Unjustified Enrichment: The Modern Civilian Approach

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In his *Nicomachean Ethics*[1] Aristotle distinguishes two forms of justice: *iustitia distributiva* and *iustitia commutativa*. The latter specifically concerns the relationship between private individuals. It has to be based on a fundamental respect for each others' rights. 'Iustitia est constans et perpetua voluntas ius suum cuique tribuendi', specifies Ulpian,[2] and it is implicit in this definition that a person may have and enjoy, or request to receive, what is due to him. This entails, inter alia, that his status quo must be protected. One of the precepts of natural law therefore requires: '(I.) Ut ne quis alterum laedat, utque (II.) si quod damnum alteri dederit, id reparet'.[3] This is the moral foundation of the law of delict. At the same time, however, it cannot be tolerated that one person becomes richer at the expense of another: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem'.[4] This is the so-called enrichment principle.

The law of delict aims at making good some damage that has occurred. It looks at the position of the plaintiff. Whether the defendant has derived benefit as a result of inflicting the injury is quite immaterial. As long as the injury is 'attributable' to him, he has to make good the damage. Thus, the law is here concerned with a detrimental deviation from the status quo. The law of unjustified

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[1] Book V, II, 6 sqq (1130 b sqq).

[2] D 1, 1, 10 pr; and see Inst I, 1, pr; on Ulpian's definition of justice, see Wolfgang Waldstein, 'Zu Ulpians Definition der Gerechtigkeit (D 1, 1, 10 pr)', *Festschrift für Werner Flume* (vol 1, 1978) 213; idem, Ist das "Suum cuique" eine Leerformel, *Ius Humanitatis, Festschrift für Alfred Verdross*, 1980) at 285 sqq.

[3] Samuel Pufendorf, *De jure naturae et gentium*, Lib III, Cap I, I. See Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1992) 1032 sqq. For a recent invocation of this principle, see Eduard Picker, 'Vertragliche und deliktische Schadenshaftung' (1987) *Juristenzeitung* 1041 sqq.

[4] Pomp D 12, 6, 14. See, too, the slightly modified version of this statement, included by Justinian among the diversae regulae iuris antiqui: D 50, 17, 206. On the origin and background of this principle (stoic moral philosophy) and its reception into the legal system, see Christian Wollschläger, 'Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft', in *Römisches Recht in der europäischen Tradition, Symposion für Franz Wieacker* (1985) 41 sqq.

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enrichment, in a way, is the mirror image of the law of delict. It deals with a favourable deviation from the status quo. And it is merely concerned with the position of the defendant. The defendant has obtained a benefit. As long as this benefit is not due to him but should have accrued to the plaintiff, he has to render restitution. Whether the plaintiff has suffered some loss is as immaterial as the question concerning the defendant's gain is in the law of delict. The mere fact that the defendant holds something that he is not, but someone else is, justified to hold infringes the precepts of *iustitia commutativa*.[5] We are dealing, in other words, with a law of unjustified enrichment and not of unjustified loss.

Comparison with the law of delict is instructive also in another respect. Not every loss leads to a claim for compensation. We need an imputation to a person who has caused the damage.[6] Likewise, not every gain leads to a claim for restitution. The gain has to be unjustified in the sense that it should have accrued to the plaintiff rather than to the defendant. In both cases we therefore have to establish that a specific other person has to make good the loss or deserves to receive the benefit. In the one case we introduce criteria like causation, wrongfulness and fault in order to establish who is the appropriate defendant. In the other case we have to look for similar touchstones in order to find out the proper plaintiff.

All in all, therefore, we can say that the laws of delict and of unjustified enrichment are two ways of implementing the precept of *suum cuique tribuere*: the one looks at P's loss (quite irrespective of D's—possible—gain), the other at D's gain (without being interested in a concomitant loss on the part of P). Ideally, a legal system should provide a remedy wherever we have an unjustified enrichment in the sense that a benefit has accrued to one person which should have accrued to another.

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However, 'unjustified' is too unspecific a criterion for determining under which circumstances a person may retain a benefit. Also, it does not tell us anything about the person of the plaintiff. The second problem may be solved by introducing the notion 'at the expense' of. But apart from conjuring up the—mistaken—idea that the enrichment must intrinsically be related to a loss, it does not take us any further, as far as the first problem is concerned. The only viable solution, therefore, appears to be to look at how the 'unjustified' enrichment

[5] For a more detailed exposition of the same argument, see the influential study of Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (1934) 5 sqq, 97 sqq; and see, more recently, Paolo Gallo, *L'arrichimento senza causa* (1990) 15 sqq.

[6] In Pufendorf's terminology, the damage must have been 'imputable' to the person who had caused the damage. Such imputation, in turn, required a free and moral action; and that implied, inter alia, that the acting party had to be able to foresee the consequences and to recognize the wrongfulness of what he was doing (or failing to do). For details, and further references, see *Law of Obligations*, above n 3 at 1033 sqq. On the notion of imputation see, from an analytical point of view, Joachim Hruschka, 'Imputation', in Albin Eser, George P. Fletcher (eds), *Rechtfertigung und Entschuldigung* (vol I, 1987) 121 sqq.

has come about. Broadly speaking, it may have come about in one of two ways: either by transfer or in another manner.[7]

This subdivision, with the concept of 'transfer' as its nub, is not an arbitrary one. One of the most characteristic features of the European legal tradition is the recognition of a law of obligations. An obligation, in the words of Justinian, is a 'vinculum iuris, quo necessitate adstringimur alicuius solvendae rei'.[8] That necessity of making some performance can arise by operation of the law, or it can result from a contractual undertaking. If the performance is rendered, it is in both cases rendered for a specific purpose: it is intended to discharge the obligation. Occasionally, however, this performance (which we will henceforth refer to as 'transfer')[9] will fail to achieve its purpose. It turns out that the person to whom the money was given as a compensation for loss sustained had not actually been injured by the transferor. Or it appears that a contract had not been concluded between transferor and transferee or that it had been concluded but turned out to be invalid. A set of legal rules is thus required to redress the situation. These rules revolve around enrichment-by-transfer. The frustrated attempt to discharge a delictual obligation need not detain us any longer, for it does not throw up specific problems. If the obligation to pay damages did not exist, the enrichment is unjustified. Restitution has to be granted. If we were looking for a term to label the restitutionary claim we might refer to *'indebitum solutum'*.

Matters are not, in principle, much different where we are dealing with contractual obligations. For in most cases, we have a very similar situation. A transfer rendered with the object of fulfilling a contractual obligation constitutes *'indebitum solutum'*, if an obligation requiring that performance does not in fact exist. At the same time, however, it has to be taken into account that not every transfer is made *solvendi causa*. According to Roman law, it could be made in order to elicit some form of counterperformance (*ob rem*), or to bring about a contractual obligation on the part of the recipient (*obligandi causa*), or it could be effected in order to make a gift (*donandi causa*). The various possibilities were indeed carefully canvassed by the Roman lawyers. A system of enrichment

[7] Enrichment 'in another manner', in the context, simply refers to 'enrichment not brought about by way of transfer'. For a more specific elaboration of the issues and situations involved, see below 10–14.

[8] *Inst* III, 13 pr.

[9] Transfer, for the purposes of this paper, is therefore defined as the 'intentional and purpose-oriented shift of a benefit from one person to another'. It is in this sense that the term 'Leistung' is commonly used in German law; see England, below n 24, nn 6 sq and, for details, Dieter Reuter, Michael Martinek, *Ungerechtfertigte Bereicherung*, (1983) 80 sqq; Harm Peter Westermann in Erman, *Handkommentar zum Bürgerlichen Gesetzbuch* (9th ed 1993) I, § 812, nn 10 sqq; Werner Lorenz in J. v. Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch* (13th ed 1994) § 812, nn 4 sqq; more generally, see Horst-Eberhard Henke, *Die Leistung: Grundvorgang des sozialen Lebens und Grundbegriff des Schuldrechts* (1991). The enrichment-by-transfer claim is referred to as 'Leistungskondiktion' in German law. The differentation between 'Leistungs-' and 'Nichtleistungskondiktion' is prefigured in § 812 I 1 BGB, but its significance was only recognized some thirty years after the code had been enacted by Walter Wilburg in his book *Die Lehre von der ungerechtfertigten Bereicherung*, above n 5. Wilburg thus laid the foundations of the typological differentation that made the general enrichment action (devised by Friedrich Carl von Savigny on the basis of a historical examination of the Roman *condictiones*, and subsequently incorporated into the BGB) workable in practice. For an overview of the development in English, see Reinhard Zimmermann, Jacques du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' (1994) 2 *Restitution Law Review* 14 sqq, 24 sqq with further references.

remedies, called *condictiones*, was developed by them that tied in with and supplemented the contractual system.[10] Apart from the *condictio ex causa furtiva*, all these *condictiones* were characterized by the fact that one party tries to reclaim what he has transferred to the other. Transfers *donandi* and *obligandi causa* did not require the introduction of specific remedies. *Datio ob rem*, however, did. This was the field of application of the *condictiones causa data causa non secuta* and *ob turpem vel iniustam causam*.[11] But it was the *condictio indebiti* that was undoubtedly the most important species of the Roman unjustified enrichment claims, for it covered the paradigmatic situation of '*indebitum solutum*'.[12]

3

As in Roman times, people still today transfer goods, money and services among each other. Much more often, however, these transfers are made *solvendi causa*—in order to discharge an obligation. For modern legal systems have turned the principle of *ex nudo pacto non oritur actio* on its head and have thus outgrown the fragmented contractual system of Roman law.[13] They recognize a general law of contract; and they have thereby greatly extended the range of application of the *condictio indebiti*. Its main function is still to supplement the law of contract.[14] It therefore has to be available whenever a transfer fails to achieve what it is supposed to achieve: the discharge of an obligation that the transferor had incurred towards the transferee. Retention of the benefit on the part of the recipient is thus unjustified, if the transferor was not obliged to make this transfer—if the transfer, in other words, was made without legal ground.

We are now in a position to appreciate that reference to the notion of transfer has three great advantages. In the first place, it synchronizes the law of contract with the law of unjustified enrichment. Secondly, it determines to whom restitution is due. And thirdly, it supplies a relatively simple and straightforward test as to whether an enrichment is unjustified.[15] For unjustified enrichment, in

[10] For details, see Berthold Kupisch, *Ungerechtfertigte Bereicherung: geschichtliche Entwicklungen* (1987) 4 sqq; *Law of Obligations*, above n 3 at 841 sqq.

[11] For details, see *Law of Obligations* above n 3 at 843 sqq.

[12] For details, see *Law of Obligations* above n 3 at 834 sqq, 848 sqq. In both Gaius's and Justinian's *Institutes* '*indebitum solutum*' is the only form of enrichment liability dealt within Gai III, 91 (and see Gai D. 44, 7, 5, 3 read in conjunction with Gai D. 44, 7, 1 pr); *Inst* III, 27, 6.

[13] *Law of Obligations* above n 3 at 537 sqq.; John Barton (ed), *Towards a General Law of Contract* (1990).

[14] Cf eg Ernest von Caemmerer, 'Bereicherung und unerlaubte Handlung', in idem *Gesammelte Schriften*, (1968) 218 sq.

[15] This is immediately obvious in two-party constellations. Much more difficult is the issue of third party enrichment situations. Here it is widely agreed among German writers that the concept of 'Leistung' cannot be mechanically 'applied' in order to find appropriate solutions to each and every case. On the other hand, however, it constitutes the focal point, around which certain categories of cases ('Fallgruppen') have crystallized in German law. The underlying evaluations have been made explicit by Claus-Wilhelm Canaris in his celebrated article 'Bereicherungsausgleich im Dreipersonenverhältnis' (1973) *Festschrift für Karl Larenz* 799 sqq. For an overview in English, see Zimmermann/Du Plessis (1994) 2 *Restitution Law Review* 31 sqq.; and see, in addition, Günter Hager, 'Entwicklungsstadien der bereicherungsrechtlichen Durchgriffshaftung' in *Ungerechtfertigte Bereicherung, Grundlagen, Tendenzen, Perspektiven* (1984) 151 sqq; Detlef König, *Ungerechtfertigte Bereicherung. Tatbestände und Ordnungsprobleme in rechtsvergleichender Sicht* (1985) 177 sqq; Lorenz above n 9 at § 812, nn 36 sqq.; Karl Larenz, Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts* (13th ed, vol II 2, 1994) 197 sqq. For a balanced assessment of the debate surrounding the concept of 'Leistung', see Josef Esser, Hans-Leo Weyers, *Schuldrecht* (vol II, 7th ed, 1991) 429 sqq.

the present context, can only mean the transfer of a benefit without legal ground:[16] and the relevant ground is either provided, or is not provided, by the obligation the transferor attempted to discharge. Reference to the legal ground, in turn, brings to light a further, very important feature of the modern enrichment-by-transfer claim. Why there was no legal ground for this specific transfer is entirely irrelevant. The underlying contract the transferor attempted to discharge may not have come into existence; it may have been invalid for a whole variety of reasons; it may have concerned another object of performance; or it may have related to a different creditor. All of this has to be determined according to the law of contract. The law of restitution does not have to concern itself with these issues.[17]

Provided, then, there is no legal ground: does the transferor have to have acted in the mistaken belief that he was bound to render that performance? In principle, presumably, the answer should be yes. For a legal system can hardly permit a plaintiff to claim back what he had first handed over in spite of having been aware of the fact that he was under no obligation to perform. A plaintiff, in other words, cannot be allowed to rely on the absence of a legal ground, if he had first appeared to acknowledge, by rendering performance, that a legal ground existed. That this is so, however, follows from the fact that a plaintiff is estopped from pleading what he had previously contradicted by his own behaviour; he should not be permitted, in continental terminology, to act '*contra factum proprium*'.[18] It is therefore quite unnecessary for a legal system to elevate 'error' to the status of an independent requirement for the claim for restitution. Restitution is granted wherever a transfer has been rendered without legal ground; it is excluded wherever the transferor, at the time of rendering the transfer, knew about the absence of this legal ground.[19]

4

Somewhat more untidy is the situation in cases of a *datio ob rem*. They (and with them the Roman *condictio causa data causa non secuta*) used to derive their special significance from the fact that not every agreement was enforceable in Roman law. Modern legal systems, on the other hand, recognize liability on the ground of any (lawful) agreement, and contractual remedies can therefore be

[16] Wilburg above n 5 at 7 sqq.; for more recent affirmations of this point of view, see König, above n 15 at 33 sqq; Manfred Lieb in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (vol III/2 2nd ed 1986) at § 812, nn 137 sqq; Larenz/Canaris, above n 15 at 136 sq. Cf also (comparative) Englard below n 24 at n 8.

[17] Wilburg above n 5 at 11; John P. Dawson *Unjust Enrichment* (1951) 113 sqq; von Caemmerer, above n 14, at 219 sqq.

[18] On the principle of *venire contra factum proprium (nulli conceditur)*, see Detlef Liebs, 'Rhytmische Rechtssätze' (1981) *Juristenzeitung* at 160 sqq and, most recently, the comprehensive study by Reinhard Singer, *Das Verbot widersprüchlichen Verhaltens* (1993).

[19] § 814 Bürgerliches Gesetzbuch (BGB). For a historical analysis, see König above n 15 at 39 sqq; *Law of Obligations* above n 3 at 868 sqq; Englard below n 24 at nn 12 sqq. As far as the *ratio legis* (*venire contra factum proprium*) is concerned, see Larenz/Canaris above n 15 at 160 sq. For the application of this rule see Lorenz above n 9 at § 814 nn 1 sqq.

used to claim performance from the other party if the contract is valid;[20] and if the contract turns out to be invalid, the principles explained above ensure that what has been transferred can be reclaimed. This narrows down the *condictio causa data causa non secuta's* field of application to those cases where a transfer was made with a view not towards discharging an obligation but towards encouraging someone to act in a certain way. It may, for example, be applicable where a farmer transfers his farm and all his other assets to his estranged wife in order to encourage her to return to him.[21] We are not concerned in these types of cases with the absence of a valid agreement underlying the transfer, but rather with the possibility that the other party might be induced to make a transfer which he does not want to, or cannot, be obliged to make. Thus, the notion of 'legal ground' cannot be used to determine whether that other party's enrichment is unjustified or not. Rather, the restitutionary claim will have to be granted if the transfer fails to produce the result it was intended to produce. This is not normally difficult to determine. The main problems concerning this type of enrichment claim relate to its proper field of application.[22]

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It will have become clear that the pattern of enrichment liability described, and rationalized, so far provides the basis for the modern German law of unjustified enrichment. But it reflects evaluations widely shared among what Zweigert and Kötz refer to as the Romanistic and Germanic legal families.[23] Everywhere we find general rules dealing with the restitution of benefits conferred by transfer.[24] The significance of these rules within a given legal system may vary. Thus, it is well known that within the German law of obligations they have to heal the wounds inflicted by the famous 'principle of abstraction':[25] invalidity of the underlying contract of sale (to take the most common example) does not, as a rule, affect the transfer of ownership. A purchaser may consequently acquire ownership as the result of a conveyance based on an invalid contract, and the vendor will have to avail himself of an enrichment claim rather than the *rei vindicatio* for restitutionary purposes. But whether they subscribe to a consensual,

[20] For details see *Law of Obligations* above n 3 at 843 sqq, 857 sqq.

[21] 'Reichsgericht' (1924) 78 *Seufferts Archiv*, n 124.

[22] For details, see Reuter/Martinek above n 9 at. 146 sqq; Westermann above n 9 at § 812, nn 50 sqq.; Lorenz above n 9 at 105 sqq; Larenz/Canaris above n 15 at 150 sqq. For a comparative discussion of German and Scots law, see Jörg Faber, 'Rückforderung wegen Zweckverfehlung—Irrungen und Wirrungen bei der Anwendung römischen Rechts in Schottland' (1993) *Zeitschrift für Europäisches Privatrecht* 279 sqq.

[23] Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (trans Tony Weir, 2nd ed, 1992) at 76 sqq, 138 sqq.

[24] There is now a comprehensive comparative analysis concerning 'Restitution of Benefits Conferred Without Obligation' by Izhak Englard in *International Encyclopedia of Comparative Law* (vol X, 1991) Ch 5.

[25] Heinrich Dernburg, *Bürgerliches Recht* (vol. II/2, 3rd ed, 1906) at 677 sq. For details, see *Law of Obligations* above n 3 at 867 sq with further references.

a causal or an abstract system of transfer of ownership,[26] all legal systems provide enrichment remedies, and they all specifically emphasize, and single out, the enrichment by transfer claim.

Historically, this uniformity of approach is based on the common Roman heritage. As has been pointed out already, we are dealing here with a modern, extended version of the *condictio indebiti*. This is particularly obvious in those countries that have followed the French tradition. Adopting Pothier's presentation, the French code civil deals with 'paiement de l'indu' (apart from 'gestion d'affaires') in its chapter devoted to 'quasi-contracts'.[27] Similarly, the Italian codice civile concentrates on 'pagamento dell'indebito',[28] and even the new Dutch civil code devotes nine sections to 'onverschuldigde betaling'[29] before it deals with other cases of unjustified enrichment. The French version of the *condictio indebiti*, the oldest codified one, is still rather narrow. Following the tradition of Roman law,[30] it does not cover the reimbursement of services (here resort has to be had to the general enrichment action as established by the Court de Cassation in the arrêt Boudier);[31] and following a systematic idiosyncrasy of Domat it does not even deal with the restitution of benefits conferred under an invalid contract.[32] Italian law has abandoned the latter restriction[33] and appears to be on its way to abandoning the former.[34] The Dutch civil code has brought the development to its logical conclusion.[35] The draftsmen of the Austrian General Civil Code, too, have codified the Roman *condictio indebiti*,[36] and those of the Swiss Code of Obligations, though taking a more generalized approach

[26] For a comparative evaluation, see Franco Ferrari, 'Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionsprinzip—Zu den Möglichkeiten der Rechtsangleichung im Mobiliarsachenrecht' (1993) *Zeitschrift für Europäisches Privatrecht* at 52 sqq; Ulrich Drobnig, 'Transfer of Property' in A. S. Hartkamp, M. W. Hesselink et al (eds) *Towards a European Civil Code* (1994) at 345 sqq. (both arguing in favour of the causal system that used to prevail under the *ius commune* and has been adopted, for instance, by the Austrian code). See also Andreas Roth, 'Abstraktions-und Konsensualprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien' (1993) 92 *Zeitschrift für Vergleichende Rechtswissenschaft* at 371 sqq.

[27] Artt 1371 sqq; see Zweigert/Kötz/Weir above n 23 at 584 sqq.

[28] Artt 2033 sqq codice civile.

[29] Artt 203 sqq of book 6 Burgerlijk Wetboek (BW).

[30] Where the *condictio* presupposed, in principle, that an act of '*dare*', rather than '*facere*', had taken place; cf Fritz Schwarz, *Die Grundlage der condictio im Klassischen römischen Recht* (1952) at 9 sq and passim.

[31] Murad Ferid, Hans Jürgen Sonnenberger, *Das Französische Zivilrecht* (II, 2nd ed, 1986) at 440; Englard above n 24 at 61.

[32] Laurent Aynès, Philippe Malaurie, *Cours de droit civil, Les obligations* (2nd ed, 1990) at nn 926 and 586. But see Boris Starck, Henri Roland, Laurent Boyer, *Droit civil, Obligations* (vol II, 2nd ed, 1986) at nn 2063 sqq. According to Murad Ferid *Das Französische Zivilrecht* (vol I, 1971) at 345 the rules relating to *répétition de l'indu* are applicable *per analogiam*. See further, in particular, Gallo above n 5 at 277 sqq.

[33] Gallo above n 5 at 279 sqq.

[34] Pietro Rescigno (ed) *Codice civile* (1992) at § 2033, n 6 (concerning the interpretation of the term 'pagamento'); Englard above n 24 at n 61.

[35] Art 6: 203 deals in its first subsection with the transfer of 'een goed', in its second subsection with payment of 'een geldsom' and in the third one with 'een prestatie van andere aard'. On the cases covered by Art 6: 203, see A. S. Hartkamp, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht* (vol III, 9th ed, 1994) at n 323. Hartkamp (n 318) specifically emphasizes the historical relationship of art 6: 203 with the *condictio indebiti* (via art 1395 of the old BW).

[36] Allgemeines Bürgerliches Gesetzbuch (ABGB) §§ 1431 sqq. For details as to its range of application, see Peter Rummel, in: idem (ed) *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* vol II 2nd ed, 1992 vor § 1431, nn 5 sqq. (*sub voce* 'Leistungskondiktion').

than their Austrian predecessors, have given it a special treatment.[37] By and large, this recognition of a broadly based enrichment-by-transfer claim is not regarded as an historical eccentricity but as a sound device to render the general enrichment principle operational.

6

What may, however, be regarded as an outdated historical quirk is the insistence on *error* as a requirement for the enrichment-by-transfer claim in a few of the modern legal systems. It is a remnant of the Roman *condictio indebiti*[38] and we still find it in the Austrian and Swiss codes. Both the French and Italian codes have confined it to the situation where someone pays another person's (existing) debt because he believes himself to be the debtor.[39] In both countries it is disputed whether *error* is required also in all other cases of 'paiement de l'indu'. In Italy, the prevailing opinion rejects this proposition.[40] French courts originally, in tune with tradition, generalized the *error* requirement;[41] in the meantime, however, they have watered it down considerably.[42] A variety of writers have advocated its abolition. Very widely, therefore, the claim for restitution is regarded as being based on the fact that a transfer was rendered without legal ground: 'L'obligation de restitution s'explique par l'idée de l'absence de cause'.[43] This (entirely salutary) move away from Roman law[44] is taken to its logical conclusion in the new Dutch Civil Code. For here the error requirement has been dropped altogether. Art 6: 203 crisply states that 'anyone who has given a thing to another without legal ground is entitled to reclaim it from the recipient as a performance which was not due'. Contrary to German law, the restitutionary claim is not

[37] Arts 62 II, 63 I Obligationenrecht (OR). For details, see Hermann Schulin, in Heinrich Honsell, Nedim Peter Vogt, Wolfgang Wiegand (eds), *Kommentar zum Schweizerischen Privatrecht, Obligationenrecht* (Vol I, 1992) at Art 62, nn 21 sqq. ('Leistungskondiktion').

[38] For details, see *Law of Obligations* above n 3 at 849 sqq. Throughout the history of the *ius commune*, the *error* requirement constituted the single most disputed subject in the law of unjustified enrichment: cf *Law of Obligations*, above n 3 at 868 sqq. The matter has been investigated comprehensively by D. P. Visser, 'Die rol van dwaling by die condictio indebiti' (unpublished Dr iur thesis, Leiden, 1985) at 66 sqq; and see D. P. Visser, 'Das Recht der ungerechtfertigten Bereicherung' in Robert Feenstra, Reinhard Zimmermann (eds), *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) at 387 sqq.

[39] Art 1377 code civil and art 2036 codice civile ('indebito soggettivo'), as opposed to art. 1376 code civil and art 2033 codice civile. The *error* requirement in cases of 'indebito soggettivo' is more easily explicable in view of the fact that intentional payment of someone else's debt may have the effect of discharging that debt; cf art 1236 code civil, art 1180 codice civile.

[40] Rescigno, above n 34 at § 2033, n 4; Gallo above n 5 at 165 sq, 173 sq.

[41] Malaurie/Aynès above n 32 at n 927.

[42] Thus, restitution on account of an invalid contract ('action en nullité') is not subject to the *error* requirement: Malaurie/Aynès above n 32 at n 926. More generally, see Gallo above n 5 at 171 sqq.; Detlef König, 'Ungerechtfertigte Bereicherung' in Bundesminister der Justiz (Hg.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (vol II, 1981) at 1538.

[43] Starck/Roland/Boyer above n 32 at n 2064.

[44] At least, as it was understood in later ages. Today, it is thought that in classical Roman law *error* was not a (positive) requirement of the *condictio indebiti* that had to be proved by the plaintiff. As far as we can see, it was not so much the plaintiff's error that made the action applicable; it was rather his knowledge, at the time of rendering performance, which barred the claim (see *Law of Obligations* above n 3 at 849 sqq). Without realizing it, the German legislature (§ 814 *BGB*; cf above n 19) has thus come close to the position that once prevailed in Roman law.

even barred, if the recipient is able to prove that the transferor, at the moment of the transfer, knew about the absence of the legal ground.[45] This disagreement does not, however, affect the foundations of the law of unjustified enrichment, for it merely reflects a difference of opinion as to whether and, if so, how far a legal system wants to condone behaviour *contra factum proprium*.[46]

Arguably the *condictio causa data causa non secuta* also constitutes a relic of the past that has no place in modern law.[47] Some legal systems do, however, still reserve a special niche in order to accommodate the situation where a person transfers a benefit to another in order to elicit a counterperformance. This is the case in Germany[48] and Switzerland.[49] Austrian courts and legal writers apply a rule within the wider compass of the *condictio indebiti per analogiam*,[50] whereas in France and Italy these cases are lumped together with the other instances of enrichment liability falling outside the scope of 'répétition de l'indu'.[51] The Dutch Civil Code is silent on the matter.[52] Professor König in his draft restatement of German enrichment law, on the other hand, retains a separate rule for these kinds of cases.[53]

7

The modern civilian approach towards unjustified enrichment appears to be characterized by (or, at least, drifting towards) the recognition of a general remedy for the restitution of benefits conferred without obligation.[54] Its core features are the notions of 'transfer' and 'without legal ground'. It is not an *error* (of whatever kind) that renders the enrichment unjustified and that could therefore be regarded as the basis of the claim (or even as one of its requirements). Moreover, it should be noted that there is no need to introduce a separate requirement of 'at the expense of'. For we are dealing with the restitution of a benefit conferred by way of 'transfer'. It is therefore self-evident that the recipient of the transfer is in the position of the restitution-debtor, whereas the transferor is bound to be the proper creditor.

We may add that the nature of the enrichment claim does not depend on the type of benefit conferred. More specifically, we do not have different restutionary remedies arising from payment of money, the receipt of services and the delivery

[45] Hartkamp above n 35 at n 318.
[46] Cf above n 18.
[47] Von Caemmerer above n 14 at 222 sqq. (who wants to apply the modern version of the *clausula rebus sic stantibus* in cases of this kind); François Chaudet, 'Condictio causa data causa non secuta' (unpublished doctorat en droit thesis, Lausanne, 1973) at 15 sqq and passim. On the decline of the *condictio causa data causa non secuta* see, generally, *Law of Obligations*, above n 3 at 860 sqq.
[48] § 812 I 2, 2nd alternative: '[Die Verpflichtung zur Herausgabe] besteht auch dann, wenn ... der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt'.
[49] Art 62 OR: '... aus einem nicht verwirklichten Grund...'.
[50] Rummel above n 36 at § 1435, nn 5 sqq.
[51] Englard above n 24 at n 128.
[52] The consequences are discussed by Hartkamp above n 35 at n 318.
[53] § 1. 2; and see the motivation in König, above n 42 at 1543.
[54] Cf the title of vol X, ch 5 of the *International Encyclopedia of Comparative Law.*

of goods.[55] Whatever may be the object of a transfer may also be the object of a claim for restitution.[56] For every type of benefit its requirements are exactly the same. That the content of the restitutionary claim[57] may vary is another matter. It follows from the nature of things. If money has been transferred, the same sum has to be retransferred.[58] The recipient of property, on the other hand, is bound to restore the very object that he has received.[59] There is no reason to force the transferor, by denying him a right to specific restitution, effectively to sell his property to the recipient of the transfer: 'restitutio est actus commutativae justitiae'.[60] Obviously restitution in kind cannot be demanded where it is no longer possible. In these cases the transferor has to be satisfied with a claim for the (market) value of the object of his transfer.[61] Restitution in kind is impossible, from the outset, where services have been received. Again, therefore, the action must lie for the value of those services.

8

One of the trickiest issues to be determined by the law of unjustified enrichment is whether the recipient is liable for the value received or the value surviving. Another way of putting the matter is to ask whether the recipient may raise the defence of loss of enrichment, or change of position, against the restitutionary claim. The European legal systems do not agree on the basic principle to be adopted. According to German law, for instance, the defendant is liable only for his actual 'enrichment' at the time of litispendence:[62] the characteristic 'weakness' of enrichment claims in German law.[63] Other systems are less well disposed towards the recipient. The matter has recently been fully canvassed by Izhak Englard.[64] Significantly, he has come to the conclusion that no legal system rigorously carries through its basic approach. 'As elsewhere', he writes,[65] 'laws starting from opposite principles tend to converge'. This is quite obvious if we look at German law. Change of position may only be pleaded by the *bona fide*

[55] But see, as far as France is concerned, above text to n 30. For a comparative analysis, see Englard above n 24 at nn 57, 61.

[56] This is the formula commonly used in German law: see Lorenz, above n 9 at § 812 n 65.

[57] For a comparative discussion, see König above n 15 at 52 sqq; Englard above n 24 at nn 200 sqq.

[58] Cf most recently, art 6: 203 (2) BW.

[59] Englard above n 24, n 57; and see art 6: 203 (1) BW.

[60] St. Thomas Aquinas; for details see Udo Wolter, *Das Prinzip der Naturalrestitution in § 249 BGB* (1985) and *Law of Obligations* above n 3 at 824 sq.

[61] Cf eg § 818 II BGB and § 1. 4 (2) of the König-draft (read together with König, above n 42 at 1544).

[62] § 818 III BGB.

[63] Axel Flessner, *Wegfall der Bereicherung* (1970) at 2; Zweigert/Kötz/Weir above n 23 at 621.

[64] Above n 24 at nn 273 sqq. For comparative discussion, see further Flessner above n 63 at 37 sqq; König above n 15 at 51 sqq, 73 sqq; Zweigert/Kötz/Weir above n 23 at 621 sqq; D. P. Visser, 'Responsibility to Return Lost Enrichment' (1992) *Acta Juridica* at 175 sqq.; Werner Lorenz, 'Inhalt und Umfang der Herausgabepflicht bei der Leistungskondiktion in rechtsvergleichender Sicht' in *Ungerechtfertigte Bereicherung. Grundlagen, Tendenzen, Perspektiven* (1984) at 127 sqq. For a critical discussion of the German approach, see John P. Dawson, 'Erasable Enrichment in German Law' (1981) 61 *Boston University Law Review* 271 sqq. As far as American law is concerned, see John P. Dawson, 'Restitution without Enrichment' (1981) 61 *Boston University Law Review* at 563 sqq. The historical background is sketched in *Law of Obligations* above n 3, at 895 sqq.

[65] Above n 24 at n 274.

recipient.[66] Moreover, § 818 III BGB has largely been unhinged as far as the adjustment of transfers made under invalid reciprocal agreements are concerned.[67]

If we wish to consider the policy behind the various compromise solutions adopted throughout Europe, we first have to remind ourselves that with the breakthrough towards a general law of contract European private law has outgrown the Roman system of specific condictiones. Thus, we have seen an extension of enrichment liability. The generalized modern enrichment-by-transfer claim is evidence of this tendency. It is based on fairly obvious considerations of commutative justice. The further one was prepared, however, to take the principle against unjustified enrichment, the more anxious one had to be about the protection of the reasonable interests of the enrichment-debtor. That he has to hand over the value surviving, is obvious. That a *mala fide* recipient does not deserve to be protected, is equally plain: he has to be liable for the value received. But what about the recipient who has disposed of what he has received in good faith? After all, he has relied on the definitiveness of the transfer and could thus reasonably assume that the benefit received was, and would remain, his.

If it is correct that the law of unjustified enrichment is not concerned with the reparation of losses, but with the skimming off of unjustified gains,[68] we have to focus our attention, in the first place, on the position of the recipient. And if that has induced us to extend his liability so as to cover all benefits retained by him without legal ground, that same consideration may also induce us to limit his liability to situations where there is a benefit, at the time of litispendence, that can be skimmed off. The restitutionary claim, in other words, should reduce the recipient's economic position to the *status quo ante* but it should not force him to suffer a loss. (The law of delict, again, provides the mirror image, for it, in turn, aims at the compensation of the loss incurred and should not lead to a situation where the plaintiff derives a benefit from the damaging event.[69]) If, therefore, a legal system decides, in principle, to concentrate on value surviving rather than value received, it does so because it wishes to protect the recipient's good faith in the finality of his acquisition. Implicit in this rationale are the two main limitations on the range of application of the principle, as pointed out above.[70] The *mala fide* recipient, of course, is liable for value received. The same

[66] On the dichotomy of the German liability system for unjustified enrichment, depending on whether the recipient has been *bona fide* or *mala fide*, see Larenz/Canaris above n 15 at 257 sqq.

[67] This is a traditional battle ground of German unjustified enrichment doctrine. The problems arise from the fact that the draftsmen of the BGB mainly had in mind the individual enrichment claim (for a detailed analysis, see König, above n 15 at 81 sqq.). They did not specifically deal with the situation of an enrichment debtor himself wanting to institute an action against the enrichment creditor, as in the situation where a reciprocal contract (that later on turns out to be invalid) has been discharged by both parties. Three different 'theories' (Zweikondiktionenlehre, the famous Saldotheorie and the Lehre vom faktischen Synallagma) are vying for recognition; for an overview see Zimmermann/Du Plessis (1994) *Restitution Law Review* at 40 sqq; in addition, see König above n 15 at 81 sqq; Lorenz above n 64 at 141 sqq (comparative); and, most recently, Lorenz, above n 9 at § 818, nn 41 sqq.

[68] Cf above section 1.

[69] Both the law of delict and the law of unjustified enrichment may thus be described as branches of a law of restitution.

[70] Larenz/Canaris above n 15 at 323 sqq. For a more detailed discussion, see Claus-Wilhelm Canaris, 'Die Gegenleistungskondiktion', in *Festschrift für Werner Lorenz* (1991) at 19 sqq.

must apply to those who have received under an (invalid) reciprocal contract. If, for instance, a purchaser has lost, or destroyed, the object of the sale, he deserves to be protected insofar as he was entitled to expect not to have to return it. At the same time, however, he had to take into account that he would not be able to get back his purchase money. Thus, he was imagining a situation where he could do with the object received whatever he wanted to (and where, as a result, he would not be liable to anyone if he lost or destroyed it), but where he also would neither be able to shift his loss onto the vendor nor be in a position to recover the purchase price. If the contract now turns out to be invalid, he can hardly expect to recover his money without, at the same time, having to return the value of the object received. Protection of reasonable reliance would clearly overshoot the mark if the purchaser, as a result of the invalidity of the sale, were to find himself in a position which he could never reasonably have hoped to attain.

9

If one compares the modern civilian approach, as outlined above, with that adopted by modern English law, one will probably not find significant differences at the level of the actual results reached by the courts in typical restitution situations.[71] The general enrichment principle has now been recognized by the House of Lords.[72] A significant revision in relation to mistake in the law of unjustified enrichment is about to take place. The common law is moving towards a position where restitution may be allowed irrespective of whether the transferor had been labouring under an *error iuris* or an *error facti*.[73] This entails a considerable extension of liability. It was made possible by the simultaneous recognition of the defence of change of position.[74]

Thus, we have here a significant rapprochement of patterns of liability. At the same time, it cannot be denied that there are still considerable differences as to the question of how best to organize this area of the law. With the recognition of the unjust enrichment principle as the intellectual bond uniting all restitutionary

[71] Cf Zweigert/Kötz/Weir, above n 23 at 590: 'English law certainly allows a plaintiff to sue in most of the situations where he would have a claim for enrichment on the Continent'. Since then, there has been further convergence on a variety of issues. Paolo Gallo, 'Unjust Enrichment: A Comparative Analysis' (1992) 40 *American Journal of Comparative Law* 431 sqq points out, repeatedly, the similarities between German and English law (cf eg at 445 sqq dealing with the transfers under an invalid contract; or at 456 dealing with the important problem of indirect enrichment (rejection of the *actio de in rem verso*)).

[72] On *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548, the decision that brought the breakthrough, cf Peter Birks, 'The English Recognition of Unjust Enrichment' (1991) *Lloyd's Maritime and Commercial Law Quarterly* 473 sqq; Sonja Meier, 'Bereicherungsanspruch, Dreipersonenverhältnis und Wegfall der Bereicherung im englischen Recht' (1993) *Zeitschrift für Europäisches Privatrecht* 365 sqq. See also Lord Goff of Chieveley, Gareth Jones, *The Law of Restitution*, (4th ed, 1993) at 12 sqq ('The Principle of Unjust Enrichment'). The development had been anticipated by Michael Martinek, 'Der Weg des Common Law zur allgemeinen Bereicherungsklage—Ein später Sieg des Pomponius?' (1983) 47 *RabelsZ* 294 sqq, 305 sqq.

[73] For details, see Peter Birks, 'Konkurrierende Strategien und Interessen: Das Irrtumserfordernis im Bereicherungsrecht des common law' (1993) *Zeitschrift für Europäisches Privatrecht* 554 sqq.

[74] *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548; and see Goff and Jones, above n 72 at 739 sqq; Meier (1993) *Zeitschrift für Europäisches Privatrecht* 377 sqq.

claims they should, in due course, also vanish. For the time being, however, we have a rather complex and fragmented system of specific grounds for redressing unjustified enrichment. These grounds have developed, over the centuries, in a rather haphazard way.[75] They are the product of historical accident and legalistic fiction rather than the result of rational design. Some of the older grounds have been refined and expanded, new ones have been recognized. The growth is still continuing,[76] with the result that the gaps between the grounds are bound to become smaller. But there has not yet been a real breakthrough on a general conceptual level.[77] Thus, we still find different principles governing claims arising from the payment of money, from the receipt of services and the delivery of goods. And whilst it appears to be widely recognized that one group of cases can be brought home under the general notion of 'restitution for wrongs', there is no unanimity as to how all other cases should be organized.

A particularly influential classification is the one proposed by Peter Birks[78] and, more recently, elaborated upon by Andrew Burrows.[79] They refer to enrichment 'by subtraction': the plaintiff has to connect himself to the defendant's enrichment by showing that the defendant's gain corresponds with a loss to himself. In addition, however, the plaintiff has to establish that the enrichment happened in circumstances rendering it 'unjust' in the eyes of the law. A full typology of 'unjust factors' is thus required in order to determine when restitution can be granted. These unjust factors include mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, *ultra vires* demands by public authorities and the retention of the plaintiff's property without his consent.[80]

It may well be that the compilation of this kind of list is a particularly convenient way of organizing the casuistry of the English common law. In

[75] For a detailed analysis of the development of implied assumpsit see A. W. B. Simpson *A History of the Common Law of Contract* (1975) at 489 sqq; Dawson above n 17 at 9 sqq; Goff and Jones above n 72 at 5 sqq; Gallo above n 5 at 31 sqq. For a particularly important episode cf Peter Birks, 'English and Roman Learning in *Moses* v *Macferlan*' (1984) 37 *Current Legal Problems* 9 sqq; Peter Birks, Grant McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century Before Blackstone' (1986) 6 *OJLS* 46 sqq Generally on the development in English and American law, see George E. Palmer 'History of Restitution in Anglo-American Law in *International Encyclopedia of Comparative Law* (vol X, ch 3, 1989).

[76] 'The case law now demonstrates that the courts recognize that the principle of unjust enrichment unites restitutionary claims, and that the law is not condemned to "no further growth in this field" ... The courts may well recognize new grounds to found a restitutionary claim ... The judicial recognition of the unifying principle of unjust enrichment should encourage them to do so' (Goff and Jones above n 72 at 14 sq). Goff and Jones themselves suggest 'unconscionability' as a new ground (43 sq).

[77] Although a variety of German authors have remarked on the fact that the categories suggested by Goff and Jones in their influential textbook (Where the Defendant has Acquired a Benefit from or by the Act of the Defendant; Where the Defendant has Acquired from a Third Party a Benefit for which he must Account to the Plaintiff; Where the Defendant has Acquired a Benefit through his own Wrongful Act) are more than vaguely reminiscent of the Wilburg/Von Caemmerer taxonomy accepted in German law and that this might turn out to be the starting point for a convergence of German and English law even on a systematic level: Martinek, (1983) 47 *RabelsZ* 318 sqq, 330 sqq; König above n 42 at 1521; Lorenz above n 9, Vorbem zu §§ 812 sqq, n 17 ('Bei allen Unterschieden in Detail ... darf dies als eine Bestätigung dafür angenommen werden, daß die namentlich von Wilburg und v Caemmerer herausgearbeitete Typologie der Bereicherungsansprüche offenbar weithin der Natur der Sache entspricht'). On the proximity between the German and English approach on a substantive level see Gallo (1992) 40 *American Journal of Comparative Law* 431 sqq, 445 sqq, 448 sqq, 456, 465.

[78] *An Introduction to the Law of Restitution* (1989, revised paperback edition).

[79] *The Law of Restitution* (1993) at 16 sqq.

[80] The list has been taken from the headings of chapters 3 to 13 in Andrew Burrows's book.

comparison with the modern civilian approach, and viewed against the background of the principle of unjust enrichment, it does not, however, appear to be a scheme distinguished by its elegance. In the first place, it is not very tidy. In most cases we are dealing with a situation where a transfer has occurred. Ignorance, however, presents an exception.[81] Secondly, it is not comprehensive. New unjust factors may be recognized. The law remains uncertain. Thirdly, it requires courts and legal writers to analyse ten or even more specific grounds of restitution. Several of them (mistake, duress, exploitation) throw up formidable problems of delimitation. Forthly, the fragmentation is quite unnecessary. Placing the focus on the single issue of 'transfer without legal ground' does not lead to runaway liability. The civil law systems provide the proof. And fifthly: insistence on specific unjust factors does not contribute to the internal economy of the legal system. For it leads to an unfortunate duplication of problems. Mistake, in certain circumstances, invalidates the contract. Mistake also provides the basis for a claim for restitution. What is the relationship between these two inquiries?[82] Why deal with one and the same issue in two different contexts? Why develop two different sets of rules in order to determine the sphere of operative mistakes? It is difficult to see why the law of unjustified enrichment should be saddled with the task of sorting out the fate of the contractual relationship between recipient and transferor.

All in all, therefore, it is hardly conceivable that a legal system engaged with the task of rationally reorganizing its law of unjustified enrichment should take its lead from English jurisprudence. Scots law, the future direction of which we have come together to contemplate, has all the less reason to do so, since the Institutional writers have implanted in it the germ of the modern civilian enrichment-by-transfer claim: the *condictio indebiti*.[83] The same, incidentally, applies to modern Roman-Dutch law in South Africa.[84]

[81] On ignorance see Birks above n 78 at 140 sqq; Burrows above n 79 at 139 sqq; but see Goff and Jones above n 72 at 107 sq.

[82] Obviously, the baseline has to be (as in the civilian systems) that there can be no restitution if the contract is valid.

[83] Cf Jacques du Plessis, Hartmut Wicke '*Woolwich Equitable* v *IRC* and the *Condictio Indebiti* in Scots Law' (1993) *Scots Law Times (News)* 303 sqq; Robin Evans-Jones, 'From "Undue Transfer" back to "Retention Without a Legal Basis" (the *condictio indebiti* and *condictio ob turpem vel iniustam causam*)' in Robin Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995). The *condictio indebiti* does not, of course, apply where someone wishes to rescind a contract because of breach of contract on the part of the other party and consequently wants to recover what he has already handed over. According to English law, this is a case dealt with as part and parcel of the law of restitution. In Germany, contractual remedies are provided. For a comparative analysis, see Englard above n 24 at nn 132 sqq. As far as Scotland is concerned see Robin Evans-Jones, Johann Andreas Dieckmann, Robin Evans-Jones, 'The Dark Side of *Conelly v Simpson*', 1995 *Judical Review* 90ff.

[84] D. P. Visser, in D. Hutchison (ed) *Wille's Principles of South African Law* (8th ed, 1991) at 630 sqq (636 sq); Wouter de Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (3rd ed, 1987) at 153 sqq. Most recently, cf D. H. van Zyl, 'The General Enrichment Action is Alive and Well' (1992) *Acta Juridica* 115 sqq. On the general enrichment action that once existed in classical Roman-Dutch law see *Law of Obligations* above n 3 at 885 sqq; Visser above n 38 at 370 sqq.

10

We now have to turn our attention to the remaining field of the enrichment-in-any-other-way claims. Their common denominator is, in the first place, a negative one: the enrichment that we seek to skim off has not come about by way of transfer—it is not, in other words, the result of a conscious and purpose-oriented disposition of the person who now wishes to recover. It appears to be very difficult, if not impossible, to find a general, yet workable, positive denominator. Enrichment-in-any-other-way claims form a somewhat heterogeneous assemblage of situations; moreover, their scope within a given legal system may differ even more widely than that of the enrichment-by-transfer claim. Again, it is essential to keep the interplay with other areas of private law in mind. This interplay is somewhat more complex than in the case of enrichment-by-transfer which, as we have seen, serves to supplement the law of contract. Of course, there are significant differences among the modern legal systems concerning, inter alia, the relationship between transfer of ownership and underlying contract. But these differences, though affecting the scope of operation of the law of unjustified enrichment, are of a rather technical nature; they do not change the fact that an enrichment-by-transfer claim is required to provide for restitution wherever an asset has been transferred 'without legal ground'. The situation is somewhat different when it comes to enrichment-in-any-other-way.

If we survey the modern continental legal systems we see that, typically, they recognize a general enrichment action as a kind of residual remedy covering everything apart from enrichment by transfer. That is not, of course, quite true of French law. Because of the comparatively narrow scope of 'répétition de l'indu', claims based on the receipt of services and arising from a situation of *causa data causa non secuta* have to be brought under 'enrichissement sans cause', the famous general enrichment action established in 1892 by the Cour de Cassation on the somewhat scanty foundations of the *actio de in rem verso*.[85] But it is true of Swiss[86] and German law,[87] it applies to Austrian law,[88] and it reflects the situation in modern Dutch law, even though the regulation of the law of unjustified enrichment in the new Dutch Civil Code still essentially follows the French model.[89]

[85] For the historical development see *Law of Obligations* above n 3 at 878 sqq; Gallo above n 5 at 99 sqq. For details of the application see Zweigert/Kötz/Weir above n 23 at 586 sqq; Ferid/Sonnenberger above n 31 at 435 sqq; Starck/Roland/Boyer above n 32 at nn 1796 sqq.

[86] Art 62 I OR: and see the analysis by Walter R. Schluep, 'Über Eingriffskondiktionen' in *Mélanges Paul Piotet* (1990) at 173 sqq.

[87] § 812 I 1, 2nd alternative ('oder in sonstiger Weise'). The essential foundations for structuring this area of the law have been laid by Wilburg above n 5 at 22 sqq and von Caemmerer above n 14 at 209 sqq. For an overview in English of the Wilburg/Von Caemmerer taxonomy (which will also be used in the discussion that follows), see Zimmermann/Du Plessis (1994) 2 *Restitution Law Review* 24 sqq.

[88] The inconspicuous basis for the general enrichment-in-any-other-way claim is § 1041 ABGB; for an analysis of the development see Wilburg, above n 5 at 52 sqq. Berthold Kupisch, 'Franz v. Zeiller und die "EingriffSkondiktion" des § 1041 ABGB', in Walter Selb, Herbert Hofmeister (eds), *Forschungsband Franz von Zeiller (1751–1825)* (1980) 134 sqq.

[89] Art 6: 212 BW ('Anyone who has been unjustifiably enriched at the expense of another is bound, in so far as is reasonable, to make good the other's loss to the extent of his enrichment . . .'). For all details, see Hartkamp above n 35 at nn 349 sqq.

11

The most important group of cases usually subsumed under this broad residual category is what German lawyers refer to as enrichment by encroachment ('Eingriffskondiktion'): unjustified enrichment has been brought about by interfering with another person's rights. This claim is based on the following policy considerations.[90] In every legal system there are a number of legal positions that are 'assigned' to a specific person. The prime example is ownership. The owner may use and enjoy his property and he may exclude others from any interference. But there are many other legal positions with a similar degree of exclusivity: copyright, patent right, the right to one's own image or to one's own name, to mention some of those most frequently encroached upon. It is clear that a person who unlawfully, and either negligently or intentionally, interferes with any of these rights is liable in delict. But an action in delict requires proof of damages. Yet, one can imagine many situations where the plaintiff has not suffered any loss. If someone uses another person's picture in order to advertise his products, that other person may not in any way be deterimentally affected—not, at least, as far as his financial position is concerned. Also, it may be difficult for the plaintiff to prove fault on the part of the defendant. Nevertheless, it does not appear proper that the defendant should be allowed to benefit from interfering with a right which the legal system has assigned specifically to the plaintiff. Thus, the latter is granted the 'Eingriffskondiktion' in order to skim off the enrichment. It is in these cases that the 'at the expense of' requirement comes into its own, for it determines who is the right plaintiff: the person who could lay claim to the right which was encroached upon.

A particularly important issue, in this context, consists in determining the range of legal positions protected by means of an enrichment-by-encroachment claim. For we must be careful not to hamper normal competitive activities which form a constituent element of a modern market economy.[91] Any gain secured by one individual company can, after all, be said to have been received 'at the expense' of its competitors. What we are therefore looking for is an indication as to where the legal system draws the line. This can conveniently be gauged, at least in German law, by looking at the law of delict.[92] For here the law indeed provides a differentiated regulation as to which legal positions are allocated exclusively to individual persons and thus deserve to be protected against interference. It also constitutes the most natural criterion to circumscribe the sphere of application of enrichment-by-encroachment: we are only concerned with benefits resulting from an interference with another's right, insofar as it

[90] Cf in particular, Reuter/Martinek above n 9 at 234 sqq; Peter Schlechtriem, 'Güterschutz durch Eingriffskondiktion' in *Ungerechtfertigte Bereicherung. Grundlagen, Tendenzen, Perspektiven* (1984) at 57 sqq; Schluep *Mélanges Piotet* 187 sqq, 196 sqq; Lorenz above n 9 § 812 at nn 23 sqq; Larenz/Canaris above n 15 at 69 sqq.

[91] Larenz/Canaris above n 15 at 134 sq.

[92] Larenz/Canaris above n 15 at 170 sq. There is considerable dispute concerning this question. But see Schluep, *Mélanges Piotet* at 190 who draws attention to the rapprochement of the conflicting views in recent years.

enjoys delictual protection (and insofar, of course, as such interference would normally only be permitted in return for financial compensation).[93]

Obviously, then, enrichment based on an encroachment and delict are closely associated. Both sets of rules are concerned with the protection of legal interests. In both instances the person whose right is interfered with may waive this protection. If one person has allowed another to take his photograph and to use it for purposes of advertisement, he can claim neither damages nor restitution of the benefits derived. But there is one crucial difference between the remedies. The one aims at the compensation of loss incurred, the other at the restitution of benefits. A plaintiff claiming enrichment based on encroachment, in other words, does not have to prove loss. Nor does restitution presuppose a shift of benefit in the sense that what is now with the defendant must first have been present in the property of the plaintiff. It is quite sufficient that it was *potentially* present: it must have been drawn from a right which only the plaintiff was entitled to dispose of. This is the legal significance of the requirement 'at the expense of' (the plaintiff).[94]

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Swiss and Austrian law have drifted towards a very similar pattern of enrichment liability based on encroachment.[95] English law does not substantially differ in this regard either.[96] It, too, does not require proof of loss as far as restitution as a remedy within the law of civil wrongs is concerned. And it also recognizes a category of 'restitution for wrongs'; cases, in other words, where the defendant has enriched himself by doing wrong to the plaintiff. Goff and Jones describe the situation as one where the defendant has acquired a benefit through his own wrongful act.[97] Of course, the solutions in German and English law will not be identical. They may differ as to the range of wrongs for which they make available the gain-based remedy. This is all the more likely since the law of torts does not, in some respects, correspond to the law of delict. But the structure of this specific enrichment claim appears to be essentially compatible.

Less compatible are French law and the legal systems following the French approach.[98] For here we find 'restitution for wrongs' being absorbed within a general enrichment action that does not only require 'enrichissement' on the part of the plaintiff but also a corresponding 'appauverissement' on the part of

[93] Larenz/Canaris above n 15 at 171 sq ('Entgeltsfähigkeit' of the interest encroached upon).

[94] This is very widely accepted in German law. See Wilburg above n 5 at 126 sqq; Esser/Weyers above n 15 at 468 sq; H. P. Westermann above n 9 at § 812, n 64; Lorenz above n 9 at § 812, n 24.

[95] Schluep, *Mélanges Piotet* at 183; Schulin above n 37 at Art 62, nn 13, 55; Rummel above n 36, Vor § 1431, n 4.

[96] This has been pointed out by Gallo (1992) 40 *American Journal of Comparative Law* 448 sqq. Cf also Goff and Jones, above n 72 at 714 sq, 726 sq.

[97] Above n 72 at 641 sqq. Cf also Birks above n 78 at 313 sqq; Burrows above n 79 at 376 sqq.

[98] For a general comparative discussion see Gallo above n 5 at 363 sqq.

the defendant.[99] It is also of a strictly subsidiary character,[100] a feature that has even found its way into the Italian codification;[101] most recently, however, it has been abandoned by the Dutch legislature.[102] The reason usually provided for the subsidiarity of the enrichment claim is that whoever can sue in delict (or contract) cannot be said to have suffered 'appauverissement'. This argument is not convincing, since it could equally be argued, the other way round, that someone who has an enrichment action cannot be said to have suffered damages.[103] The comparative lack of interest in an effective gain-based remedy for civil wrongs in countries like France, Italy and the Netherlands appears to be based, mainly, on the close relationship between restitution for wrongs and the law of delict. For in all three countries we find the famous general clause of delictual liability according to which 'every act whatever of man which causes damage to another obliges him by whose fault the damage occurred to repair it'.[104] No specific rights and interests are listed. Delictual protection is thus available more easily than in German law[105] and it cannot serve as an adequate test for circumscribing the range of application of an enrichment claim based on an encroachment. At the same time, account has to be taken of the far-ranging recognition of acquisition of ownership in good faith according to French law ('En fait de meubles, la possession vaut titre').[106] As far as movable property is concerned, there is therefore not much scope for a *bona fide* possessor's enrichment liability.

That does not mean, however, that the differences between French and German law are practically all that significant. For, on the one hand, German law also curtails the scope of its 'Eingriffskondiktion' in order to protect *bona fide* possessors. Acquisition of ownership in good faith, admittedly, is only part of the answer, for it does not take place where the owner has lost his property

[99] Starck/Roland/Boyer above n 32 at n 1812; Malaurie/Aynès above n 32 at n 948; Rescigno above n 34 at §§ 2041 sq n 3; Hartkamp above n 35 at n 354. For criticism cf Gallo above n 5 at 397 sqq, 447 sqq. Again, the Dutch Civil Code has taken matters to their logical conclusion by subjecting the claim based on 'ongerechtvaardigde verrijking' to the rules pertaining to the compensation of loss (Book VI, Title 1, Section 10 of the BW). This is the significance of the fact that, according to art 6: 212 the person who has been unjustifiably enriched at the expense of another has to make good the other's loss ('diens schade te vergoeden'). Cf Hartkamp above n 35 at n 363.

[100] Starck/Roland/Boyer above n 32 at n 1820; Malaurie/Aynès above n 32 at n 955. 'Subsidiary' in this context means that the plaintiff may not be able to avail himself of any other remedy (of whatever kind). The German 'subsidiarity principle', on the other hand, merely deals with the relationship between enrichment-by-transfer and enrichment-in-any-other-way and pertains only to third party enrichment cases. For an overview, see Zimmermann/Du Plessis (1994) 2 *Restitution Law Review* 36 sqq.

[101] Art 2042 codice civile.

[102] Hartkamp above n 35 at n 360.

[103] Cf Schluep, *Mélanges Piotet* at 184.

[104] Art 1382 code civil; cf also art 2043 codice civile; art 6: 162 BW (and art 1401 old BW).

[105] § 823 I BGB. Most obviously, perhaps, French law does not recognize a rule like § 816 I 1 BGB, the most important specific emanation of enrichment based on an encroachment (see Zimmermann/Du Plessis (1994) 2 *Restitution Law Review* 27). In France, art 1382 code civil appears to cover these cases; see König above n 15 at 173.

[106] Art 2279 code civil; for details, see Ferid/Sonnenberger above n 31 at 558 sqq. Generally on the history of the acquisition of movables in good faith in European legal history, see Werner Hinz, 'Die Entwicklung des gutgläubigen Fahrniserwerbs in der europäischen Rechtsgeschichte' (1995) *Zeitschrift für Europäisches Privatrecht* (in press).

through theft or in any other manner.[107] But §§ 987 sqq contain a complex set of rules extending that protection to all cases where a so-called 'owner-possessor relationship'[108] exists. On the other hand, French courts have indeed recognized at least occasionally an enrichment claim based on encroachment. A waterwork, for instance, that used the plaintiff's pipes for distributing water to its consumers was made to pay for their use: the remedy was said to be based on the 'principe d'équité que nul ne peut sans juste cause s'enrichir aux dépens d'autrui'.[109] Thus, it can at least be said that some kind of enrichment remedy appears to be available in most modern legal systems to deal with encroachment situations.[110]

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Another one of the 'enrichment-in-any-other-way' claims recognized in German law deals with the restitution of unauthorized expenditure on someone else's property ('Verwendungskondiktion').[111] Its range of application is, however, limited in that the German Civil Code provides special rules for all those cases where the expenditure has been incurred by a possessor. According to §§ 994 sqq. BGB the (*bona fide*) possessor is entitled to demand compensation for all his necessary expenditures, and generally for all other expenditures which have increased the value of the object inasmuch as they have been made before an action has been filed and before the possessor has learnt that he is not entitled to the possession. There are some rather difficult problems surrounding these provisions but, by and large, German law takes the protection of the *bona fide* possessor rather seriously. The French code civil, too, subscribes to the same policy; it contains a whole variety of specific rules concerning the reimbursement for mistaken improvements to another person's property.[112] They are based on the general idea that 'l'équité, qui ne permet pas qu'on s'enrichisse aux dépens d'autrui, m'accorde, en ce cas, contre la subtilité du droit, une action contre vous, pour répéter de vous les frais de ma gestion, jusqu'à concurrance de ce que vous en avez profité'.[113] 'Contre la subtilité du droit': that was a shot against the all too narrow Roman approach in this matter which, however, had already been abandoned by the writers of the *ius commune* by extending the *actio negotiorum gestorum contraria*.[114] Even today, therefore, reimbursement of expenses

[107] §§ 929, 932, 935 BGB.

[108] Briefly explained in (1994/5) 1 *Columbia Journal of European Law* 63 sqq. Generally on the relationship between the rules relating to 'owner-possessor relationship' and unjustified enrichment claims see, most recently, Lorenz above n 9, Vorbem zu §§ 812 sqq, nn 39 sqq; Larenz/Canaris above n 15 at 338 sqq.

[109] The case is discussed by Zweigert/Kötz/Weir above n 23, at 587; Schluep, *Mélanges Piotet* at 177; cf also König above n 15 at 174.

[110] Cf also the comparative analysis by Gallo above n 5 at 363 sqq.

[111] Von Caemmerer above n 14 at 241 sqq; König above n 42 at 1568 sqq; Lieb above n 16 at § 812, nn 249 sqq; Larenz/Canaris above n 15 at 188 sqq. For a comparative discussion see Gallo above n 5 at 451 sqq.

[112] Ferid/Sonnenberger above n 31 at 433 sq; König above n 42 at 1572, 1573.

[113] Robert Joseph Pothier, 'Traité du contrat de mandat (appendice)' in *Oeuvres de Pothier* (vol IV, 1824) at n 189.

[114] See D. H. van Zyl, *Negotiorum gestio in South African Law* (1985) at 84 sqq.; *Law of Obligations* above n 3 at 875 sqq.; Marleen H. J. van der Horst, *Compensation for Improvements. The Roman-Dutch Law in Sri Lanka* (1989); Visser, above n 38 at 421 sqq.

according to French law is situated somewhere between 'enrichissement sans cause' and 'gestion d'affaires'.[115]

The close association with *negotiorum gestio* also, incidentally, explains the traditional reluctance of English law to grant an action in these cases. For while courts and legal writers on the continent are happy to encourage useful activities in the interest of others, Anglo-American law displays considerable concern about officious interloping. Often quoted are the words of Bowen LJ in *Falcke* v *Scottish Imperial Insurance Co*:[116] 'The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure'. However, the contrast between the attitudes of civil law and common law is no longer so dramatic as this general statement makes it sound. As far as necessary expenditures are concerned the doctrine of agency by necessity—based, historically, on maritime usages—will often provide the basis for a claim.[117] Even apart from that, however, the English courts now seem to be ready to accept that a restitutionary claim may lie if it can be shown that the defendant has been 'incontrovertibly benefited' by the services which have been rendered.[118] This does not, so far, apply to mistaken improvements to land. But with regard to chattels we have the decision of the Court of Appeal in *Greenwood* v *Bennett*[119] where a plaintiff was allowed to recover his expenditures: thinking that he owned a car, he had spent a considerable sum in order to put it in good order without the true owner being aware of these improvements. And in 1977 a statutory allowance was granted to the mistaken improver, provided he sue for 'wrongful interference'.[120]

For a legal system that has always recognized a doctrine of *negotiorum gestio* and that has, moreover, regarded the *bona fide* possessor's claim for mistaken improvements to another person's property as the paradigm case of a remedy called 'recompense'[121] it should not prove too difficult to recognize 'Verwendungskondiktion' as one specific emanation of a generalized law of unjustified enrichment.

[115] One of the reasons lies in the tendency of French courts to extend the range of application of *negotiorum gestio* by not insisting on the gestor's will to act in someone else's interest; cf Ferid/Sonnenberger above n 31 at 321; cf also Wilburg above n 5 at 82 sqq.

[116] (1887) 34 Ch D 234 (CA) at 248.

[117] Samuel S. Stoljar, 'Negotiorum gestio' in *International Encyclopedia of Comparative Law* (vol X, ch 17, 1984) n 58; Goff and Jones above n 72 at 363 sqq; Lee W. J. Aitken, 'Negotiorum gestio and the Common Law: A Jurisdictional Approach' (1988) 11 *Sydney Law Review* 585 sqq, 591 sqq; Friedman/Cohen above n 123 at nn 36 sqq; Gallo above n 5 at 546 sqq.

[118] Goff and Jones above n 72 at 166 sqq; Gallo above n 5 at 454 sqq.

[119] [1973] 1 QB 195 (see especially the judgement of Lord Denning at 201 sq.).

[120] See Goff and Jones above n 72 at 174.

[121] See Niall R. Whitty, 'Die Reform des schottischen Bereicherungsrechts' (1995) *Zeitschrift für Europäisches Privatrecht* at 228 sqq.

14

Whether or not a legal system requires what is known in German law as 'Rückgriffskondiktion' (an enrichment claim based on the discharge of another person's debt)[122] depends, in the first place, on the availability of alternative avenues for obtaining redress. German law, for instance, largely uses the device of *cessio legis* (assignment by operation of law).[123] This is the case where two or more persons are obliged in such manner that each of them is bound to effect the whole performance but the creditor is entitled to demand the performance only once.[124] As between themselves, the joint debtors are normally liable in equal shares.[125] If one of them discharges the (full) debt, he can sue the others for their share. But he does not have to rely on an enrichment action for, according to § 426 II BGB, the claim of the creditor against the other debtors is transferred to him. The same applies in cases where a surety satisfies the creditor: the creditor's claim against the principal debtor is transferred to him by operation of the law (§ 774 I BGB). The main situation that remains without specific regulation is the one where a third party voluntarily pays another person's debt. According to German law, the debt is thus discharged; the debtor's approval is not required (§ 267 I BGB). If the third party does not intend managing the debtor's affairs, no right of recourse lies on account of *negotiorum gestio*. Since he did not intend making a transfer to the debtor, he is also unable to bring an enrichment-by-transfer claim. In this case a general 'Rückgriffskondiktion' will have to be available in order to provide the third party with a right of recourse against the debtor, merely on the ground that he received a benefit (discharge of his debt) without justification and at the expense of the third party. The practical field of application of this remedy is rather limited, since few people pay other peoples' debts without either having been instructed to do so or assuming that they are paying their own debt.[126] A problematical aspect of granting this type of enrichment claim is that it leads to a debtor's release without his consent and entails, in effect, the substitution of a new creditor for the old one. However, it may be argued that a debtor cannot, in the absence of an agreement to the contrary, reasonably rely on retaining his original creditor.[127] A cession, after all, does not require the debtor's consent either.

By and large, this appears to be the paradigm accepted also by other civilian jurisdictions.[128] That third parties are entitled to render performance on behalf

[122] As in the case of 'Verwendungskondiktion', it is the enrichment creditor himself who has caused the shift of assets by his own act. This is why these two types of enrichment claims are sometimes dealt with *sub nom* 'Aufwendungskondiktion' (see § 3 of the König draft and, most recently, Larenz/Canaris above n 15 at 188 sqq). The act of the enrichment creditor does not, however, constitute a 'transfer' in the sense discussed above. Further on 'Rückgriffskondiktion', see von Caemmerer above n 14 at 237 sqq.; König above n 42 at 1564 sqq.

[123] For a comparative discussion of the legal techniques used in German, French and Anglo-American law (apart from *cessio legis* mainly subrogation), see Daniel Friedman, Nili Cohen, 'Payment of Another's Debt' in *International Encyclopedia of Comparative Law* (vol X, ch 10, 1991) nn 16 sqq.

[124] 'Gesamtschuld': see § 421 BGB.

[125] § 426 I BGB.

[126] For a comparative discussion of the latter situation see Friedman/Cohen above n 123 at nn 49 sqq.

[127] Dieter Medicus, *Bürgerliches Recht* (15th ed, 1991) at n 952.

[128] Friedman/Cohen, above n 123 at nn 3, 9.

of the debtor had already been recognized in Roman law: 'Solvendo quisque pro alio licet invito et ignorante liberat eum.[129] Under the *ius commune*, the *actio negotiorum gestorum (contraria)* was, once again, employed in order to provide a right of recourse against the debtor.[130] It still appears to be widely used in French law[131] and it also constitutes the historical basis for the German 'Rückgriffskondiktion'.[132] The close association with *negotiorum gestio* also, of course, explains the reticence of English courts to grant a restitutionary action. Payment of another person's debt is, above all, another instance of officious intermeddling that must not be encouraged. According to traditional opinion, it does not even extinguish that debt, and thus there is no basis for a right of recourse against the debtor.[133] Yet there are exceptions to this rule. Where a payment unauthorized by the debtor is made under 'legal compulsion', the debt is discharged and the third party is granted a right of recourse.[134] Compulsion, in this instance, serves a double function: it constitutes the ground of extinction and, at the same time, the 'unjust factor' triggering the restitutionary remedy (to be subsumed, in Peter Birks's scheme, under 'enrichment by subtraction')[135] There are other exceptions and the list appears to be growing. The argument is even gaining ground that payments unauthorized by the debtor should, in principle, extinguish the debt.[136] Still, however, for the purposes of restitution a specific unjust factor (mistake, necessity, etc) appears to be required. The common law may thus be heading, at least in principle, towards a reversal of its restrictive policy. Under these circumstances a legal system that has always followed the civilian approach towards discharging other person's debts[137] would be ill-advised not to consider a generalized restitutionary remedy along the lines of 'Rückriffskondiktion'.

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It would normally be appropriate, at this stage, to provide a summary or conclusion. Instead, I would like to supply a translation[138] into English of a draft law of unjustified enrichment prepared by the late Professor Detlef König at the behest of the German Minister of Justice. As things stand at the moment, this

[129] Gai D 3, 5, 38; cf also Gai D 46, 3, 53. See *Law of Obligations* above n 3 at 752. As far as French law is concerned, see art 1236 code civil.

[130] Friedman/Cohen, above n 123 at n 9.

[131] But in the last resort, 'enrichissement sans cause' is also available. König above n 42 at 1571; Friedman/Cohen, above n 123 at n 15; and see Ferid/Sonnenberger above n 31 at 321.

[132] König above n 42 at 1564 sqq.

[133] Goff and Jones above n 72 at 17 sq. ('It is not ... easy to discharge another's debt in English law. This will occur only if the debtor authorised, or subsequently ratified, the payment. There are few exceptions to this principle, which appears to be of little merit now that debts are freely assignable'); Peter Birks, Jack Beatson, 'Unrequested Payment of Another's Debt' (1976) 92 *Law Quarterly Review* 188 sqq. And see Friedman/Cohen above n 123 at 4.

[134] For all details, see Goff and Jones above n 72 at 299 sqq.

[135] Above n 78 at 185 sqq. And see Whitty (1995) *Zeitschrift für Europäisches Privatrecht* at 229 sqq.

[136] Daniel Friedman 'Payment of Another's Debt' (1983) 99 *Law Quarterly Review* 534 sqq; Burrows above n 79 at 222 sqq.

[137] Whitty (1995) *Zeitschrift für Europäisches Privatrecht* at 229, 231 sqq.

[138] Of which a first draft was prepared by Johann Andreas Dieckmann and Jacques du Plessis (Regensburg/Aberdeen); referred to by N. R. Whitty (1994) *Juridical Review* 134 at n 62.

draft is not going to be enacted. The ambitious attempt to subject the entire law of obligations to a comprehensive revision has been abandoned.[139] Instead, the enterprise has now been limited to two specific problem areas: the law of extinctive prescription and breach of contract (including warranty claims).[140] Still, the König draft constitutes a most valuable restatement of German enrichment law as it has evolved over the last hundred years.[141] It is based squarely on the principles elaborated above and thus embodies the results of an extensive scholarly debate that has raised the German law of unjustified enrichment to a level of considerable refinement as well as complexity.[142] On the other hand, it appears to avoid the danger of overregulating. The law of unjustified enrichment, more than many other areas of the law of obligations, can only flourish on the basis of a harmonious alliance between legislature, courts and legal writers. The statutory provisions have to be brought to life by active and imaginative judicial interpretation. They have to leave scope for doctrinal elaboration and they have to be sufficiently abstract and flexible to be employed in ever new factual contexts and to all kinds of novel problem situations.[143] The König draft contains five sections, of which the first deals with enrichment-by-transfer, the second with enrichment-by-encroachment and the third with the payment of another person's debt as well as restitution for improvements (both under the umbrella of 'restitution for outlays'). § 4 provides directions as to how to penetrate the dreaded third party enrichment jungle.[144] § 5 contains a general clause enabling courts and legal writers to carve out, if necessary, new types of claims or to deal with miscellaneous individual situations.

§ 1 Enrichment based on transfer

§ 1.1 (1) A person who has transferred something to another in order to fulfil an existing or a future obligation can reclaim what he has transferred from the putative

[139] Cf the three volumes containing proposals and detailed comments, published under the title *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (vols I and II 1981, vol III 1983) and edited by the Bundesminister der Justiz.

[140] Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[141] Thus, it is consistently taken into consideration in the latest commentary on the subject (Lorenz above n 9, *Vorbem zu* §§ 812 sqq, nn 5 sq). Cf also Wolfgang Grunsky, 'Vorschläge zu einer Reform des Schuldrechts' (1982) 182 *Archiv für die civilistische Praxis* 462 sq and the contributions in *Ungerechtfertigte Bereicherung. Grundlagen, Tendenzen, Perspektiven. Symposium zum Gedenken an Detlef König* (1984).

[142] See the balanced assessment by Lorenz above n 9 at § 812, n 36 concerning a debate as to whether the German academic discussion about the law of unjustified enrichment has reached such a degree of sophistication that it has become impractical and esoteric (cf the polemic by Horst H. Jakobs, 'Die Rückkehr der Praxis zur Regelanwendung und der Beruf der Theorie im Recht der Leistungskondiktion' (1992) *Neue Juristische Wochenschrift* 2524 sqq. Indisputably, this area of the law has attracted considerably more academic attention in Germany than in any other European country. Thus, for instance, in France there are few monographs on the subject of unjustified enrichment. Nor is much space devoted to 'répétition de l'indu' or 'enrichissement sans cause' in the general textbooks. See, too, the remarks by Gallo above n 5 at 6 sqq. Recently, however, stimulated mainly by Goff and Jones and Peter Birks, the academic discussion has also started to flourish in England. As Horst H. Jakobs in Germany, Tony Weir likes to refer to the law of restitution as the 'South Sea Bubble of the Nineties'.

[143] For further discussion and references, see Reinhard Zimmermann 'Codification: History and Present Significance of an Idea' (1995) *European Review of Private Law* vol 1 (in press).

[144] The translation is provided even though the matter has not been discussed in the present paper. But see the references above n 15, and the motivation by König for his proposal in above n 42 at 1577 sqq; cf also the comparative remarks in above n 15 at 219 sqq.

creditor (the recipient) a) if the obligation does not exist, does not come into existence or later on ceases to exist, or b) if the right to claim is barred by a defence on account of which enforceability is excluded permanently.

(2) Restitution is excluded a) if the transfer was rendered in compliance with a moral duty, or b) if the debt had prescribed, or c) if the recipient could reasonably believe that the transferor wanted him to keep the benefit in spite of the fact that the requirements of subsection 1 were met, or d) insofar as the restitution of what was transferred to fulfil an invalid contract would frustrate the purpose of the invalidating rule.

§ 1.2 (1) A person who transfers something to another, not in order to fulfil an obligation, but with the intention, noted by the latter, to induce him to act in a certain way, may reclaim the benefit if that action does not in fact take place.

(2) Restitution is excluded a) if the achievement of the purpose was impossible from the outset and if the transferor knew this, or b) if the transferor, contrary to the precepts of good faith, prevented the achievement of the purpose.

§ 1.3 A person who transfers something to another, not in order to fulfil an obligation, but on account of compulsion or threat, may reclaim the benefit, unless the recipient proves that he had a right to the benefit.

§ 1.4 (1) Restitution comprises what has been received, the emoluments derived, and whatever the recipient may have obtained for the destruction of the object received, for damage done to it or for being deprived of it.

(2) If restitution in kind is impossible on account of the nature of the object received or if the recipient for any other reason is not capable of returning what he has received, he has to pay the common value. Relevant for determining the common value is the moment when the claim for payment of the value arose.

(3) The duty to render restitution falls away insofar as the recipient is enriched, neither by the object received nor by its value, as a result of consumption, passing on, destruction, deterioration, or for any other reason. If the recipient has incurred expenses or has suffered loss because he has relied on the effectiveness of the transfer, he may refuse to render compensation until he has been compensated; this does not apply if the transferor has not engendered the reliance or if, having engendered it, it is nevertheless not attributable to him. The transferor bears the costs associated with the rendering of restitution. He also bears the risk.

§ 1.5 (1) Where restitution has to be rendered as a result of the invalidity of a reciprocal contract, the recipient can only rely on § 1.4 (3) insofar as this is required by the purpose of the invalidating rule. The destruction or deterioration of the object transferred always releases the recipient from his duty to render restitution if, assuming the contract had been valid, the transferor would have had to bear the risk.

(2) The parties' duties to render restitution are reciprocal; §§ 320, 322 BGB are applicable *per analogiam.*

§ 1.6 (1) If the recipient is aware of the absence of the legal ground at the moment of receiving the performance, or if he is unaware of it as a result of gross negligence, if he becomes aware of it later, or if an action to render restitution has been filed against him, he is liable according to §§ 1.4 (1) and (2), 1.5 and the following rules from the moment of receipt, or of the attainment of knowledge, or of litispendence.

(2) If the recipient does not derive emoluments which he could have derived in accordance with normal commercial usage, he is liable for compensation insofar as he has been at fault. As far as money is concerned, he has to pay interest. Any profit drawn from what has been received has to be handed over.

(3) If the object transferred is destroyed or if it has deteriorated, the recipient has to make good the loss if he has been at fault; otherwise he is discharged from his obligation to render restitution. He can claim compensation according to the rules concerning *negotiorum gestio* for necessary improvements to the object. § 995 BGB is applicable *per analogiam.* For improvements other than those that are necessary he does not receive compensation.

(4) Liability according to the rules of *mora debitoris* remains unaffected.

§ 1.7 The right to claim restitution prescribes after two years, to be calculated from the moment when the person entitled to the claim learns of its existence; irrespective of this knowledge the claim prescribes after ten years.

§ 2 Enrichment based on an encroachment

§ 2.1 (1) Whoever encroaches upon the property or another object of legal protection that has a financial value, by disposing of it, by consuming or using it, by effecting *commixtio, confusio* or *specificatio,* or in any other manner, has to render restitution by paying the common value to the person entitled to that property or object. In case of an ineffective disposal the person so entitled can demand restitution of the value from the person encroaching, provided he ratify the transaction in terms of § 185 II 1 BGB.

(2) Relevant for determining the common value is the moment when the encroachment occurred. If the disposal is not made gratuitously, it is rebuttably presumed in favour of the person entitled that the price received constitutes the common value.

§ 2.2 If a transfer is made to a person who is not entitled to the object of the transfer, and it is effective against the person so entitled, then the former has to hand over to the latter what has been transferred to him.

§ 2.3 If the encroaching person was not aware, without gross negligence, of his lack of entitlement, his obligation to render restitution falls away, insofar as at the moment of litispendence of the restitutionary claim he is no longer enriched by the value of what

he has received. Whatever the encroaching person has spent in acquiring the object in question does not diminish his enrichment.

§ 2.4 If the encroaching person disregards the entitlement of the other intentionally or by gross negligence, the latter can also demand restitution of a profit that exceeds the common value. The encroaching person has to supply information as to the profit that he has derived from the goods belonging to another.

§ 2.5 The claim prescribes after three years, to be calculated from the moment at which the person entitled attains knowledge of the encroachment and of the person obliged to render restitution; irrespective of this knowledge, it prescribes after thirty years, to be calculated from the time of the encroachment.

§ 3 Enrichment as a result of outlays incurred

§ 3.1 Whoever, deliberately or by mistake, discharges the obligation of another, can claim restitution for his outlays from that other person, insofar as the latter, at the moment of litispendence, is enriched as a result of being released from his obligation.

§ 3.2 Whoever, deliberately or by mistake, spends anything on an object belonging to another, can claim restitution for his outlays from that other person, insofar as the latter is enriched as a result of that expenditure, taking into account his own plans concerning his estate. Relevant for determining the enrichment is the moment at which the debtor receives his object back or otherwise starts to benefit from the increase in value. The claim is excluded a) if the other party can demand the removal of what was created by means of the expenditure and does indeed demand it, or b) if the person entitled to the claim has been at fault in failing to notify the other party timeously of the planned expenditure, or c) if the other party objected to the expenditure, before it was incurred.

§ 3.3 The claim prescribes after ten years.

§ 4 Third party enrichment

§ 4.1 (1) Whoever, in the case of § 1.1, transmits a benefit to a third party on the order of his putative creditor, can demand restitution from the putative creditor just as if he had transmitted the benefit to him. If the transmission of wealth was not attributable to the putative creditor, the restitutionary claim is only available against the third person.

(2) Whoever, in the case of § 1.1, has transmitted a benefit to a third party under a contract for the benefit of that third party, which he believed to have come into existence in terms of § 328 BGB, can demand restitution from the recipient of his promise just as if he had transmitted the benefit to him. If the transmission of wealth was not attributable to the recipient of the promise, the restitutionary claim is only available against the third party.

(3) Whoever, in the case of § 1.1, transmits a benefit to the putative new creditor after an assignment has occurred, can demand restitution from the putative original creditor just as if he had transmitted the benefit to him. If the transmission of wealth was not attributable to the putative original creditor, the restitutionary claim is only available against the putative new creditor.

(4) §§ 1.4–1.7 apply *per analogiam.*

§ 4.2 If, in a case of §§ 1 or 4.1, the recipient who is obliged to render restitution gratuitously transmits what he has received to a third party, and if satisfaction cannot be obtained from the recipient, the third party, too, is obliged to render restitution, just as if he had received the benefit from the creditor without legal ground. § 1.4–1.7 apply *per analogiam.*

§ 4.3 If a person who is not entitled to dispose of an object disposes of it gratuitously, and if this disposition is effective against the person who was entitled so to dispose, then whoever directly receives a legal benefit on account of that disposition is obliged to return that benefit to the person who was entitled so to dispose. §§ 2.3–2.5 are to be applied *per analogiam.*

§ 5 General Clause

Whoever is enriched at the expense of another in another way than according to §§ 1–4 is obliged to render restitution, if the enrichment is unjustified. The rules laid down in §§ 1–4 concerning the content of the restitutionary claim apply *per analogiam.*