize' (failure of consideration); 'I was unequal or compelled' (exploitation and duress)? My answer is Yes. When the German code refers to a legal justification that subsequently ceases, such must refer to cases where a claimant in the loose sense can be regarded to have transferred an enrichment only to later discover that there was no justification for the transfer. Restitution from public authority where payment is made on the basis of a mistake of law certainly is one such case.

In *Kleinwort Benson v Lincoln London City Council*²⁴ the House of Lords recognized payment made by mistake of law as an unjust factor. Thus a valid payment made subsequently shown to be invalid becomes a basis of reversing an enrichment. Situation within the count of failure of consideration, absence of consideration, mistaken payment and some other can sit well with the German classification of legal justification that subsequently ceased. If C makes payment to D on the understanding that he will sell to him his car and D fails to do so, C can argue that the legal justification for the sale ceases to the extent that D has failed to perform his own side of the obligation, a perfect case of total failure of consideration (an unjust factor in the common law). If C pays taxes to D when in fact D has no authority to demand and receive same, C can bring himself within the requirement of the German code by claiming that the basis for receipt by D is void. At the time payment was made, it was imagined that D had such a right when in fact there was no such right, a claim within the count of absence of

²¹ *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676.

²² See *C T W Cash a Carry Fed v Gallarier* [1994] 4 All ER 71, 72.

²³ Birks, above n 5.

²⁴ [1998] 3 WLR 1095.

consideration. Most of these situations can be brought within the other part of 'unjust factor' in the code-transfer not having the effect envisaged. For instance a payment by C to D believing that he is under an obligation to do so do (mistake) can be treated as a payment that does not have the effect envisaged in the transaction. If C's money is paid to D by E (ignorance of C), such transfer certainly will not have the effect envisaged. So at a level of generality it will appear that the unjust factor in the common law and Germanic civil system bear lots of striking similarities. The Germanic factual reason for reversing an unjust enrichment on the basis of original or subsequent invalidity closely corresponds to the English classification of unjust factor.

Under the French system, an unjustified enrichment claim within the count of article 1376 (*condictio in debit*) will only exhibit the unjust factor if it is shown that the transfer of enrichment is made pursuant to a debt which did not exist at the time of transfer. This is largely analogous to a restitutionary claim at common law for mistaken payment. Under the general enrichment claims established by the Court of Cassation in the *Boullier* case,²⁵ that covers restitutionary claims for services, failure of consideration, interference with enrichment and third party claims – *actio de rem verso*²⁶ it is accepted under this system that it is a necessary ingredient of an enrichment claim to show that it is received within legitimate causes (*sans cause legitime*) - an unjust factor. Like the Germanic law such a basis will arise if the transfer is original or subsequently invalid. Thus an enrichment will not be reversed where there is contractual basis for the receipt. If a defendant's receipt is not pursuant to a valid contract, he will be obliged to make restitution. Subsequent refinement of enrichment claims reveals that restitution will be ordered if there is any other legal basis (excluding the unjust factor of *sans cause legitima* – an underlying valid contract) on which the claimant may ground his claim.²⁷ A purposive interpretation of the unjust factor that an enrichment be '*sans cause a legitima*' and '*subsidiarite de l' action de rem verse* (any other legal basis for restitution) in the French system may well fit the same category of unjust factor under English common law.

b) Restitution for Wrongs

Restitution claims under the common law exist for the disgorgement of benefits obtained from wrong.²⁸ This branch of restitution law is referred to as restitution of the gain-yes, because the wrongdoer is made to disgorge his gain received as though it is at the expense of the claimant. For example in *Reading v Attorney-General*²⁹ the gain made by Sergeant Reading in shielding smugglers with his uniform through road checkpoints was treated as gains made at the expense of the Crown in the sense that though the Crown lost no money to him in the subtractive sense, the gain of Reading was in breach of his fiduciary duty to the Crown. This is why restitution for wrong often arises in context of breach of duty.³⁰

Are there counterparts of restitution for wrong in the civil system? Under the German Civil Code there exist unjustified enrichment claim based on *condictio* of interference. The essence of the claims is for the disgorgement of benefit from property or right in another without the authorization.³¹ Article 812 puts a defendant under an obligation to pay damages in tort and make restitution if he interferes with the other's

²⁵ Above n 19.

²⁶ Action *in rem verse* cover situation where an enrichment claim arrives in the hand of the defendant through an intermediary of a third party who receives directly from the claimant.

²⁷ Zweigert *et al*, *op cit*, 50-1.

²⁸ For example, see *Keech v Sandford* (1726) Sel Cas Ch 61; *AG v Guardian Newspaper Ltd (No 2)* [1980] 1 AC 109; *Re Diplock* [1949] Ch 463; *Reading v AG* [1951] AC 507.

²⁹ Above.

³⁰ Millette, P J, "Restitution and Constructive Trusts," (1998) 114 *Law Quarterly Review*, 399.

³¹ Zweigert *et al*, *op cit*, 544.

rights. Liability does not depend on fault. Any unauthorized use of another's right generates restitutionary claims. So if Reading had done what he did against the British Crown under the German law, he would still be under an obligation to pay the value of his user - in this case it would be calculated as the amount of bribe which he received by unauthorized use of his British uniform. A restitutionary claim within the content of the Germanic law bears a striking resemblance with the principle of user in a restitutionary claim of a tort.³² The only fundamental difference between a common law restitution claim for wrong and the German counterpart is that liability in the former requires a breach of a fiduciary or stationary duty,³³ whereas liability for the former arises once there is an interference with the right or property of another. That being the case, unlike the common law rule which imports fault, the Germanic system does not require any fault - mere interference will do, even if it is innocent.³⁴ Thus if the defendant uses the claimant parking space without authority for which fees are payable, it would be no defense for him to say that at the material time of his case, the claimant would not have earned the parking fees because no one could have been there. He will be under liability to reimburse the claimants up to the value of his use even if the claimant could not have used the right or put parking lot to hire. The essence of restitution claim in this context (like that of the user principle for tortious wrong at common law) is not to compensate the claimant for diminution of asset (a tortious remedy) but to rather reverse an enrichment obtained by the wrongdoer which ought to be an accretion to the property of the claimant. It is in this sense that the strict nature of this form of restitution also looks like the common law restitutionary claim founded on the vindication of property right.

One may mistakenly imagine that restitution claims for wrongs do not exist under the French system. Such a conclusion may be borne out of fact that every general enrichment must exhibit an improvement and a subtraction from the claimant. This will be a simplistic conclusion, because the French law unlike some other civil system makes no distinction whether an impoverishment/enrichment occurs as a result of 'transfer' by the claimant or 'arises otherwise'. Since such an impoverishment may arise otherwise, it follows that a general restitutionary claim is not confined to restitution in the subtractive sense. It may arise in the general sense - as where the defendants interfered with right or uses the property of another in an unauthorized manner. To use the example of the learned authors on comparative law, if a waterworks use the pipe of another to distribute water, it will be liable to pay for the use. On this ground it can be argued that the French also have a general restitutionary claim that can work in a manner similar to the common law restitution for wrongs.

c) **Restitution for the Vindication of Proprietary Rights**

Restitution for the vindication of proprietary rights represents the third branch of the unity that makes up the structure of restitutionary claim under the common law tradition.³⁵ The foundation for restitution in this context is the proprietary interest the claimant retains in the enrichment received by the defendant. The right to restitution can be founded in law or equity. It is generally stated that this is the main branch of restitution law where property notion enter into obligations, because the claim in this context may be vindicated *in rem* or *in personam*.³⁶

³² See *Stoke-on-Trent City Council v W and J Wass Ltd* [1988] 1 WLR 1466.

³³ For example in *Attorney-General v Guardian Newspaper Ltd (No 2)* [1980] 1 AC 109 it was a breach to reveal official secrets for gain.

³⁴ *Zweigert et al, op cit*, 544.

³⁵ *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

³⁶ Samuel, George, "Property Natives in the Law of Obligation," (1994) *Cambridge law journal*, 524.

As previously stated an enrichment within the Germanic system that 'arise otherwise' where a person uses or profit from property or right vested in other without his authorization is to a large extent analyzable as performing a similar function as a common law restitution for the vindication of proprietary rights. This *condictio* based on interference essentially reverses property or gain that result from its use to the original owner. It will follow that a claimant can only vindicate his right (like its common law counterpart) only if he has a property foundation for his claim. Fault or negligence is thus immaterial, so long as the defendant has interfered with property or right. It is in this respect that it more closely resembles the common law claim. For example, in the case of *Lipkin Gorman v Karpnale*³⁷ it is hardly contestable that the gambling house was at fault in receiving money from the fraudulent solicitor. The firm vindicated its proprietary rights against the gambling house on the basis that its money standing at credit with its bankers was a chose in action (an incorporeal property). If the property was then found with the gambling house, they were under a duty to return same unless they could show a bona fide receipt, which they could not because there was no consideration for its receipt based on a gambling contract, itself illegal. Even though not at fault, they were made to disgorge the money to the claimant. The *condictio* of interference under the Germanic law works in a similar manner.

Under common law, if the claimant cannot obtain the property because the purchaser from the defendant who interferes with his property has acquired a good title, the claimant may vindicate his right by having a constructive trust imposed on the proceeds received by the defendant from the transfer of the property to the third party.³⁸ The *condictio* of interference does a similar thing. If the defendant sells the property to another in circumstances that cover a title on him, the claimant can require the defendant to hand over what he receives from the third party including any gain made from the deal.³⁹ This is certainly a parallel of the common law trust. Thus *condictio* is employed where ownership rights are infringed.

The French law however does not show clear similarities. While a general enrichment claim can 'arise otherwise' it would appear that the current thinking among scholars that a general enrichment claim must give way if there is any other legal basis on which the claimant can ground his claim, will have the effect of driving claim within the count of vindication of property right away from obligations to property. Thus an unjustified enrichment claim that sounds like property may be defeated by the principle of subsidiarity.⁴⁰

IV

Even though the unities of unjustified enrichment have been traced as located with the branches of the common law it is possible at the level of generality to explore the similarities within the legal families on a wider notion of equity and justice. Its formative stage at common law was characterized by appeal to general principle of equity and fairness. This was what Lord Mansfield alluded to in *Moses v Macferlan*⁴¹ when he stated that 'the gist of this kind of actions that the defendant is obliged by the ties of natural justice and equity to refund the money'. Though the appeal to corrective justice as Lord Mansfield proposed no longer explains unjustified enrichment law it did provide the foundation on which the subject is presently constructed.⁴²

³⁷ [1991] 2 AC 548.

³⁸ Birks, P., "Misdirected Funds Restitution from the Recipient," (1989) *LMCLCP* 296; Jones, G., "Knowing Receipt and Knowing Assistance," in Goldstein (ed) *Equity and Contemporary Legal Problems*, 1992, 374.

³⁹ Zweigert, *op cit*, 544.

⁴⁰ *Ibid* 550-551.

⁴¹ (1760) 97 ER 676.

⁴² Lord Wright's statement in *Fibrosa Spolks Akeyjna v Fairbairn, Lawson, Combe, Barbour Les*[1943] AC 32.

Unjustified enrichment law under the civilian tradition also share root in principle of equity and corrective justice. It is also said that even the Germanic law of unjustified enrichment is based in the last resort on consideration of corrective justice, in the sense that the court will reverse an enrichment if retention will be contrary to a just equitable ordering of economic relation.⁴³ The creation of a general claim for enrichment in *Boulier* for situation outside the French Civil Code can also be ascribed to a gap filling device that employs equity as foundation.

The various appeal to equity under the various legal families is no surprise, Appeal was necessary when restitutionary claim had to fight in asserting itself as an autonomous head of civil liability, as are contract and tort. Today, there is no strong debate about its status as a fundamental category of obligation creating event.

Clearly our discussion reveals that unjustified enrichment in the common law and civilian system performs similar function - reversing an enrichment obtained by subtraction or gain as the case may be. The German and common law lawyers will have no difficulty agreeing that the two most important types of unjustified claims arise from subtraction (*leistangsk conditio*) and from gains (*engriffsk conditio*). The first part is captured by restitution for the reverse of unjust enrichment and the second part by restitution for wrong. It means in essence that the question of unjustified enrichment in the context of whether the defendant has acquired a benefit from or by the act of the plaintiff at common law is the equivalent of German *leistangsk conditio* and the question of whether the enrichment is obtained by wrong equates with the German *engriffsk conditio*.

In the same manner, claims within the bracket of article 1376 (*condictio indebit*) and those general restitutionary claim within the *Boulier's* proposition that require receipt without legitimate cause - sans cause a legitimate will aggregate with restitution by subtraction at common law or the German *leistangsk conditio*. On the other hand, enrichment that occurs otherwise than by transfer can fairly equate with restitution for wrong or the German *engriffsk conditio*.

While the claim for vindication of proprietary rights under the common law may find equivalence with certain aspects of the German *engriffsk conditio* - condition of interference with property or rights under Germanic law the restriction by the principle of subsidiarity makes it difficult to vindicate property right within the count of obligation - to which restitution certainly belongs.

The picture therefore will look like this - both civil and common law lawyers can to a large extent think across systems and can see how unjustified enrichment law operates in the subtractive and gain sense without losing sleep by different labels. The few differences are merely theoretical and it is hoped that each system can take the good of the other and learn from the other, as we think more about a common taxonomy for unjustified enrichment law.

⁴³ See *Dernburg, Burgerliches Recht II 2* (3rd ed 1906) 677; *Enneccerus Lehman, Recht der Schuldverhdmiss* (4th ed 1954) 220, both cited in *Zweigert et al, op cit*, 560 and judgment of the Reichsgericht (RGZ 86, 343 and BGHZ 36.232 at 235, decisions in civil matters of the German Imperial Court and German Federal Supreme Court (Bundesgerichtshof) respectively.