THE HISTORY OF A MYSTERY: THE EVOLUTION OF THE LAW OF UNJUST ENRICHMENT IN GERMANY, ENGLAND AND CHINA

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I. INTRODUCTION[1]

The law of unjust enrichment is more or less recognized in all modern jurisdictions.[2] The name suggests that nobody should enrich herself at the expense of another party.[3] Details of even very fundamental aspects of the law of unjust enrichment are, however, highly disputed everywhere. This article aims to explore the reasons of the existing complexities by discussing the historical development of the law of unjust enrichment from a comparative point of view with a focus on Germany, England, and China. It is the authors' goal to identify and assess historical similarities and differences, if any, and thus to provide a new and unique perspective of the current status of this area of law.

The authors are expressly not concerned with the (micro-) comparison of historical facts or particular aspects of the current law of unjust enrichment. The focus of this article is on the landmark developments in the evolution of the law of unjust enrichment in order to allow for a comparative (macro-) analysis. The article starts with

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[1] Footnote references in word-for-word quotes have been omitted for the sake of improving readability. Online links were last checked on Feb. 28, 2020. The general themes of this article were first presented at a public seminar on February 2, 2018 as part of the CUHK Faculty of Law Greater China Legal History Seminar Series. We would like to thank all participants for their attendance and valuable comments during the Q&A session.

[2] David A. Juentgen, *Unjustified Enrichment in New Zealand and German Law*, 8 CANTERBURY L. REV. 505, 505 (2002).

[3] *Cf.* Alvin W.L. See, *An Introduction to the Law of Unjust Enrichment*, 5 MALAYAN L.J. 1, 1 (2013).

the hypothesis that in each jurisdiction a very few main factors can be identified which have shaped the historical development of the law of unjust enrichment and which are responsible for the very confusing current state of this area of law. The comparison of these factors with a view to different jurisdictions allows for conclusions as to whether the existing difficulties are subject-specific, embedded in particular legal traditions, or just circumstantial. This analysis thus offers completely new insights and paves the way for a different understanding of the complexities of the law of unjust enrichment.

Of course, the selection of particular legal systems for comparative purposes requires an explanation.[4] What is the methodological rationale behind the authors' decision to compare German, English and Chinese law of unjust enrichment?

Apart from the background of the authors of this article,[5] and the limitations in terms of time and resources which every comparative study faces,[6] there are indeed very specific reasons which make the comparison of the historical development of the law of unjust enrichment in Germany, England, and China especially valuable. The legal systems of these countries belong to different legal traditions[7] and they appear to be very different.[8] Furthermore, the law of unjust enrichment is based on different sources and the stage of development of the law of unjust enrichment is not the same.[9]

Germany is a representative of the civil law tradition. Moreover, the German law of unjust enrichment is arguably one of the oldest unjust enrichment regimes in the world.[10] German law has, to a certain

4 Lutz-Christian Wolff, *Comparing Chinese Law … But with Which Legal Systems?*, 6 CHINESE J. COMP. L. 151, 153–58 (2018) [hereinafter Wolff, *Comparing Chinese Law … But with Which Legal Systems?*].

5 *See id.* at 158–59 (for the use of personal features of researchers as criteria to select legal systems for comparative purposes).

6 *Id.* at 159.

7 S*ee id.* at 159–61 (For the concept of legal traditions—also called "legal families"—and doubts regarding its methodological viability in modern times due to the fact that basically every jurisdiction is somehow "mixed and mixing").

8 *See id.* at 161 (for the suitability of the degree of differences and similarities of legal systems as factor for selecting legal systems for comparative purposes).

9 *See id.* (for the suitability of the stage of development of legal systems as a factor for selecting legal systems for comparative purposes).

10 *See* Nils Jansen, *Farewell to Unjust Enrichment?*, 20 EDINBURGH L. REV. 123, 124 (2016) (". . . [German unjust enrichment law] has a comparatively long and lively tradition, but nevertheless continues to be a fast-developing part of the law."); Hector MacQueen, *The Sophistication of Unjustified Enrichment: A Response to Nils Jansen*, 20 EDINBURGH L. REV. 312 (2016); Steve Hedley, "*Farewell to Unjustified Enrichment?"—A Common Law Response*, 20 EDINBURGH L. REV. 326 (2016).

extent, informed, if not influenced, the development of both the common law[11] and the Chinese rules on unjust enrichment.[12]

In contrast, English law forms the basis of the rather mature common law legal tradition. However, the English law of unjust enrichment is relatively young, and thus differs from the German system. Furthermore, other common law jurisdictions have not simply adopted the English law of unjust enrichment, but have partly taken different approaches.[13] English law must therefore also be contrasted against the regimes of other common law jurisdictions.

Finally, the modern Chinese legal system is a mixed system.[14] Based on a statutory legal framework, it shows civil law and common law elements, but is also guided by socialist principles.[15] While the current Chinese legal system has a relatively short history, it seems to rely on concepts developed even before the Chinese revolution in 1949.[16]

The first three sections of this article introduce the evolution of the law of unjust enrichment in Germany, England, and China. The fourth section of this article then compares the historical development of the three unjust enrichment regimes on the basis of three hypotheses regarding similarities, despite the rather different backgrounds. The comparative analysis suggests that the very idea of unjust enrichment law must be called into question. This article concludes with final remarks of a more general nature.

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11 Juentgen, *supra* note 2, at Part II ("[O]n occasion common law jurists have expressed the view that 'much is to be learned from the German law.'").

12 *Cf.* Lei Chen, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78 LEGAL HIST. REV. 159 (2010).

13 *See* Juentgen, *supra* note 2, *passim* (for comparison to New Zealand); Elise Bant, *The Evolution of Unjust Enrichment and Restitution Law in the High Court of Australia*, 25 RESTITUTION L. REV. 121 (2017) (for a comparison to Australia); Niamh Connolly, *The Future of Unjust Enrichment in Ireland*, 25 RESTITUTION L. REV. 136 (2017) (for a comparison to Ireland); Robert Chambers, *The Future of Unjust Enrichment in Common Law Canada*, 25 RESTITUTION L. REV. 3 (2017) (for a comparison to Canada).

14 Wolff, *Comparing Chinese Law … But with Which Legal Systems?*, *supra* note 4, at 168–69.

15 *Id.*

16 *See infra*, Part IV(A).

II. GERMAN LAW OF UNJUST ENRICHMENT

A. Historical Development

The German law of unjust enrichment is often regarded as being based on Roman law, yet "[d]espite its residually Roman terminology (*condictiones; Kondiktionen*), the Civilian law of unjustified enrichment can barely be understood as a Roman institution. Indeed, Roman lawyers did not know of 'unjustified enrichment' as a separate legal category."[17] Roman law originally provided for different actions, so-called "*actiones*," which allowed plaintiffs to demand return of something from another party who had been unjustly enriched in particular scenarios.[18] The gaps left by the fragmented coverage of cases of unjust enrichment were addressed by a general, subsidiary action (*condictio sine causa generalis*), which began to replace the specific *actiones* during late Roman law.[19] This general action was based on Roman jurist Pomponius' writing: "By the law of nature it is just that no one should be enriched by another's loss or injury."[20]

In modern times, prior to the enactment of the German *Civil Code* on January 1, 1900, German private law, i.e. the *ius commune*, was essentially Roman law as interpreted and applied by German jurists.[21] As Jansen has explained, during these times the natural law doctrine of restitution also played a role in forming the emerging civilian notion of unjust enrichment.

> [The] idea of a duty to return all enrichment received out of another person's property . . . stems from the theological doctrine of *restitutio*, and thus from the theological tradition of natural law. . . . During the fifteenth and sixteenth centuries, this theological doctrine of *restitutio* was turned

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17 *See* Jansen, *supra* note 10, at 125; Frank L. Schäfer, *Ungerechtfertigte Bereicherung [Unjustified Enrichment]*, *in* HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB BAND III SCHULDRECHT: BESONDERER TEIL [HISTORICAL-CRITICAL COMMENTARY OF THE CIVIL CODE, VOL. III LAW OF OBLIGATIONS: SPECIAL PART], 2584 (Mathias Schmoeckel et al. eds., 2013) (Ger.); JOACHIM WOLF, DER STAND DER BEREICHERUNGSLEHRE UND IHRE NEUBEGRÜNDUNG [THE STATUS OF THE UNJUST ENRICHMENT DOCTRINE] 1 n. 7 (1980) (Ger.).

18 *Cf.* Schäfer, *supra* note 17, at 2583.

19 *Cf. id.* at 2583-4.

20 *Digest*, 50.17.206: "*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*"; also see *Digest*, 12.6.14: "*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*" ("For by nature it is fair that nobody should be enriched by another's loss").

21 Juentgen, *supra* note 2, at Part II.

> into a natural law theory of corrective justice. Its purpose was primarily to explain moral duties of compensation for loss suffered by another person.[22]

The law of unjust enrichment remained, however, very fragmented, and doctrinal consistency through a coherent system of rules did not exist.

In the nineteenth century, famous jurist and historian Friedrich Carl von Savigny tried to identify a single abstract principle which could explain the general idea underlying the different *actiones* under Roman law.[23] Savigny saw this abstract principle in the goal to give back to one party what has been transferred out of her own wealth to another party without justification.[24] This so-called "property shifting doctrine" [25] focused on the retransfer of what the claimant has unjustifiably transferred to somebody else. The property shifting doctrine was criticized because it was not able to explain certain important cases which do not involve any physical transfer of claimant's property to the defendant, such as cases of unauthorized use.[26]

As a result, the drafters of the German *Civil Code*, which entered into force on January 1, 1900, did not adopt Savigny's property shifting doctrine.[27] They rather stated expressly that enrichment does not have to come out, but only has to be "related" to the claimant's wealth.[28] However, eventually the drafters of the German *Civil Code* did not simply codify the different *condictiones* of the *ius commune*, but rather saw the law of unjust enrichment as based on one single

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22 Jansen, *supra* note 10, at 127-28; *cf.* Schäfer, *supra* note 17, at 2584, 2592–2604, 2679–80.

23 Jansen, *supra* note 10, at 130-32; *cf.* Schäfer, *supra* note 17, at 2586–88.

24 LUTZ-CHRISTIAN WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERESSE - STRUKTUR UND RÜCKABWICKLUNG VON ZUWENDUNGEN DARGESTELLT AM BEISPIEL VON SYNALLAGMA UND LEISTUNGSKONDIKTION [Property Rights' Transfer Risk and Restitutional Interest–Structure and Revocation of the Transfer of Property Rights Explained on the Basis of the Examples "Synallagma" and "Leistungskondiktion"] 171 (1998) [hereinafter WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE]; WOLF, *supra* note 17, at 3; ULRICH LOEWENHEIM, BEREICHERUNGSRECHT [Enrichment Law] 4–5 (3rd ed. 2007) (Ger.).

25 In German: "Vermögensverschiebungslehre."

26 *See* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 171; WOLF, *supra* note 17, at 5.

27 WOLF, *supra* note 17, at 3; LOEWENHEIM, *supra* note 24, at 6–7.

28 *See* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 171–72.

idea,[29] namely that "*condictiones* are personal claims aiming at undoing rights and property acquisitions effected according to applicable rules which lack a legal basis."[30]

The section of the German *Civil Code* on unjust enrichment was drafted accordingly as can be seen from its core rule, Article 812, paragraph 1, sentence 1: "A person who obtains something without legal basis as a result of the performance of another or by other means at his expense without legal basis is obliged to return it."[31] The doctrinal evolution after the enactment of the German *Civil Code* saw two major developments:

First, in 1909 Professor Fritz Schulz tried to explain the law of unjust enrichment as a tool to remedy a situation where a person gains by illegally violating another person's right.[32] For Schulz, the law of unjust enrichment therefore seemed to be very close to the idea of tort law.[33] While Schulz's input allowed the general discussion to move away from Savigny's property transfer doctrine, it did not find general acceptance.[34]

Germany's modern law of unjust enrichment is based on a "discovery" made by Professor Walter Wilburg in the 1930s as further developed by Professor Ernst von Caemmerer in the 1950s.[35] Wilburg was the first to explain that performance-based unjust enrichment

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29 *See* Juentgen, *supra* note 2, at Part II.

30 *See* BENNO MUGDAN, *Band 2 Recht der Schuldverhältnisse, Motive [Vol. 2, Law of Obligations, Motives]*, *in* DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH [THE COMPLETE MATERIALS FOR THE CIVIL CODE OF THE GERMAN REICH], at 463

31 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 812, para. 1, sentence 1, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3458 (Ger.).

32 *See* Fritz Schulz, *System der Rechte Auf den Eingriffserwerb* [System of the Rights to Acquisitions Through Intervention], 105 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1–488 [Archive of Civil Practice] (1909) (Ger.), *available at* https://www.jstor.org/stable/pdf/41002273.pdf; *see also* Jansen, *supra* note 10, at 126–27 (explaining that "Roman jurists never acknowledged a *condictio* genuinely based on an infringement upon another person's rights . . . Roman jurists did not conceive of rights as reasons for legal remedies . . . .").

33 *See* Schulz, *supra* note 32; WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 174.

34 *See* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 174.

35 *See id.* at 174–75; *see also* Schäfer, *supra* note 17, at 2610; WOLF, *supra* note 17, at 6–7, 25–27; WOLFGANG FIKENTSCHER & ANDREAS HEINEMANN, SCHULDRECHT ALLGEMEINER UND BESONDERER TEIL [LAW OF OBLIGATIONS GENERAL AND SPECIFIC PART] 857 (11th ed. 2017) (Ger.); LOEWENHEIM, *supra* note 24, at 9–11.

needs to be distinguished from unjust enrichment by other means,[36] because "an [sic] universal answer as to when an enrichment is unjustified cannot be given."[37] Von Caemmerer developed this idea further by concluding that performance-based unjust enrichment claims are similar to other claims available under the German law of obligations requiring one party to return property to another—for example, at the end of the term of a lease, a loan, or when somebody withdraws from a contract.[38] Since the 1960s, the separation between performance-based unjust enrichment and enrichment by other means has been adopted by the prevailing opinion in German legal literature and is also followed by German courts.[39]

Article 812 and the other rules of the German *Civil Code* on unjust enrichment form a very complex system, based on differing pre-enactment ideas and legal practice as well as untested new theories. While it is formulated in abstract, general terms, the drafters of the *Civil Code* still had to rely on the previous experience with the application of Roman law to address specific questions. Most importantly, they could not envisage future doctrinal developments.[40] In fact, "the separation of different claims for unjustified enrichment amounted to a fundamental break with the codifications' legislative programme."[41] As a result, the law of unjust enrichment remains one of the most complicated and controversial areas of German private law.[42]

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36 WALTER WILBURG, DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT [THE DOCTRINE OF UNJUST ENRICHMENT UNDER AUSTRIAN AND GERMAN LAW] 17-8 (1934) (Ger.).

37 Juentgen, *supra* note 2, Part II.

38 Ernst von Caemmerer, *Bereicherung und unerlaubte Handlung* [Unjust Enrichment and Torts], *in* FESTSCHRIFT FÜR ERNST RABEL, BAND 1 [FESTSCHRIFT FOR ERNST RABEL, VOL. I] 333, 342 (Hans Dölle et al. eds., 1954) (Ger.).

39 40 BGHZ, 272-282 (Ger.); *see* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 174, 176; Schäfer, *supra* note 17, at 2589–90, 2611–12; LOEWENHEIM, *supra* note 24, at 11–15 (for attempts to revive the idea that the law of unjust enrichment is based on one single idea of "illegal having" in particular during the 1970s).

40 Jansen, *supra* note 10, at 135 ("Today, the nineteenth century foundations of unjustified enrichment lie in ruins.").

41 *Id.* at 137.

42 Schäfer, *supra* note 17, at 2580–81; LOEWENHEIM, *supra* note 24, at 9; Juentgen, *supra* note 2, Part II; WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 170.

B. Legal Sources

Germany's law of unjust enrichment is set out in Articles 812 to 822 of the German *Civil Code*. It forms an integrated, but separate part of the German law of obligations, i.e., it is neither part of contract law nor of tort law.[43] Moreover, there are numerous (non-binding) judgments and academic writings which supplement the statutory provisions.

C. Basic Rule(s)

Under Article 812, paragraph 1, sentence 1, alternative 1, a performance-based unjust enrichment claim requires: (i) a performance by the claimant which increases of the defendants' wealth, (ii) an (ongoing) enrichment of the defendant, (iii) without a legal basis.[44] Performance has been famously defined by German jurists as a "goal- and purpose-oriented increase of the defendant's wealth" by way of the discharge of an obligation (*solvendi causa*), the creation of an obligation (*obligandi causa*), or a gift (*donandi causa*).[45] Special rules of the *Civil Code* address other cases of performance-based unjust enrichment which require a more differentiated approach.[46]

According to Article 814 paragraphs 1 and 2 of the German *Civil Code*, performance-based unjust enrichment claims are not available if the claimant knew that she was not obliged to perform, and similarly are not available if the performance is required under a moral obligation.[47]

The unjust enrichment claim "by other means" requires: (i) an encroachment or the fulfilment of someone else's debt or an unauthorized expenditure on someone else's property, and (ii) an enrichment of the defendant, (iii) at the plaintiff's expense, (iv) without legal basis. It is important that, according to German legal doctrine, element (iii) only constitutes a claim precondition for unjust

43 Juentgen, *supra* note 2, Part III.

44 BGB, § 812, para. 1, sentence 1.

45 Juentgen, *supra* note 17, at Part IV.

46 *See id. See also* BGB, § 812, para. 1, sentence 2, alternative 1 *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p345 (later lapse of the legal basis = *condictio ob causam finitam*); *id.* at alternative 2, (non-occurrence of the intended goal = *condictio of causam datorum*); *id.* at § 817, sentence 1, (violation of moral standards or legal prohibition by the recipient of the enrichment = *condictio of turpem vel iniustam causam*); *cf.* Schäfer, *supra* note 17, at 2607–09; LOEWENHEIM, *supra* note 24, at 7.

47 BGB, § 814, para. 1-2.

enrichments "by other means," i.e., not for performance-based unjust enrichment claims.[48]

D. What is the Function of the German Law of Unjust Enrichment?

It appears to be the prevailing view that for performance-based unjust enrichment the law serves as a tool to "reach between the parties the status that would have existed in the normal course of events had the transfer of wealth never taken place."[49] In this regard, it has often been argued that the law of performance-based unjust enrichment is mainly concerned with supplementing the so-called "principle of abstraction."[50] The "principle abstraction" is indeed a unique feature of German civil law. It entails the following:

Under German law, any property transfer is legally separate from the underlying obligation to make such transfer.[51] Take the example of a sales contract. According to German law, under a sales contract the seller must transfer ownership and possession to the buyer,[52] and the buyer must pay the purchase price, i.e., transfer ownership and possession of the price money to the seller.[53] In order to fulfill these contractual obligations, separate "real acts" are necessary, such as in the case of movable property, where another agreement is required in addition to delivery.[54] While this may sound strange for non-German lawyers, the acquisition, e.g., of real property under common law would normally follow exactly the same concept, with a sales contract being concluded first and the actual title transfer to follow later on the basis of a different legal act. German law is, however, special because

48 WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 175.

49 Juentgen, *supra* note 2, Part V.

50 *Cf.* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 168 nn.1–2; Schäfer, *supra* note 17, at 2621.

51 Lutz-Christian Wolff, *Assignment Agreements under English Law: Lost between Contract and Property Law?*, 7 J. BUS. L. 473, 485 (2005) [hereinafter Wolff, *Assignment Agreements under English Law*].

52 *See* BGB, § 433, para. 1: "By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects."

53 *See* BGB, § 433, para. 2: "The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased."

54 *See* BGB, § 929 ("For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.").

this concept has been elevated to a general principle which applies to all types of property transfers, including, e.g., assignments.[55]

German legal doctrine provides not only that the underlying obligation and any property transfer in fulfilment of such obligation are separate, but also that they are abstract. This means that when the underlying obligation is invalid, the validity of the real act remains unaffected. To take the above example of a sales contract, if such sales contract is or later becomes invalid, while valid real acts to fulfill the contract have been performed as required by law, the transfer of ownership and possession regarding the sold subject matter are valid. But, since the underlying contract is invalid, the transfer lacks a legal basis. Moreover, since the ownership transfer is valid, a claim for re-transfer cannot be based on any right *in rem*. And, this is precisely where performance-based unjust enrichment law comes into play. It gives the seller the right to request re-transfer of what has been transferred to another party without legal basis.

Non-performance-based unjust enrichment claims—i.e., claims for unjust enrichment "by other means"—do protect the claimant against any violation of her rights. This is basically what Professor Fritz Schulz had tried to establish during the first decade of the last century, except that he wanted this idea to be applied for all types of unjust enrichment claims.[56]

Two more points are important for the comparative discussion:

First, a general concept of "restitution" does not exist under German law.[57] Instead different sections of the German *Civil Code*, including the section on unjust enrichment, allow claims for the return of property held by a defendant without a legal basis for her to keep the property.[58] Second, the German law of unjust enrichment has never been regarded as an equitable tool to remedy situations when the application of other rules does not lead to fair results.[59] The correct translation for the German name of this area of law should therefore not be "law of unjust enrichment," but rather the "law of unjustified enrichment."[60]

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55 Wolff, *Assignment Agreements under English Law*, *supra* note 51, at 485–87.

56 *Supra*, Section II(A).

57 Florian Mächtel, *The Defence of "Change of Position" in English and German Law*, 5 GER. L. J. 23, 26 (2004) (Ger.).

58 *See id.*

59 Juentgen, *supra* note 2, Part III.

60 Mächtel, *supra* note 57, at 27.

E. What Can Be Claimed under German Law of Unjust Enrichment?

German law of unjust enrichment allows the claimant to claim for whatever has been lost, such as ownership, possession, the possibility to use a thing, rights,[61] advantageous legal positions, and the discharge of a debt. In other words, unjust enrichment claims are not just for financial compensation, but are rather primarily object-oriented, i.e., concerned with whatever has been transferred or lost.[62]

According to Article 818 paragraph 1 of the German *Civil Code*, the defendant must give the claimant whatever she has obtained as surrogate for the destruction, damage, or the disposition of an item received, as well as fruits and interest or other gains made prior to returning the object or monies in question.[63] The claim will be monetary[64] if the enrichment cannot be returned because of its nature, e.g., if a service is performed without legal basis or for any other reason.[65]

According to Article 818, paragraph 3 of the German *Civil Code*, if the defendant is no longer enriched, he does not have to return anything to the claimant.[66] This rather broad rule has been limited by German courts depending on which party should bear the related risk in a particular case,[67] and thus seems to mirror what the common law

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61 For a discussion regarding the qualification of rights as property, *see* Lutz-Christian Wolff, *The Relationship Between Contract Law and Property Law*, 49 COMMON L. WORLD REV. 31, 34-40 (2020), *available at* https://journals.sagepub.com/doi/pdf/10.1177/1473779520903729.

62 *See* Schäfer, *supra* note 17, at 2692 *with* Wolfgang Ernst, *Einleitung: Werner Flumes Lehre von der Ungerechtfertigten Bereicherung [Werner Flume's Doctrine of Unjust Enrichment]*, in STUDIEN ZUR LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG [STUDIES OF THE DOCTRINE OF UNJUST ENRICHMENT] 1, 6–10 (Wolfgang Ernst ed., 2003).

63 BGB, § 818, para. 1. Expenses are to be deducted under the so-called "Surrogationstheorie."

64 According to current market value.

65 *See* BGB, § 818, para. 2, ("If the return of what was received is no longer possible due its condition, or if the recipient is on other grounds not able to return it, he has to pay money value instead.").

66 BGB, § 818, para. 3 (except if the claimant's claim was pending before court or if she had known that there was no legal basis); *see* Schäfer, *supra* note 17, at 2678–91 (for the historical background).

67 *See* Bundesgerichtshof [BGH] [Federal Court of Justice] (16 Dec. 1991), NEUE JURISTISCHE WOCHENSCHRIFT [NJW]1037–39 (1038), 1992 (Ger.); BGH (25 Oct.1989), NJW 314–17 (315), 1990; WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 207–09.

covers under the change of position to defense.[68] In the case of invalid reciprocal contracts, as a matter of principle, the claims of the contract parties are to be "netted" under the so-called "Saldotheorie" and only the balance can be claimed by one party.[69] The aim of the "Saldotheorie" is to avoid unfair outcomes in situations where one of the contract parties is no longer enriched with the result that the claim of the other party fails[70] while this party may still enforce her own claim against the other. However, the "Saldotheorie" and its application to particular scenarios are disputed,[71] last but not least, because it is not enumerated in the *Civil Code.*

Finally, the defendant also does not have to return anything in cases of "imposed enrichment," i.e., when the enrichment is forced upon her, such as in cases of the transfer of unsolicited benefits.[72]

III. ENGLISH LAW OF UNJUST ENRICHMENT

A. Historical Development

Unjust enrichment is one of the newest forms of action at common law in England. Like its civil law cousins, the action for unjust enrichment in English law is understood to have its roots in Roman law,[73] but in reality English unjust enrichment has more in common with German law.[74]

The origins of the modern unjust enrichment action are often traced back to *Slade's Case*, which involved two of the most distinguished jurists of the late sixteenth and early seventeenth centuries in a conflict between the Court of King's Bench and the Court of Common Pleas.[75] In *Slade's Case*, the King's Bench

68 Mächtel, *supra* note 57, at 28–29.

69 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN RGZ 54, at 137; *cf.* Ernst, *supra* note 62, at 14–21.

70 BGB, § 818, para. 3.

71 FIKENTSCHER & HEINEMANN, *supra* note 35, p. 906.

72 Juentgen, *supra* note 2, at Part VI; *cf. infra*, Part III(C).

73 Julio Alberto Díaz, *Unjust Enrichment and Roman Law – Enriquecimento sem Causa e o Direito Romano*, 12 PENSAR, 114 (April 2007), *available at* https://www.ucc.ie/academic/law/restitution/archive/articles/diaz.pdf; *see also* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (Oxford University Press 1985) [hereinafter BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION].

74 BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION, *supra* note 73, at 313.

75 Slade v. Morley (1598) 4 Co Rep 92b, 76 ER 1074 [hereinafter *Slade's Case*] (the case was heard in a series of actions between 1598 and 1602); *see also* H. G. Hanbury, *Recovery of Money*, 40 L.Q.R. 31 (1924) (Eng.).

developed the action of *indebitatus assumpsit* for the recovery of money based on trespass.[76] This doctrine was a court-created fiction that avoided the procedural and formulaic problems associated with writs of debt, which were traditionally enforced solely in the Court of Common Pleas.[77] *Slade's Case* was an appeal to the Court of Exchequer Chamber, with Edward Coke arguing for the King's Bench and *assumpsit*, and with Francis Bacon defending Common Pleas and writs of debt.[78] Coke succeeded, as he stated in his own reports, with Popham C.J. giving judgment: "[t]hat although an action of debt, lies upon the contract, yet the bargainor may have an action on the case, for an action of debt at his election . . . ."[79]

Slade's Case was part of a great tradition of cases through the sixteenth and early seventeenth centuries which, through the recognition of *indebitatus assumpsit* in preference to actions on debt,[80] helped develop the doctrine of consideration.[81] Thus, *Slade's Case* exemplifies the courts moving away from the restrictive approaches of the medieval common law and aided the development of the common counts on the general principle of action to recover on undertakings (*assumpsit*).[82] A "count" is "each separate statement in a complaint stating a cause of action which, standing alone, would give rise to a lawsuit."[83] The *indebitatus* money count "for money had and received,"[84] became the basis for the quasi-contract fiction and

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76 Hanbury, *supra* note 75, at 31.

77 David Ibbetson, *Sixteenth Century Contract Law: Slade's Case in Context*, 4 OXFORD J. LEGAL STUD. 295, 297 (1984) (Eng.).

78 For information on the personal animosity between Coke and Bacon, *see* Peter Grajzl & Peter Murrell, *Estimating a Culture: Bacon, Coke, and Seventeenth-Century England* 15 CLIOMETRICA 1, 6 (2021) (forthcoming).

79 *Slade's Case*, at 93a.

80 Ibbetson, *supra* note 77, at 295.

81 James B. Ames, *History of Assumpsit*, 2 HARV. L. REV 1, 1-2 (1889) (Ames notes that there were many sources which contributed to the development of the doctrine of consideration but focuses on consideration as detriment and assumpsit).

82 For a detailed history of the development of the counts *see* Alison Reppy, *The Action of Indebitatus (General) Assumpsit—At Common Law, under Modern Codes, Practice Acts and Rules of Court*, 34 N.D. L. REV. 105, 117 (1958); *see generally id.* at 217-49; Alison Reppy, *The Action of Indebitatus (General) Assumpsit—At Common Law, under Modern Codes, Practice Acts and Rules of Court (Continued)*, 35 N.D. L. REV. 36, 36-61 (1959) [hereinafter Reppy, *The Action of Indebitatus (General) Assumpsit (Continued)*].

83 *Count*, LAW.COM, https://dictionary.law.com/Default.aspx?selected=373 (last visited Sept. 20, 2019).

84 *See* Reppy, *The Action of Indebitatus (General) Assumpsit (Continued)*, *supra* note **Error! Bookmark not defined.**, at 38 (referencing JOHN J. MCKELVEY, PRINCIPLES OF COMMON LAW PLEADING, § 39 at 27 (1894)), Reppy identifies the

provided Lord Mansfield the chance to develop his theory of equity in the common law.

Lord Mansfield's judgment in the *Moses v Macferlan* "quasi contract" case[85] is often referred to as identifying a common principle for actions for the recovery of money which the defendant should return because "the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."[86] Many view this case and the identified principle from it as an initial justification for the modern action of unjust enrichment.[87] In the case, Moses paid cash and endorsed and passed four promissory notes to Macferlan as settlement of a debt. Macferlan had promised Moses that he would not seek to enforce the notes against Moses if the issuer did not pay. However, Macferlan ultimately sued Moses on the notes as endorser. Moses's solicitor sought to defend on the basis of the promise not to enforce, but the court refused to hear the defense holding that the case was outside its jurisdiction. Judgment was therefore rendered against Moses, he paid and Macferlan withdrew the action. Moses subsequently brought an action to recover the money at the King's Bench, and the jury found that he was entitled to restitution subject to an adjudication upon whether the money was actually recoverable:

> [I]n the present form of action; (an action upon the case for money had and received to the plaintiff's use) or whether he should be obliged to bring a special action upon the contract and agreement between them.[88]

The problem was whether a cause of action for Moses to recover the money existed. This was because the usual instances of action for monetary *assumpsit*, which involved recovery for debt arising from an implied contractual transaction, a promise to pay a debt, did not apply to the circumstances of this case. The Chief Justice, Lord Mansfield, considered the problem and allowed Moses to prevail in *assumpsit*,

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common counts as being subdivided into the *indebitatus* accounts (including the money counts and other accounts), the value accounts (including *quantum meruit* and *quantum valebant*), and account stated.

85 Moses v. Macferlan, (1760) 2 Bur 1005, 97 ER 676.

86 Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 309 (1935) (opinion of the Court by Cardozo, J.).

87 *See generally* W. M. C. Gummow, *Moses v. Macferlan 250 Years On*, 68 WASH. & LEE L. REV. 881 (2011).

88 *Id*.

and in doing so dispelled three major objections and clarified the applicable principle.[89]

First, Mansfield noted that although it had been claimed "no *assumpsit* will lie, where an action of debt may not be brought. It is much more plausible to say, 'that where debt lies, an action upon the case ought not to be brought,'" and thus from *Slade's Case* "the rule then settled and followed ever since is, 'that an action of *assumpsit* will lie in many cases where debt lies, and in many where it does not lie.'"[90]

Second, Lord Mansfield considered "'[t]hat no *assumpsit* lies, except upon an express or implied contract: but here it is impossible to presume any contract to refund money, which the defendant recovered by an adverse suit.'"[91] He concluded:

> [I]f the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract . . . . This species of *assumpsit*, ("for money had and received to the plaintiff's use,") lies in numberless instances.[92]

Third, Lord Mansfield was concerned that "[w]here money has been recovered by the judgment of a Court having competent jurisdiction, the matter can never be brought over again by a new action."[93] However, he observed that:

> [T]he ground of this action is not, "that the judgment was wrong:" but, "that . . . the defendant ought not in justice to keep the money." . . . Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.[94]

Lord Mansfield explained the general principle that underpinned these actions as follows:

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89 *Id.* at 1012.
90 *Id.* at 1008.
91 *Id.*
92 *Id.*
93 Moses v. Macfarlan, (1790) 2 Burr. at 1009.
94 *Id.*

> This kind of equitable action, to recover back money, which ought not is justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex asquo [sic] et bono, the defendant ought to refund . . . it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstance of the case, is obliged by the ties of natural justice and equity to refund the money.[95]

This principle is often identified as the basis for the modern action of unjust enrichment. However, Lord Mansfield's underlying principle was not developed by the common law courts in England beyond the specific money counts[96] until the beginning of the twentieth century when academic influence from the United States became recognizable in England.

Warren Swain has noted that, "[f]rom the beginning in the United States the unjust enrichment was largely a creation of the law schools."[97] For example, James Barr Ames, the great Harvard academic, introduced the first common law course on quasi-contract. In 1888 he wrote in his published lectures on the history of implied *assumpsit* that "the most important category of quasi-contract was founded 'upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.'"[98] Additionally, Kit Barker has remarked that the influence of such academic writings should not be underestimated although they should only ever be persuasive.[99]

Academic debate about the money counts and the importance of unjust enrichment continued on both sides of the Atlantic, but was

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95 *Id.* at 1012.

96 *Cf.* Parke B in Kelly v. Solari (1841) 9 M & W 54; also Hanbury, *supra* note **Error! Bookmark not defined.**5, at 34.

97 Warren Swain, *Unjust Enrichment and the Role of Legal History in England and Australia*, 36 U.N.S.W. L. J. 1030, 1032 (2013) (Austl.).

98 Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 304 (2005) (Eng.), noting that these terms had not been used since Lord Mansfield's time.

99 Kit Barker, *Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales*, 34 OXFORD J. LEGAL STUD. 155, 175 (2014) (Eng.).

only addressed in the United States in quasi-legislative form by the 1937 American Law Institute *Restatement of Restitution*.[100]

In England at the beginning of the twentieth century, eminent members of the judiciary were keen to emphasize that there was no general principle of unjust enrichment in English common law, and that the accepted common law action for "money had and received" was subject to the usual formalistic restrictions of any common law action. For example, Cozens-Hardy M.R., in *Baylis v. Bishop of London*, noted: "[t]he wide language thus used by that great judge [Mansfield] has not been followed."[101] Similarly, Lord Sumner in *Sinclair v. Brougham*[102] opined that "[t]here is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."[103]

The academic debate had crossed the Atlantic with a division emerging, as might be expected, between the universities of Oxford and Cambridge. The latter, it seems, had a preponderance of academics who favored the United States' *Restatement of Restitution* as a logical conclusion drawn from Lord Mansfield's underlying general principle for the recovery of monies in *Moses v. Macferlan*. This was termed the "Mansfield Fallacy" by their Oxford opponents, even though Mansfield was an Oxford graduate.[104] Oxford men such as H.G. Hanbury, writing before the United States Restatement, wrote that:

> [A]lthough the scope of the action may be apparent enough at the present day, this was by no means always the case; for Lord Mansfield was much attracted by it, and tended to use it as a peg whereon to hang his own peculiarly wide doctrines of justice and equity.[105]

Hanbury also noted that in *Moses v. Macferlan*:

> Lord Mansfield definitely crossed the all too narrow bridge which leads from the sound soil of implied contract to the

100 *See* Kull, *supra* note 98, at 298.

101 Baylis v. Bishop of London [1913] 1 Ch. 127, 133.

102 Sinclair v. Brougham [1914] AC 398.

103 *Id.* at 456.

104 *See* Hanbury, *supra* note 75, at 36, for the contemporary use of this term; *see also* Kull, *supra* note 98, at 301.

105 Hanbury, *supra* note 75, at 35.

> shifting quicksands of natural equity—and equity in the mouth of a common lawyer is apt to mean equity in its ethical and somewhat nebulous sense.[106]

Hanbury concluded that "[t]he result of Lord Mansfield's error was to cast a veil of doubt over things which were in their origin as clear as day."[107]

However, the influence of "Mansfield's Folly" may be found in certain contemporary judicial commentary. For example, Lord Wright noted in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.[108]

The use of the term "restitution" in the United States' *Restatement of Restitution* fueled the emergence of proponents of a common law of restitution, who often argued for a theory of restitution through a fusion of law and equity. This was sometimes termed the "Fusion Fallacy" by its opponents and led to the development of what might pejoratively be called a "cult of restitution." This was a concerted effort by some academics and judges in England to identify and enhance an area of the common law which would be known as restitution in imitation of the civil law. The leading proponents for the law of restitution and its progeny—the action for unjust enrichment—were Lord Goff and Professor Gareth Jones.

Lord Goff was, in common with Mansfield, a Scot born in Perthshire and educated at Oxford. He was described as having a willingness to "look to other jurisdictions to fill voids which he

106 *Id.*

107 *Id.* at 36.

108 Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1942] UKHL 4, [1943] AC 32, 61.

perceived to exist in our own law."[109] He was also known to advocate the submission of full judgments by all judges sitting on an appeal panel, "observing that a 'feast of contrasting courses' would nourish the evolution of the law."[110]

Gareth Jones was a Cambridge academic whose career included stints at Harvard, where he studied unjust enrichment, and Oxford, where he met Lord Goff.[111] In 1966, Goff and Jones published "The Law of Restitution," which argued for a coherent law of restitution drawing from various common law and equitable causes of action and remedies.[112] Goff and Jones acknowledged the impact of the United States' *Restatement of Restitution* on their work, noting that the justification for the *Restatement* was firmly based upon Lord Mansfield's judgment in *Moses v Macferlan*. [113]

Although there was a reluctance in the courts to identify or develop a law of restitution or a general doctrine of unjust enrichment, the concept of unjust enrichment as a specific form of action gained favor in England. For example, Lord Diplock noted in *Orakpo v. Manson Investment Ltd.*: "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law."[114]

Two-hundred and thirty years after Lord Mansfield gave his judgment in *Moses v Macferlan,* the doctrine of unjust enrichment was finally accepted in English law in the case of *Lipkin Gorman v. Karpnale Ltd.*,[115] in which Lord Goff gave a leading judgment. In the case, a solicitor, Cass, made numerous withdrawals (amounting to £223,000) from his firm's client account. Later, Cass lost the majority of this money gambling at the Playboy Club. The firm sought to

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109 *Lord Goff of Chieveley, Senior Law Lord – Obituary*, THE TELEGRAPH, (Aug. 18, 2016, 5:29 PM), https://www.telegraph.co.uk/obituaries/2016/08/18/lord-goff-of-chieveley-senior-law-lord—obituary/.

110 *Id.*

111 *See* Gareth Jones, *An Eightieth Birthday*, TRINITY ANNUAL RECORD 2011, (speech delivered on Nov. 10, 2010), https://www.trin.cam.ac.uk/wp-content/uploads/jones_gareth_80th_Birthday.pdf.

112 *See generally* ROBERT GOFF AND GARETH JONES, THE LAW OF RESTITUTION (Sweet & Maxwell 1966).

113 Kull, *supra* note **Error! Bookmark not defined.**, at 297.

114 Orakpo v. Manson Inv. Ltd [1978] AC 95, 104 (Eng.).

115 Lipkin Gorman v. Karpnale Ltd [1991] 2 AC 548 (Eng.). For a detailed consideration of the judgment, *see* Lionel Smith, *Simplifying Claims to Traceable Proceeds*, 125 L.Q. REV. 338 (2009) (Eng.).

recover the money from the Club, by an action in equity for knowing receipt or at common law for money had and received, or from the bank in equity by way of accessory liability, as the bank manager had known that Cass was a gambler.[116] The Trial Judge, Alliott J, considered the matter and held that the firm could not recover against the Club by way of knowing receipt,[117] but could against the bank on a theory of accessory liability.[118] The Court of Appeal allowed the bank's claim against its accessory liability.[119] The House of Lords found, however, that by following the money — using common law following and tracing principles[120]— into the Club's possession, the firm could recover its money by way of "money had and received" (or unjust enrichment, in other words). Because this was a gambling contract, the Club could not claim to have given consideration for the money.[121] The five lords unanimously accepted that the Casino had to repay the solicitors because it had been unjustly enriched.[122] In particular, Lord Goff, relying on the judgment of Lord Mansfield in *Moses v. Macferlan*,[123] and Lord Templeman noted: "On principle and on authority a donee is bound to reimburse the victim for stolen money received and retained by the donee and, in the circumstances, the club was unjustly enriched to the extent that the solicitors' money was retained by the club."[124]

Although restitution may have lost its attraction for many proponents as a general area of the common law, unjust enrichment is now an accepted cause of action in England, albeit perhaps differing slightly from an action for "money had and received."[125] More than any other area of the common law, restitution and unjust enrichment have been confused by the dogmatic approach taken by some of their

116 *Lipkin Gorman*, [1991] 2 AC, at 559.

117 Lipkin Gorman v. Karpnale Ltd [1987] 1 WLR 987 (HC) 988-989, 1005-1006, 1007, 1008.

118 *Id.* at 989, 996-997, 1012, 1014.

119 Lipkin Gorman v. Karpnale Ltd [1989] 1 WLR 1340 (CA) 1341-2, 1355–1360.

120 "Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old." Foskett v. McKeown [2001] 1 AC 102 (HL) at 127-128 (Eng).

121 Such contracts were void by the Gaming Act 1845, 8 & 9 Vict. c. 109, § 18 (Eng.), repealed Sept. 1, 2007 by the Gambling Act 2005, 2005 c. 19, § 356(3)(d), sch. 17 (Eng.).

122 Lord Bridge of Harwich, Lord Templeman, Lord Griffiths, Lord Ackner, and Lord Goff of Chieveley.

123 *Lipkin Gorman,* 2 AC at 571.

124 *Id.* at 566.

125 CHARLES MITCHELL ET AL., GOFF & JONES: THE LAW OF UNJUST ENRICHMENT (8th ed. 2011).

adherents, and these doctrines usually lack authority outside of the writings of these adherents.[126]

B. Legal Sources

Unjust enrichment in English common law is entirely judge made, but is heavily influenced by academic opinion. The common law authority for the specific unjust enrichment action is the *Lipkin Gorman v Karpnale Ltd.* case,[127] as interpreted by subsequent judgments and by academics.

C. Basic Rule(s)

The basic principle behind a claim for unjust enrichment at common law was explained by Lord Millett in *Foskett v. McKeown*: "A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff's expense, for he cannot have been unjustly enriched if he has not been enriched at all."[128]

The modern framework for approaching claims for unjust enrichment has been repeated in a number of decisions including *Benedetti v. Sawiris*,[129] where the Supreme Court noted that it is now well-established that the court must pose four questions when faced with a claim for unjust enrichment: "(1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust?[130] (4) Are there any defences available to the defendant?"[131]

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126 *Cf.* Peter G. Watts, *'Unjust Enrichment'—The Potion that Induces Well-meaning Sloppiness of Thought*, 69 CURRENT LEGAL PROBS. 289 (2016); Lionel Smith, *Restitution: A New Start?*, in THE IMPACT OF EQUITY AND RESTITUTION IN COMMERCE (Peter Devonshire & Rohan Havelock eds. 2019), 91, 92 [hereinafter Smith, *Restitution: A New Start?*] (". . . many scholars . . . have unintentionally . . . avoided . . . . [to articulate the causes of action] by simultaneously acting as if there is only one cause of action in unjust enrichment, while also acting as if there are multiple cause of action in unjust enrichment.").

127 *Lipkin Gorman*, [1991] 2 AC 548.

128 [2001] 1 AC 102 at 129.

129 [2013] UKSC 50, [2014] AC 938, 955 [10]. These questions have been approved in other common law jurisdictions, such as Hong Kong. *See* Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd (2004) 7 H.K.C.F.A.R. 79, [2004] 2 H.K.L.R.D. 548, per Ribeiro PJ, at [67].

130 Based on "unjust factors" such as mistake, undue influence and ignorance.

131 Foskett v McKeown [2001] 1 AC 102, 129. *But see* Robert Stevens, *The Unjust Enrichment Disaster*, 134 L.Q.R. 574, at 576 (2018).

A specific defense available to a claim of unjust enrichment is the change of position defense, which was explained and applied by Lord Goff in the case of *Lipkin Gorman v. Karpnale Ltd*:[132]

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.[133]

Sometimes now referred to as the "good faith change of position defence," the defendant must have acted in good faith in receiving and spending the money.[134] If the defendant expended the money in such a way as to make the defendant repay, that would now leave the defendant in a worse position than she was before she received the money; the court therefore would not order them to return it. Thus, the essential question for the court when considering the defense of change of position is "whether on the facts of a particular case it would in all the circumstances be inequitable or unconscionable, and thus unjust, to allow the recipient of the money paid under a mistake of fact to deny restitution to the payer."[135]

D. What is the Function of the English Law of Unjust Enrichment?

In English common law, unjust enrichment serves as a cause of action to recover money lost by one party, which in some form is identifiable as money received by another who has been enriched by this money and has no legal right to retain it. The late academic Peter

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132 *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 AC 548 (Eng.).

133 *Id.* at 579F. *But see* Stevens, *supra* note 131, at 592 (". . . the authorized payment out of partnership assets should have been, and was, a sufficient basis for a claim by the firm . . . against the club.").

134 Arlen Duke, *The Knowing Receipt Knowledge Requirement and Restitution's Good Faith Change of Position Defense: Two Sides of the Same Coin*, 35 U. W. AUSTL. L. REV. 49 (2010-2011) (Austl.).

135 Niru Battery Manufacturing Co. v. Milestone Trading Ltd [2003] EWCA Civ 1446, [2004] Q.B. 985 at 162 (Eng.) (Clarke LJ endorsing Moore-Bick J's approach).

Birks identified the common principle of unjust enrichment as "the receipt of a mistaken payment of a non-existent debt."[136]

E. What can be Claimed under the English Law of Unjust Enrichment?

In the English common law of unjust enrichment, the sole remedy available is financial compensation. However, academics such as Peter Birks have argued that there was no need for the restriction of unjust enrichment to personal claims, and that an action for unjust enrichment might give rise to a property interest and consequent rights to identify the property in the hands of others or substitutions for the missing money.[137] Thus, Birks considered Lord Millet's comment in *Foskett v. McKeown* [138] that "[t]he transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment" was "unfortunate opposition," although Birks noted it was supported by Lord Browne Wilkinson and Lord Hoffman.[139] This is an example of an important issue in considering the common law of unjust enrichment—there are academic views of what the law should be and there is the law as judges interpret it, and these views do not always coincide, nor should they, as even the academics do not agree. Recently it has been confirmed by the Supreme Court in *Bank of Cyprus UK Ltd. v. Menelaou* that a successful claimant may be granted the equitable remedy of an unpaid vendor's lien. [140] Although this might seem to support a property interest arising from unjust enrichment, this is an equitable lien, and is therefore a personal interest.

The judgments in *Bank of Cyprus* illustrate that the judiciary has considered the academic case for a property right and, so far, has not accepted it. Lord Kerr and Lord Wilson were in agreement with the judgments of Lord Clarke and Lord Neuberger in dismissing the defendant's appeal and upholding the Court of Appeal's award of the equitable remedy of subrogation to an unpaid vendor's lien over a property purchased.[141] Lord Clarke quoted Lord Millet from *Foskett*

136 PETER BIRKS, UNJUST ENRICHMENT 21 (2d ed. 2005) [hereinafter BIRKS, UNJUST ENRICHMENT].

137 *See id.* at 203-204 (where Birks referred to the "heresy" that "property and unjust enrichment are systematically opposed categories.").

138 [2000] UKHL 29, [2001] 1 AC 102 (Eng.).

139 BIRKS, UNJUST ENRICHMENT, *supra* note 136, at 35.

140 Bank of Cyprus UK Limited v. Menelaou [2015] UKSC 66.

141 *Id*. at 141.

to emphasise that a claimant in unjust enrichment does not need to show a property right,[142] and confirmed that the Bank succeeded "even if the Bank did not retain a property interest in the proceeds of sale of [the original property]."[143] Lord Neuberger noted that the claimant could have succeeded on an orthodox proprietary claim in addition to unjust enrichment.[144] Although Lord Carnworth agreed to dismiss the appeal, he did so using only the doctrine of subrogation, noting he was "less convinced" by Lord Clarke's arguments conflating unjust enrichment and subrogation, and arguing ". . . it is surely time for the principles of restitution or unjust enrichment to be allowed to stand on their own feet. A proprietary remedy may arguably be justified because, as Lord Neuberger says . . . such a remedy, rather than a personal remedy, is the most appropriate response to the unjust enrichment found in this case."[145] However, he concluded this had not been the case argued and was unnecessary here.

IV. CHINESE LAW OF UNJUST ENRICHMENT

A. Historical Development

Unjust enrichment was transplanted into the Chinese legal system in 1911, when the Qing dynasty drafted China's first modern civil code. Nevertheless, the notion that nobody should be enriched without justification can be traced back to Ancient China as set out in the following.

Although the modern concept of unjust enrichment did not emerge in Ancient China, there were scattered legal rules targeting individuals who had obtained benefits without justification in different dynasties. In the Warring States period, *Fa Jing*, the first systematic code in Chinese history, declared that a person who picked up lost property should be put to death.[146] *The Tang Code* declared that anyone who claimed a slave or property of others as his own would be punished as though he had committed a crime and would be whipped

142 *Id.* at 38.

143 *Id.* at 50.

144 *Id.* at 59.

145 *Id.* at 108-109.

146 ZHOU MI, ZHONGUO XINGFA SHI [HISTORY OF CRIMINAL LAW IN CHINA] 181 (1985).

forty times.[147] Codes in the Ming and Qing dynasties also had rules compelling the return of lost property.[148]

The kings and emperors of ancient China used law as a tool to reign. The law was essentially a compilation of ethical customs that did not distinguish private law from public law.[149] As such, it is not surprising that the rules stripping people of gains without justification also imposed criminal punishments on the enriched. Although such rules were not intended to protect individual property rights, they indicated that Ancient Chinese ethics saw the receipt of a windfall gain as morally unacceptable.

From 1902 onwards, the late Qing government initiated a modernization of the legal system. In 1911, the Qing government formulated the first draft of civil law in Chinese history, the *Great Qing Civil Code Draft* ("*Qing Civil Code*").[150] This code, which was heavily influenced by the German *Civil Code* via Japan, [151] transplanted the concept of unjust enrichment into China for the first time. One chapter in Book II, "Obligatory Rights" of the *Qing Civil Code* devoted sixteen articles to unjust enrichment.[152] Article 929 set out the general principle, stipulating:

> A person who obtains benefits by another person's performance or in any other way without legal grounds resulting in another's loss is bound to return the benefits back to him. The duty also exists if the legal grounds fall away subsequently or if a transfer fails to produce the result it was intended to produce in accordance with the contents of the legal act.

147 TANG LÜ SHU YI [THE TANG CODE], 381 (Zhangsun Wuji, 1993).

148 DA MING LÜ [THE LAW OF MING DYNASTY] 82 (Huai Xiaofeng ed., 1999); DA QING LÜLI [THE LAW OF QING DYNASTY] 271 (Zhang Rongzheng ed., 1999).

149 Xingzhong Yu, *State Legalism and the Public/Private Divide in Chinese Legal Development*, 15 THEORETICAL INQUIRIES L. 27, 30-34 (2014) (Isr.).

150 F.T. Cheng, *Law Codification in China*, 6 J. COMP. LEGIS. & INT'L L. 288, 289 (1924).

151 Chen, *supra* note 12, at 163.

152 Articles 929 to 944 of the *Qing Civil Code* regulates unjust enrichment. *See* YANG YOUJIONG, JINDAI ZHONGGUO LIFASHI [MODERN CHINESE LEGISLATIVE HISTORY] 73 (Rev. Ed. 1966); DAQING MINLÜ CAOAN; MINGUO MINLÜ CAOAN [DRAFT CIVIL LAW OF THE GREAT QING DYNASTY; DRAFT CIVIL LAW OF THE REPUBLIC OF CHINA] 121 (Yang Lixin ed., 2002).

> Acknowledgement of the existence or non-existence of an obligation shall be deemed as performance.[153]

The provision was not only nearly identical with Article 812 of the *German Civil Code*,[154] the *Qing Civil Code* borrowed the whole chapter regulating unjust enrichment from the German *Civil Code*. The regulations on unjust enrichment were comprehensive and addressed, amongst other things, the scope of unjust enrichment claims, increased restitutionary liability in certain circumstances, and also defenses. However, as the *Qing Civil Code* was drafted under extreme time pressure,[155] the notion of unjust enrichment was adopted without in-depth research of its history, operation, and setting in the general legal system. Due to the impending collapse of the Qing dynasty, the *Qing Civil Code* was never actually implemented. Instead "it paved the way for future Chinese civil laws" and had far-reaching influence.[156]

The 1911 revolution led by Dr. Sun Yat-Sen turned China into a republic. Despite political turmoil, the governments in the Republic of China never ceased efforts to enact a comprehensive civil code.[157] In 1925, the Beiyang Government completed the *Draft of Civil Law of the Republic of China*. This document reduced the number of provisions concerning unjust enrichment to thirteen (Articles 273 to 285).[158]

In 1930, the Nationalist Government promulgated the *Civil Code of the Republic of China* ("*Republican Civil Code*"), which recognized

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153 *See* Yang ed., *supra* note 152, at 121-23.

154 BGB, § 812, "Claim for restitution," states: "A person who obtains something without legal basis as a result of the performance of another or by other means at his expense without legal basis is obliged to return it.. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. Performance also includes the acknowledgement of the existence or non-existence of an obligation."

155 Lei Chen, *100 Years of Chinese Property Law: Looking Back and Thinking Forward*, *in* 1 TOWARDS A CHINESE CIV. CODE: COMP. & HIST. PERSP. 88, 89 (2012) (Neth.).

156 *Id.*

157 Li Xiuqing, *20 Shiji Qianqi Minfa Xin Chaoliu Yu Zhonghua Minguo Minfa* [*The New Trend of the Civil Law in Early 20th Century and the Republican Civil Code*], 1 ZHENGFA LUNTAN [TRIB. OF POL. SCI. & L.] 124, 124 (2002) (China).

158 *See* Yang, *supra* note 152, at 238-240; *cf.* Chen, *supra* note 12, at 169. The Beiyang Government was the first government acknowledged internationally as representing the Republic of China after the Revolution of 1911.

unjust enrichment as a cause triggering obligations.[159] The number of provisions on unjust enrichment shrunk to five (Articles 179 to 183), with Article 179 providing the general principle, stating, "[a] person who acquired benefits without legal grounds and resulting in another's loss should return the benefits. The duty also exists if the legal ground later lapses."[160]

This was a simplified version of Article 929 in the *Qing Civil Code*, which discarded the dichotomy of performance and non-performance-based unjust enrichment found in the *Qing Civil Code*. The rest of the provisions covered associated matters: those situations where restitution should be barred (Article 180); the scope of restitution for unjust enrichment (Article 181); the restitutionary liability of defendants who knew or did not know the defect in the legal basis (Article 182); and third parties' restitutionary liability (Article 183).[161]

The basis of the *Republican Civil Code* was the *Qing Civil Code*, but a large number of "otiose" provisions were eliminated to achieve brevity and to give space for local customs.[162] The law of unjust enrichment was preserved presumably because it was perceived as adhering to good morals against reaping without sowing. Meanwhile, the simplification reflects that lawmakers may have considered the provisions concerning unjust enrichment in the *Qing Civil Code* excessive and may have thought that such an inarguable notion ought not to be regulated in such a complex way.

The establishment of the People's Republic of China ("PRC"), a socialist country, in 1949 led to the complete abolition of the Republic of China's legal system.[163] The Communist Party has since initiated five rounds of civil law codification.[164] The first four rounds have failed outright, and China is currently engaged in the fifth round.[165]

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159 Liu Yanhao, Bu Dang Deli Fa De Xingcheng Yu Zhankai [The Formation and Development of The Law of Unjustified Enrichment] 203-204 (2013).

160 *Id.* at 204.

161 *Id.* at 204-209.

162 This explanation was given by Hu Hanmin, one of the drafters of the *Republican Civil Code*. *See* Chen, *supra* note 12; *see also* Roscoe Pound, *Chinese Civil Code in Action*, 29 TUL. L. REV. 277, 278 (1955).

163 Xianchu Zhang, *The New Round of Civil Law Codification in China*, 1 UNIV. BOLOGNA L. REV. 106, 111 (2016).

164 Wang Shu, *Minfa Dian Bianzuan Di Yi Bu Zoule Liushisan Nian [It Took 63 Years to Make the First Step of Civil Law Codification]*, XINHUA NET (China) (March 9, 2017), http://www.xinhuanet.com/fortune/2017-03/09/c_129505083.htm.

165 The Civil Code of the PRC was finally promulgated after this article had been finalized on 28 May 2020. The full version is available at: https://news.rednet.cn/content/2020/05/20/7275888.html. According to a

The attempts produced numerous draft civil law codes as discussed further throughout this paper.

The first round of civil codification in the 1950s (from 1954 to 1956) created three versions of the "Law of Obligations" modeled after the law of the Soviet Union.[166] As China had adopted a planned economy model after its establishment in 1949, the law of obligations did not receive much attention.[167] Nonetheless, all three drafts contained three provisions on unjust enrichment and recognized unjust enrichment as a cause triggering obligations alongside tort, contract, and planning legislation.[168] The provisions set out the general unjust enrichment principle and addressed the beneficiary's compensation liabilities and their claim for necessary expenses incurred.[169] However, the concept of unjust enrichment varied between drafts,[170] indicating that the draftsmen were uncertain about what the unjust enrichment concept really entailed.

The second attempt to develop a *Civil Code* (from 1962 to 1964) failed during the time of the chaotic Cultural Revolution. The drafts produced during that attempt contained no regulations on unjust enrichment,[171] but rather focused on the planned economy and state intervention.[172]

The PRC did not launch its third round of codification until the late 1970s after the end of the Cultural Revolution and the beginning of the economic reforms. Four drafts appeared between 1979 and 1982, all of which contained a single provision on unjust enrichment. The provision on unjust enrichment in the first and second draft was identical and located in the chapter concerning tort liabilities.[173] For the third and the fourth drafts, this provision remained roughly the same, but was moved to the chapter titled "Liabilities."[174] It also

preliminary analysis of the provisions on unjust enrichment of the Civil Code, the conclusions in this article remain unaffected.

166 *Cf.* MO ZHANG, CHINESE CONTRACT LAW: THEORY AND PRACTICE 30 (2006).

167 Liu, *supra* note 159, at 211.

168 HE QINHUA ET AL., XIN ZHONGGUO MINFADIAN CAOAN ZONGLAN [AN OVERVIEW OF THE DRAFTS OF CIVIL CODES OF NEW CHINA] 179-180, 204, 247 (2003).

169 *Id.*

170 *Id*. at 180, 204, 247, 250.

171 Liu, *supra* note 159, at 216.

172 *Id.* at 216.

173 HE QINHUA ET AL., *supra* 168, at 430, 484 (2003).

174 *Id.* at 556, 618.

clarified that benefits obtained without legal basis should belong to the state when the victim could not be traced.[175]

It was at this time when Chinese academics began researching the area of unjust enrichment. Prior to this, unjust enrichment was generally considered as an event which generated liabilities, rather than an obligatory right for citizens.[176]

The civil law codification was temporarily put on hold after the drafts were completed due to uncertainties regarding the direction of certain economic and legal reforms.[177] Instead, lawmakers promulgated a series of separate civil law statutes to meet the urgent needs of economic and social development. The *General Principles of Civil Law of PRC* ("*GPCL of 1986*") were promulgated in 1986,[178] playing the role of an interim and simplified version of a *Civil Code*. The *GPCL of 1986* defines unjust enrichment as a source generating obligatory rights in Article 92: "Where a person acquires benefits improperly without a legal basis and causes another's loss, the person shall return the benefits to the person suffering a loss."[179]

The *Supreme People's Court of the PRC* ("SPC") supplemented one judicial interpretation explaining the scope of the return of benefits obtained unjustly. It states that: "The returned unjust benefits shall include the original object and the fruits arising therefrom; other benefits obtained by using the enrichment obtained unjustly shall be taken over by the state after deducting the expenses of labour services overheads".[180]

The civil law draft produced in the fourth codification round in 2002 adopted Article 92 of the GPCL with no changes.[181]

As noted above, China is in the process of formulating a unified *Civil Code* scheduled for completion in 2020. As part of this endeavor, the *General Provisions of the Civil Law of the PRC* ("*General Provisions*") were promulgated on 15 March 2017, which will be the

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175 *Id.* The relevant additional sentence read as follows: ". . . When the person suffering the loss is unknown, the benefits should be transferred to the state. . . ."

176 Liu, *supra* note **Error! Bookmark not defined.**, at 217.

177 ZHANG, *supra* note 166, at 111.

178 Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law of the PRC] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987, last amended Aug. 27, 2009) [hereinafter GPCL of 1986].

179 GPCL of 1986, art 92.

180 *Id.* Note that the wording of this provision is not completely clear as to the Chinese state's involvement.

181 Fu Guangyu , "Zhongguo Minfadian Yu Bu Dang De Li: Huigu Yu Qianzhan" [The Chinese Civil Code and Unjustified Enrichment: Retrospect and Prospect] (2019) 1 Huadong Zhengfa Daxue Xuebao [ECUPL Journal] 116, 120.

first chapter of the future Civil Code.[182] Like the *GPCL*, the *General Provisions* sets out general private law rules, but does not include those provisions concerning specific civil law subjects in the *GPCL*, e.g. contract, intellectual property and tort liability. Currently, the *GPCL* and the *Opinions on the GPCL of 1986* are not rescinded, and thus remain in force to the extent that they do not contradict the *General Provisions*.[183] In respect of the regulation of unjust enrichment, Article 122 of the *General Provisions* nearly reproduces Article 92 of the *GPCL*.[184]

Draft versions of other parts of China's new *Civil Code* (the "Draft") were submitted to the National People's Congress Standing Committee ("NPCSC") for first deliberation on August 28, 2018.[185]

The Draft contained five specific provisions on unjust enrichment in Chapter 28 of Book II, titled "Contract."[186] These provisions set out the circumstances where restitution should be barred (Article 768), the restitutionary liability of defendants who knew or did not know the defect in the legal basis (Articles 769 and 770), third party restitutionary liability (Article 771), and emphasized that the law of unjust enrichment should apply where a person manages another's affairs as his own intentionally or mistakenly (Article 772).[187] Interestingly, these provisions were to a large extent similar to the regulations regarding unjust enrichment in the *Republican Civil Code*. A revised draft of Book II, "Contract" of the Draft was then submitted to the NPCSC on January 4, 2019, with no changes to the provisions on unjust enrichment.[188] However, the sub-chapter on unjust

182 Zhonghua Renmin Gongheguo Minfa Zongze [General Provisions of the Civil Law of the PRC] (promulgated by the NPC, Mar. 15, 2017, effective Oct. 1, 2017).

183 Zhonghua Renmin Gongheguo Lifa Fa [Legislation law of the PRC] (promulgated by the NPC on 15 March 2000, effective since 1 July 2000, last amended on 15 March 2015). According to Article 92 of the *Legislation Law of the PRC*, if the discrepancy arises between new provisions and old provisions, new provisions shall prevail.

184 *Supra* note 178 at art. 92; *supra* note 182, art 122. Article 122 of the *General Provisions* stipulates: "A person suffering a loss due to another person's obtainment of unjust benefits without a legal basis is entitled to require such person to return the unjust benefits."

185 *Minfa Dian Ge Fenbian* (Caoan) (Zhengqiu Yijian) [The Individual Books of the Civil Code (Draft) for Consultation], http://www.rcees.ac.cn/tz/tzgg/zlyghyjs/201809/W020180917470224477866.pdf.

186 *Id.*

187 *Id.*, at art. 768-72.

188 Minfa Dian Hetong Bian (Caoan) (Er Ci Shenyi Gao) [The Book of Contract of the Civil Code (Draft) for Second Deliberation], http://www.sinotf.com/GB/102/1021/10212/2019-01-04/3MMDAwMDMyODg3Mw.html.

enrichment is now interestingly located in Part III titled "Quasi-Contract" with the other sub-chapter of Part III "Quasi-Contract" titled "*Negotiorum Gestio*."[189] The reason for such arrangement may be that provisions as to unjust enrichment and *negotiorum gestio* cannot fit into the six individual books of the Civil Code (the Rights *in Rem*, Contract, Personality Rights, Marriage and Family, Inheritance, and Tort Liability).

The Draft versions represent the first attempt to develop the Chinese law of unjust enrichment in recent decades. The China Academy of Social Sciences and the China Law Society had been entrusted to write up several draft proposals for the new *Civil Code*.[190] The process had started as early as in the year 2000. The provisions of the Draft versions on unjust enrichment mostly follow the proposals prepared by China Academy of Social Sciences. Professor Liang Huixing, who has been involved in civil law codification in China for decades, was in charge of the overall drafting,[191] and Professor Zou Hailin drafted the chapter concerning unjust enrichment in the proposal.[192]

In 2002, Professor Wang Liming of Beijing's Renmin University had been entrusted by the Legislative Affairs Committee of the NPCSC to prepare a draft of a part of the *Chinese Civil Code*, which was published in 2004.[193] The provisions of his draft concerning unjust enrichment are similar to those of Professor Liang Huixing's

189 *Id.*

190 Liang Huixing, Minfa Dian Bianzuan Zhong De Zhongda Zhenglun, *Debates on the Important Issues in the Civil Law Codification*, 3 GANSU ZHENGFA XUEYUAN XUEBAO (J. GANSU POL. SCI. & L. INST.) 1, 5 (2018) (China).

191 *See generally* LIANG HUIXING, ZHONGGUO MINFADIAN CAOAN JIANYIGAO [A PROPOSITIONAL VERSION FOR CIVIL CODE DRAFT OF CHINA], (3d ed. 2013).

192 *Id*. at § 2 of Chapter 21.

193 *See generally* WANG LIMING, ZHONGGUO MINFADIAN CAOAN JIANYIGAO JI SHUOMING [A PROPOSITIONAL VERSION FOR CIVIL CODE DRAFT OF CHINA AND ILLUSTRATION] (2004).

proposal manuscript,[194] and both relied heavily[195] on the German *Civil Code*,[196] the Japanese *Civil Code*, and the *Civil Code* of Taiwan.[197]

B. Legal Sources

Chinese law follows the civil law tradition in that it relies on codified rules promulgated by the legislature or authorized governmental bodies.[198] Additionally, past court decisions have no precedential effect. However, the SPC has the authority to issue judicial interpretations which have full legal force.[199] Since 2013, China has developed a "Guiding Cases System" to standardize court practice,[200] yet these guiding cases are non-binding,[201] and none of the guiding cases published so far have addressed unjust enrichment scenarios.

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194 *See id.* at 161; LIANG, *supra* note 191, at 142-43.

195 ZHONGGUO MINFADIAN CAOAN JIANYIGAO FU LIYOU: ZHAIQUAN ZONGZE BIAN [A PROPOSITIONAL VERSION WITH REASONS FOR CIVIL CODE DRAFT OF CHINA ON THE BOOK OF GENERAL PROVISIONS OF OBLIGATORY RIGHTS] 18-38 (Liang Huixing ed., 2013). The French *Civil Code*, Macau's *Civil Code* and the Austrian *Civil Code* were also mentioned, but less frequently.

196 LIANG HUIXING, ZHONGGUO MINFADIAN CAOAN JIANYIGAO FU LIYOU: ZHAIQUAN ZONGZE BIAN (A PROPOSITIONAL VERSION WITH REASONS FOR CIVIL CODE DRAFT OF CHINA ON THE BOOK OF GENERAL PROVISIONS OF OBLIGATORY RIGHTS) 18-38, (2013). (The French *Civil Code*, Macau's *Civil Code* and the Austrian *Civil Code* were also mentioned, but less frequently).

197 Due to historical reasons, the *Civil Code* of Taiwan is the *Republican Civil Code* amended over time. This partly explains why the provisions on unjust enrichment in the Draft are so similar to the provisions of the *Republican Civil Code*.

198 Zhonghua Renmin Gongheguo Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective Jul. 1, 2000; last amended Mar. 15, 2015) 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

199 Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo De Jueyi [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective the same date) 1981 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).; CHEN, L., & DIMATTEO, CHINESE CONTRACT LAW: CIVIL AND COMMON LAW PERSPECTIVES 3,7 (Larry A. DiMatteo ed., 2018).

200 Guanyu Anli Zhidao Gongzuo de Guiding [Provisions on Case Guidance] (promulgated by the SUP. PEOPLE'S CT., November 26, 2010, effective the same date) 2010 (China).; *cf.* for the system in general, Stanford University Law School, *China Guiding Cases Project*, CGCP, https://cgc.law.stanford.edu.

201 Wolff, *Comparing Chinese Law ... But with Which Legal Systems?*, s*upra* note 4, at 168.

C. Basic Rule(s)

As explained above,[202] the law of unjust enrichment currently in force in China only consists of one legal provision and one judicial interpretation, which is Article 122 of the *General Provisions*, supplemented by Article 131 of the *Opinions on the GPCL*.[203]

D. What is the Function of the Chinese Law of Unjust Enrichment?

There is no unanimous view regarding the function of the Chinese law of unjust enrichment. The above historical review in section IV(A) of this article indicates that the doctrine of unjust enrichment may accord with traditional Chinese social values, i.e., that one should not benefit at the cost of others. It is unlikely, however, that the law of unjust enrichment has been preserved in China because it accords with the traditional Chinese values. As also shown throughout the above sections, a Chinese unjust enrichment doctrine seems to be more indicative of a legal transplantation process over the years. Ultimately, the law of unjust enrichment serves as a corrective aid, which applies when no other law allows retrieval of enrichments gained without a legal justification, thus functioning as a final resort in pursuit of fairness and justice.

E. What can be Claimed under the Chinese Law of Unjust Enrichment?

According to Article 131 of the *Opinions on the GPCL*, a plaintiff claiming unjust enrichment can seek the return of the object obtained without legal basis and fruits arising therefrom. The in-kind return therefore appears to be the primary remedy. The current Chinese law of unjust enrichment does not offer any specific rules on the legal consequences if the unjustly received benefits have been destroyed, damaged, lost, or cannot be returned, as is the case for the supply of services or the use of another's property.[204]

202 *See* discussion *supra* Section IV(A).

203 *See* discussion *supra* Section IV(A).

204 The specific provisions of unjust enrichment in the Draft neither explain the scope of unjustly obtained benefits to be returned nor the mode of return.

V. COMPARATIVE ANALYSIS

A. General

The previous sections have outlined milestones of the development of the law of unjust enrichment in Germany, England, and China. This section now attempts a meta-level comparative analysis. Again, it is important to note that this analysis is not concerned with the detailed stipulations of the unjust enrichment regimes in the three jurisdictions over time, but rather it aims to explore if there are similar key factors which have shaped the historical development of this area of law despite the obvious differences of the three legal systems.

The comparative analysis is structured along three hypotheses which are tested in subsequent sections. The first hypothesis, as further discussed in Section V(C), is that in all three jurisdictions, the development of the law of unjust enrichment was driven by legal academia. According to the second hypothesis, as further discussed in Section V(D), German law with its Roman law roots stood as a model for the design of the English and the Chinese unjust enrichment doctrines, thus continuing the errors of the unjust enrichment rules of the German *Civil Code*. The final hypothesis, as further discussed in Section V(E), concerns the very fundamentals of the law of unjust enrichment. It suggests that the very basic idea underpinning the law of unjust enrichment was flawed all along, thus causing theoretical and practical difficulties not just in Germany, England, and China, but also in other jurisdictions that maintain unjust enrichment regimes.

To set the scene for testing these hypotheses, we first summarize the development of the law of unjust enrichment as follows.

B. Key Factors Which Have Shaped the Historical Development of the Law of Unjust Enrichment in Germany, England, and China

Prior to the enactment of the German *Civil Code* in 1900, the German law of unjust enrichment relied on Roman law as interpreted and applied in a rather unsystematic way by contemporary legal practice. The enactment of the German Civil Code in 1900 did not improve the situation. The section on unjust enrichment of the German *Civil Code* still took reference to the Roman *actiones* system and was

potentially also influenced by other schools of thought, such as the natural law doctrine of restitution. However, most importantly it saw that the law of unjust enrichment was based on one single principle which serves as the basis of all unjust enrichment claims. This approach, however, failed to anticipate later doctrinal developments. In particular, the drafters of the German *Civil Code* did not consider that it was necessary to acknowledge "fundamental functional and doctrinal differences between different claims collected under the heading of unjustified enrichment,"[205] (e.g., that a distinction between performance-based and non-performance based unjust enrichment,[206] and probably also other claim types, is required).[207]

While the single-principle approach was also adopted in other jurisdictions, there are two important distinguishing features of the German law of unjust enrichment. First, the fact that the German law of unjust enrichment is codified makes changes extremely difficult, despite the commonly acknowledged problems of the statutory wording. In fact, the development of the German law of unjust enrichment after the enactment of the German *Civil Code* was dominated by attempts to justify deviations from the statutory text, which had been drafted in different times without knowledge of future developments, in particular, without appreciation of the necessary distinction between performance-based unjust enrichment claims from claims concerning unjust enrichment by other means.[208] It is not surprising that this has led to many problems and controversies.

Second, because German private law adopts the principle of abstraction,[209] some tool is needed to undo those property transfers, which are paradoxically valid despite the lack of a basis in law. The law of (performance-based) unjust enrichment provides this tool, and

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205 Jansen, *supra* note 10, at 125 ("premature"); FIKENTSCHER & HEINEMANN, *supra* note 35, at 858 ("The fundamental differentiation between performance-based *condictio* and non-performance based *condictio* is reflected by the law in an only unsatisfactory manner.") (translation by the authors).

206 Dieter Reuter, *2. Teilband*, *in* UNGERECHTFERTIGTE BEREICHERUNG [UNJUSTIFIED ENRICHMENT] 632 (Dieter Reuter & Michael Martinek eds., 2d ed. 2016).

207 Jansen, *supra* note 10, at 135; Schäfer, *supra* note 17, at 2591. *Cf.* FIKENTSCHER & HEINEMANN, *supra* note 35 (listing seven types of performance based and six types of non-performance-based unjust enrichment claims); LOEWENHEIM, *supra* note 24, at 13-14; Reuter, *supra* note 206, at 190-191, 602.

208 Jansen, *supra* note 10, at 135 ("[T]oday there is a huge gap between the wording of the codes' general clauses on unjustified enrichment and the law as it is actually applied."); Reuter, *supra* note 206, at 602.

209 *See* discussion *supra* Section II(D).

thus fulfills an important function within the German private law system.

The English law of unjust enrichment has mainly been shaped by two authoritative cases decided by judges who shared many common characteristics. Lord Mansfield and Lord Goff were both born in Perthshire in Scotland, both well versed in Roman law, and both known as not averse to looking to continental European jurisdictions for solutions to the problems they faced in their judicial work. Lord Mansfield was renowned for bringing equity into the common law at a time when the courts of Chancery and common law were jurisdictionally separate. Lord Goff advocated the availability of the remedies of equity for common law actions and borrowed from civilian jurisdictions.[210]

Lord Goff was one of the foremost academic-judges, and there is no area of the English common law which has been subject to so much influence from academic debate as the "cult of restitution" and the common law action for unjust enrichment. The debate regarding the existence, function, and value of restitutionary remedies also from the United States was influential in casting Lord Goff's writings, which became "Goff & Jones: The Law of Restitution."[211] Subsequently, the writings of professors Birks, Smith, and Burrows, amongst others, have helped shape the modern law of unjust enrichment, arguably adding to "the glorious uncertainty of the Law,"[212] with Lord Carnwath noting in *Bank of Cyprus UK Ltd. v. Menelaou*:

> I should make brief reference to some of the academic discussion, if only to note the lack of consensus on the issues before us. Indeed, there are few more hotly debated issues among specialist academics in this field than the scope of the remedies, personal or proprietary, for unjust enrichment.[213]

The Chinese law of unjust enrichment finds its historical roots in the late Qing dynasty and is a product of legal transplant. Although

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210 *See White v. Jones* [1995] 2 AC 207 (UK) (where Lord Goff famously borrowed from German law in deciding that a solicitor owed a duty of care to proposed beneficiaries under a will he was drafting).

211 Kull, *supra* note 98.

212 As proposed in a toast given in 1756 by Mr. Wilbraham in Serjeant's Hall following Lord Mansfield having overruled several ancient legal authorities. *See* Julius J. Marke, *The Glorious Uncertainty of Law Librarianship*, 57 LAW LIBR. J. 2 (1964).

213 *Bank of Cyprus UK Ltd v. Menelaou* [2015] UKSC 66 (UK).

China has been through tremendous transitions from feudalism to the current socialist system, China's legal system has never seen an absolute break from the past. The Qing government's reception of the civil law tradition laid the foundation for the Chinese law of unjust enrichment, using German law as the archetype but without sufficient reflection on the viability of the German-style law of unjust enrichment imposed in China. Later codification, as well as draft legislation and legislative initiatives, do not seem to have paid very much attention to the law of unjust enrichment, but have apparently as well relied directly or indirectly via references to Japanese or Taiwanese law on the German model.

There is one interesting aspect of the historical development of China's law of unjust enrichment that mirrors China's conversion to a socialist state in 1949. This is the fact that drafts of a Chinese *Civil Code* published in the early 1980s[214] allocated unjust enrichments to the State if a party which has suffered a loss as a result to the unjust enrichment cannot be identified. This very unique feature will be discussed further in this article's comparative analysis below.[215]

The law of unjust enrichment has developed against very different backgrounds in Germany, England, and China. Apart from the adoption of the general unjust enrichment concept, the detailed rules are not the same. However, there is one aspect that all three jurisdictions have in common: the current state of the law of unjust enrichment is equally unsatisfying. It is complex and disputed in all its facets in Germany and England to the extent that it is almost impractical. It is overly simplistic and completely under-researched in China. The question is whether there are similar reasons for the problems which seem to dominate this area of law.

C. Hypothesis No. 1: The Law of Unjust Enrichment Is a Product of Academic Ambitions

The historical survey above[216] showed that in Germany, the development of the law of unjust enrichment was driven by academics. Friedrich Carl von Savigny's attempts to identify the one single principle which underscores the Roman *actiones*, Professor Fritz Schulz's claim that the law of unjust enrichment aims to remedy the infringement of rights, and finally the discovery by Professor Walter Wilburg that a distinction must be made between performance-

214 *See* the discussion *supra* Section IV (A).

215 *See* discussion *infra* Section V(D).

216 *Supra* Section II (A).

based enrichment and enrichment by other means[217] are all milestones for the German law of unjust enrichment, which was developed through German legal academia. Furthermore, the often fierce academic disputes over the successes and failures of the German law of unjust enrichment are well-known and may have contributed to the overall confusion in this area of law.

While the influence of academic work on Germany's legal practice in general is acknowledged, the same cannot be said about England.[218] It is therefore surprising to note that the English law of unjust enrichment was also heavily influenced by academics, or at least by judges with academic interests.[219] As explained above,[220] the works of Lord Goff with his broad academic interests and Professor Gareth Jones stand out in this respect. Like in Germany, the academic debate regarding the law of unjust enrichment has remained vibrant, and even very fundamental issues are nowadays highly controversial.

China is altogether different. While the provisions on unjust enrichment of the latest draft of a Chinese *Civil Code* have been prepared by professors, this was not done as an academic exercise in the sense of an idea-driven development of new ideas, but contract work for lawmaking bodies.[221] Otherwise, it appears that the influence of academia on the development of the law of unjust enrichment in China has not been very strong. In this context it also important to note that the law of unjust enrichment has in no way been a prominent theme in China's modern private law theory and practice.

Leaving China aside, one may speculate that the involvement of academics in the development of the law leads to a higher level of sophistication or—put more bluntly—a more theoretical approach which may not necessarily reflect practical needs. Indeed, some do believe that academics engage in academic discourse for the sake of the discourse rather than for pragmatic solutions. Furthermore, all this could lead to the suspicion that the strong academic involvement in the development of the German and English law of unjust enrichment was one of the roots of the problem with modern unjust enrichment doctrine. However, while academic work has driven the development of the law of unjust enrichment in Germany and England, there is no hard evidence that the impact of such work has led to (mainly)

217 *See* discussion *supra* Section II(A).

218 For a detailed discussion of the perception and reality, *see* NEIL DUXBURY, JURISTS AND JUDGES: AN ESSAY ON INFLUENCE (2001).

219 *See* discussion *supra* Section III(A).

220 *Id.*

221 *See* discussion *supra* Section IV(A).

negative outcomes. What the above historical survey has demonstrated, however, is that academics and academically minded judges in England and China have considered and relied on foreign law to address problems of and thus shape domestic law.[222]

D. Hypothesis No. 2: The Law of Unjust Enrichment in England and China Is a Continuation of German Errors

As discussed earlier in this article,[223] the relevant section of the German *Civil Code* governing unjust enrichment was drafted pursuant to disputed and untested theories with reference to the Roman *actiones* system and in ignorance of subsequent doctrinal developments. In particular, the drafters of the German *Civil Code* founded the law of unjust enrichment on one general principle. They did not envisage and could therefore not incorporate the later realization that a distinction must be made between performance-based enrichments and enrichments by other means.[224] As a result, the text of the German *Civil Code* reflects differing, partly contradicting, and premature approaches to unjust enrichment law in general and to specific questions of this field. The resulting complexity and confusion was previously outlined above in Section V(A).

As stated previously, the development of the Chinese law of unjust enrichment[225] has heavily relied on German law.[226] At times, the Chinese law of unjust enrichment was essentially a carbon copy of the German codification.[227] If the German law of unjust enrichment has had such a strong influence on the development of unjust enrichment rules in China, then it can be safely assumed that the main problems of the German system have been adopted as well.

It is questionable if the same can also be said for the development of the English law of unjust enrichment. While it stands to reason that civil systems, including Roman law, have had their impact, the United States' *Restatement of Unjust Enrichment* was certainly influential as well.[228] Blaming (only) German law for the difficulties of the current English law of unjust enrichment, therefore, does not seem to do be appropriate. In particular, this is true because the post-First and

222 *See* discussion *supra Section* III (A) and IV (A).
223 *Supra* Section II (A).
224 *Supra* Section II(A).
225 *Id.*
226 *See* discussion *supra* Section III(A).
227 *See* discussion *supra* Section IV(A).
228 *See* discussion *supra* Section III(A).

Second World War debates would have studiously avoided any connection to German law, and instead emphasized Roman law, or even U.S. law. What can be observed, however, is that similar to German and Chinese law, English law also eventually incorporated the law of unjust enrichment as one which is based on one single unjust enrichment law principle.[229] The next logical question would therefore be whether adherence to this principle is the source of the problems in all three jurisdictions.

E. Hypothesis No. 3: The Law of Unjust Enrichment Itself is a Misperception

The core notion of the law of unjust enrichment follows the single basic principle that those who have unjustifiably gained something without legal basis must return it.

> Speaking in abstract terms, one person obtains an advantage at the expense of another without any agreement or final legal allotment. Formulated in a more concrete way, however, this covers circumstances from almost areas of private law.[230]

This idea is reflected in Pomponius' famous statement that "[b] by the law of nature it is just that no one should be enriched by another's loss or injury.."[231] This notion has been adopted by the German *Civil Code*,[232] and it is also the *ratio legis* of the English and the Chinese laws of unjust enrichment.[233] Intriguing as this idea sounds, it may be overly-simplistic and thus have blurred the view of what the law of unjust enrichment can or should do, and why.[234] Two fundamental observations have to be made in this regard.

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229 *Supra* Section III (A).

230 Schäfer, *supra* note 17, at 2581 (translated by the authors).

231 S.P. SCOTT, THE CIVIL LAW, 4 THE ENACTMENTS OF JUSTINIAN: THE DIGESTS (PANDECTS), Book XII, Tit. 6(14), *supra* note 20.

232 *See* discussion *supra* Section II(A).

233 *See* discussion *supra* Sections III(A) & IV(A).

234 Stevens, *supra* note 131, at 576 ("The subject lacks even the weak formal unity of being concerned with the same kind of 'enrichment,'"); *id.* at 600 ("The first problem is the continued use of the unified concept of unjust enrichment . . ."); *see also* Smith, *Restitution: A New Start?*, *supra* note 126, at 93 (". . . the problem is this: Birks, and others, have assumed or taken for granted that all examples of liability in the law of unjust enrichment fall under a single cause of action, and so must be treated alike in a strong sense, the elements of the claim must be the same, the defences must be the same, the things that are not relevant . . . must be the

First, Pomponius' statement alone does seem to imply that there is one general principle which underpins all claims in unjust enrichment. The drafters of the German *Civil Code* adopted this idea, and England and China followed. It must not be forgotten, however, that in Pomponius' time, different actions were available, and above-referenced statement was just one option of many.[235] Furthermore, the prevailing opinion in Germany now assumes—correctly, in the authors' view—that the regulation of unjust enrichment scenarios must distinguish between different enrichment modes.[236] This, however, makes it almost impossible for all unjust enrichment claims to be based upon the same general principle. In other words, upholding the claim that the law of unjust enrichment is based on one single principle, even though different enrichment scenarios require somewhat different regulatory treatment, is an invitation for confusion and practical problems, and has led to precisely this result.

Second, the general focus of the law of unjust enrichment is on the enrichment of the party who has gained benefits without legal basis. The enrichment without legal justification is not only seen as the ultimate rationale, but also as determinative of the scope of enrichment claims and possible defenses. Accordingly, the enrichment of the debtor has named this entire area of law.

Why, however, should it be the enrichment of defendants and not rather the loss of claimants in unjust enrichment claims which is most important concern in this area of law? Imagine the situation where a person is enriched without a legal basis, but without any loss on the part of anybody else. Would a private law regime, which is concerned with the relationships between private parties, even consider stripping the enriched party of its benefits in circumstances of this kind?[237] Private law does not carry any penal functions,[238] and in any event it would not be clear what an "enriched" person should be punished for even if there were no legal basis for such enrichment. Consequently, the focus of this entire area of law could be wrong. Contrary to conventional understanding, the starting point in all unjust enrichment cases might rather be the loss on the part of the claimant.

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same."). *But cf.*Andrew Burrows, *In Defence of Unjust Enrichment*, 78 CAMBRIDGE L. J. 521 (refuting Stevens and Smith).

235 *See* discussion *supra* Section II(A).

236 *Cf.* discussion *supra* Section II(A); *see also* LOEWENHEIM, *supra* note 24, at 14.

237 *Cf.* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 183-188.

238 *Id.* at 185.

In fact, this conclusion seems to be mandated by the prevailing German understanding that the law of unjust enrichment governs claims which relate to performance-based enrichments on the one hand, and enrichments by other means on the other hand. As explained above, [239] it is commonly accepted in Germany that performance-based unjust enrichment claims are similar to other claims available under the German law of obligations requiring one party to return property to another, e.g., at the end of the term of a lease or a loan or when somebody withdraws from a contract.[240] For these claims, which are not unjust enrichment claims, it is always the claimant's position which determines the general scope and the specifics of what can be recovered. And, so should it be in unjust enrichment claims.

Also, what this all means is that a complete re-branding of this whole area of law should be considered. It should not be labelled as the "law of unjust enrichment," but rather as the "law of unjust de-enrichment."[241] Apart from the fact that this will help to overcome most of the existing contradictions and to solve the resulting problems, it will have rather obvious important practical consequences. Consider the question of what exactly may be claimed in unjust enrichment. If the focus is on the loss of the claimant, it is clear that any gains of the defendant which the claimant would not have made cannot be recovered. In contrast, any gains which the claimant would have made—had she not lost the object of the enrichment to the defendant, but which the defendant did not realize—should be recoverable. Furthermore, any defenses based on the fact that the object of an enrichment has been lost or damaged "should be severely curtailed" [242] and only be permissible where the reason for such loss or damage originates from the sphere of the claimant.[243]

German commentators have vehemently rejected this point of view with reference to the clear text of the German *Civil Code*, which indeed focuses on the enrichment rather than on claimants' loss.[244] But

239 *See* discussion *supra* Section II(A).

240 *See* discussion *supra* Section II(A).

241 *Cf.* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 191; Thomas Krebs, *Review of Lutz-Christian Wolff, Zuwendungsrisiko und Restitutionsinteresse*, 9 RESTITUTION L. R. 248, 249 (2001) ("This argument will surprise common lawyers, who are only just getting used to the idea that the law of unjust enrichment is not concerned with the claimant's loss, but with the defendant's gain.").

242 Krebs, *supra* note 241, at 250.

243 *Cf.* WOLFF, ZUWENDUNGSRISIKO UND RESTITUTIONSINTERSSE, *supra* note 24, at 209-211.

244 Reuter, *supra* note 206, at 352.

why should reliance on the text of the German *Civil Code* be mandatory given the fact that the drafters did not have a clear view of what they were actually regulating? In other words, why should flawed ideas which have found their way into statutory provisions in Germany be upheld, given all the problems which they have caused? And, in any event, England and China are of course not bound by the text of the German *Civil Code*.

It is interesting to contrast these findings with the situation of the Chinese law of unjust enrichment, as embodied in the third and fourth drafts of the Chinese Civil Codes of the 1980s. As reported above, these draft codes provided for one identical unjust enrichment rule in the chapter on "Liabilities."[245] According to this rule, if no one could be identified as having suffered a loss mirroring the unjustified enrichment gained by somebody else, the enrichment was owed to the state. While it has remained unclear how this rule was intended to be applied, these drafts saw unjust enrichment as a liability rather than an obligatory right, and therefore the drafts' focus on the enrichment itself made sense. Similarly, Article 131 of the SPC's *Opinions on the GPCL* provided that, in unjust enrichment cases, benefits gained from the enrichment other than fruits should be taken by the state.[246] Here, the State's involvement in private law matters represented the socialist features of only the Chinese legal system.

VI. FINAL REMARKS

It is not possible to go back in time to find truth on the spot. Any historical analysis will consequently always be speculative to a certain extent. The same is correct for the comparative analysis of the historical development of the law of unjust enrichment as conducted for this article. With that said, it is undisputed that this area of law is highly complex and riddled with problems not just in Germany, England, and China, but in almost every jurisdiction across the world.

Our analysis has demonstrated how the unjust enrichment regimes of Germany, England, and China have developed in reliance on a single principle approach, i.e., the idea that any unjustified enrichment should be returned. We have concluded that there are good reasons to assume that problems of the law of unjust enrichment in all three jurisdictions are related to the flaws of this single principle approach, which fails to differentiate between rather different

245 *See* discussion *supra* Section IV(A).

246 *See* discussion *supra* Section IV(A).

scenarios that require different solutions.[247] As intriguing as the single principle approach is, it is time to put an end to the unjust enrichment idea in order to be able to finally solve the mystery which has surrounded this area of law for so long. Interestingly, this would also mean a return to where everything started, i.e. to Roman law which did not have a law of unjust enrichment as such.[248]

247 *Cf.* Smith, *Restitution: A New Start?*, *supra* note 126, at 103 ("the recognition of a plurality of causes of action . . . can solve the problem of overgeneralization. It abandons the idea that there is one giant claim that must be applied consistently across diverse situations.").

248 *See* discussion *supra* Section IV(A).