

# **ON THE CONCEPTUAL ORIGINS OF THE LAW OF UNJUSTIFIED ENRICHMENT IN THE *DRAFT COMMON FRAME OF REFERENCE***

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*Book VII of the Draft Common Frame of Reference presents a codification of the law of unjustified enrichment, derived from European jurisdictions and legal traditions. Yet European private law lacks a ‘common core’ concerning unjustified enrichment. Thus the question arises: where did Book VII’s drafters derive their material, and which national jurisdictions are represented therein? Through comparative analysis, this paper aims to clarify the conceptual origins of Book VII, comment on the causes of divergence in this area of law, and consider the future uses of Book VII.*

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## **I. INTRODUCTION**

The Digest of Justinian contains the fundamental principle from which modern unjustified enrichment<sup>1</sup> law is derived: ‘it is a matter of natural equity that no one should be enriched to the detriment of another’.<sup>2</sup> This

\* BA (University of Melbourne). My thanks go to Martin Vranken of Melbourne Law School and the anonymous reviewers for their insightful comments on earlier drafts of this article. Remaining errors are, of course, my own.

<sup>1</sup> For ease of reference and comparison, the terminology used in this paper is identical with that used in the *Draft Common Frame of Reference*. Thus, while ‘unjustified enrichment’ is usually rendered as ‘unjust enrichment’ in English, this paper will use the former.

<sup>2</sup> Adolf Berger, *Encyclopaedic Dictionary of Roman Law* (American Philosophical

principle informed several discrete actions, the ‘condicitions’, that were available under Roman law.<sup>3</sup> The 18<sup>th</sup> century breathed new life into this Roman learning: Lord Mansfield adopted the condicitions in *Moses v Macferlan*,<sup>4</sup> and Pothier’s enthusiasm informed their selective incorporation in the *Code civil*.<sup>5</sup> This process culminated in the following century, when most of the condicitions, as well as a general enrichment action, were codified in the *Bürgerliches Gesetzbuch* (‘BGB’).<sup>6</sup>

Despite this common Roman origin, the development of unjustified enrichment law across Europe has been highly divergent.<sup>7</sup> As Smits and Mak note, ‘[u]njustified enrichment law is an area for which it remains hard to find a “common core” of European private law’.<sup>8</sup> To wit, not every European country has rules on unjustified enrichment; when such rules do exist, they often differ greatly.<sup>9</sup> Yet the principle underlying this area of

Society 1953) 405 [*Digest* 12.6.14, 50.17.206]. Zimmermann traces this principle back further, to Aristotle: Reinhard Zimmermann, ‘Unjustified Enrichment: The Modern Civilian Approach’ (1995) 15(3) *OJLS* 403, 403. Some authors identify this as the principle underlying the entire law of obligations: André Tunc, *Traité Théorique et Pratique de la Responsabilité Civil Délictuelle et Contractuelle* (6th edn, Éditions Montchrestien 1965) vol 1, 17. See also Jan Smits, ‘A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference’ in Antoni Vaquer (ed), *European Private law Beyond the Common Frame of Reference* (Europa Law Publishing 2008) 153, 155.

<sup>3</sup> Martin Vranken, *Fundamentals of European Civil Law* (2nd edn, The Federation Press 2010) 103, para 505; Peter Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria UP 2002) 146; James Edelman, ‘Australian Challenges for the Law of Unjust Enrichment’ (Speech delivered at the University of Western Australia Summer School, Perth, 24 February 2012).

<sup>4</sup> (1760) 2 Burr 1005, 1008 – 9, 1012. See generally Peter Birks, ‘English and Roman Learning in *Moses v Macferlan*’ (1984) 37 *CLP* 1.

<sup>5</sup> See generally Daniel Patrick O’Connell, ‘Unjust Enrichment’ (1956) 5(1) *The American Journal of Comparative Law* 2 - 8.

<sup>6</sup> The BGB was the first European civil code to codify unjustified enrichment law as a discrete branch of the law: Christian von Barr and Stephen Swann, *Principles of European Law: Unjustified Enrichment* (OUP 2010) para 20. See, eg, Lionel Smith, ‘Property, Subsidiarity, and Unjust Enrichment’ in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 588, 596; Reinhard Zimmermann and Jacques du Plessis, ‘Basic Features of the German Law of Unjustified Enrichment’ [1994] *Restitution L Rev* 14.

<sup>7</sup> Von Barr and Swann (n 6) para 10.

<sup>8</sup> Jan Smits and Vanessa Mak, ‘Unjustified Enrichment’ in Luisa Antonioli and Francesca Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference* (Sellier 2008) 249, 250.

<sup>9</sup> Detlev Belling, ‘European Trends in the Law on Unjustified Enrichment – From the German Perspective’ (2013) 13(43) *Korea U L Rev* 43, 45; Smits and Mak (n 8) 251.

law remains the same across Europe: where a person has conferred some benefit upon another, in a situation where it is unjustified for the latter to retain that benefit, that benefit should be reversed.<sup>10</sup>

Building upon this common principle, Book VII of the *Draft Common Frame of Reference* ('DCFR') presents unjustified enrichment law as a series of model rules and provisions<sup>11</sup> for potential application across the European Union ('EU').<sup>12</sup> Conducted under the auspices of the European Commission, the DCFR is supposed to 'mark the apogee of all European legal harmonization efforts'; while the drafters of the DCFR emphasise that the project is a 'toolbox', others consider it a codification 'in all but name'.<sup>13</sup> Ultimately, the DCFR is intended to comprise the model for a future 'political' Common Frame of Reference, that would serve as an optional instrument of European contract law.<sup>14</sup>

The provisions of Book VII, like the other books of the DCFR, are drawn from the national jurisdictions and legal traditions found within the EU.<sup>15</sup> In published commentaries,<sup>16</sup> however, the drafters refrain from specifying

<sup>10</sup> Brice Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54(1) *CLJ* 100, 103. See generally Jack Beatson and Eltjo Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (Hart Publishing 2003) 5.

<sup>11</sup> Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Draft Common Frame of Reference (Outline Edition): Principles, Definitions and Rules of European Private Law* (Sellier 2009) <[http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)> accessed 1 October 2013.

<sup>12</sup> See generally Horst Eidenmüller and others, 'The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems' (2008) 28(4) *OJLS* 659.

<sup>13</sup> Reinhard Zimmerman, 'The Present State of European Private Law' (2009) 57 *The American Journal of Comparative Law* 479, 480, 490. The broader European codification project began at the initiation of the European Parliament, recognising that the common market and its preponderance of cross-border contractual relationship has led to a need for unification: Resolution of the European Parliament of May 26 1989 on action to bring into line the private law of the Member States [1989] OJ C158/89, 400. To achieve this aim, the Commission on European Contract Law prepared a draft treatise on European contract law, the *Principles of European Contract Law* ('PECL'). The Study Group on a European Civil Code succeeded the Commission, and drafted the *Principles of European Law* (PEL). The PEL adopted the PECL and supplemented it with additional principles, including those on unjustified enrichment. In cooperation with other European research groups, most notably the Acquis Group, the DCFR was drawn up incorporating the PEL with revisions.

<sup>14</sup> Pieter Brulez, 'From the Academic DCFR to a Political CFR' (2010) 5 *European Review of Private Law* 1041, 1042.

<sup>15</sup> Von Barr and Swann (n 6) vii.

<sup>16</sup> See generally von Barr and Swann (n 6).

which national jurisdictions and legal traditions inspired Book VII. There may be good reasons for this silence.<sup>17</sup> Nonetheless, this paper aims to clarify the conceptual origins of Book VII by posing two questions: First, what makes an enrichment *unjustified*? Second, is the enrichment claim *subsidiary*? The first question reveals how unjustified enrichment law approaches factual scenarios; the second question reveals how unjustified enrichment law interacts with the broader law of obligations. Together, these two questions illuminate the internal and external mechanisms of unjustified enrichment law.<sup>18</sup>

A comparison of the answers provided by Book VII with those from three major European jurisdictions (Germany, France and England)<sup>19</sup> indicates that Book VII's conceptual origins are predominantly German and English. The penultimate section then discusses the causes of the divergent development of unjustified enrichment law, and outlines the future uses of the Book VII in light of the comparative findings.

## **II. WHAT MAKES AN ENRICHMENT UNJUSTIFIED**

There are two broad approaches used to determine whether a particular enrichment is unjustified.<sup>20</sup> The first is the civilian 'absence of basis' approach. The second is the common law 'unjust factors' approach. Both approaches are outlined in this section. Chapter 2 of Book VII, concerning the circumstances in which an enrichment is unjustified, is partially reproduced, and compared with the approaches found in the national jurisdictions. The similarities between Chapter 2 and the German approach indicate that Chapter 2 of Book VII is conceptually German. A brief discussion concludes this section.

### *I. Comparative Jurisdictions*

The *Code civil* contains codified claims for restitution of benefits arising from benevolent intervention in another's affairs, and mistaken payment.<sup>21</sup> Other cases of *enrichissement sans cause* are remedied by a general

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<sup>17</sup> For example, the authors may have been concerned that interpretation of a given provision of Book VII may, if its national origin were identified, rely on previous interpretations of the equivalent national provision.

<sup>18</sup> Dickson (n 10) 101.

<sup>19</sup> A part of the English (but not French or German) law of unjustified enrichment is dealt with in a separate book, Book V of the DCFR, entitled 'Benevolent intervention in another's affairs'. For the purposes of this paper, this area of law is not discussed.

<sup>20</sup> Beatson and Schrage (n 10) 251.

<sup>21</sup> *Code civil* [Civil Code] (France) arts 1372 – 75 ('gestion d'affaires d'autrui'), 1376 – 81 ('répétition de l'indu'). See generally von Barr and Swann (n 6) paras 11 – 12.

enrichment action that is the result of ‘judicial creativity’<sup>22</sup> in the *Boudier* case.<sup>23</sup> The action established in this case took a Roman name, the action *de in rem verso*, but the Cour de cassation extended it far beyond its Roman origins.<sup>24</sup> Some twenty years later, in further judicial development, the action *de in rem verso* was limited by introducing the absence of basis requirement.<sup>25</sup> Thus, in modern French law ‘l’obligation de restitution s’explique par l’idée de l’absence de cause’<sup>26</sup> whereby restitution is granted to a claimant unless the defendant can demonstrate that there was ‘une cause légitime’ for the enrichment.<sup>27</sup> Given the amorphous nature of *cause* in French law, the French inquiry into justification is an expansive exercise.<sup>28</sup>

As aforementioned, the German law of unjustified enrichment is codified in the BGB.<sup>29</sup> §812(1) of the BGB provides a general enrichment action that is predicated on the absence of basis approach:<sup>30</sup>

Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg

<sup>22</sup> Vranken (n 3) para 505.

<sup>23</sup> Cour de cassation [French Court of Cassation] 15 June 1892 reported in (1892) *DP* 1, 596.

<sup>24</sup> The Roman action *de in rem verso* was only applicable in a slaveholding context: Jeffery Oakes, ‘Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana’ (1996) 56(4) *Louisiana L Rev* 873, 877.

<sup>25</sup> *Leloup v Lutier*, Cour de cassation [French Court of Cassation], 18 October 1898 reported in [1898] *Cass Req* 105. See generally Beatson and Schrage (n 10) 333.

<sup>26</sup> Boris Starck, Henri Roland and Laurent Boyer, *Droit civil: obligations* (2nd edn, Litec 1986) vol 2, 2064.

<sup>27</sup> Dickson (n 10) 115; Beatson and Schrage (n 10) 333.

<sup>28</sup> Beatson and Schrage (n 10) 115 – 18. On the multiple definitions of ‘cause’, see Vranken (n 3) paras 526 – 535.

<sup>29</sup> A plurality of EU jurisdictions contain a codified enrichment action: *Αστικός κώδικας* [Civil Code] (Greece) §904(1)(i); *Codice civile* [Civil Code] (Italy) §2041(i); *Código civil* [Civil Code] (Portugal) §473; *Polgári Törvénykönyv* [Civil Code] (Hungary) §361(i); *Kodeks cywilny* [Civil Code] (Poland) §405; *Občanský zákoník* [Civil Code] (Czech Republic) §451; *Občiansky zákoník* [Civil Code] (Slovakia) §451; *Obligacijski zakonik* [Civil Code] (Slovenia) §190; *Облигационно право* [Law of Contracts] (Bulgaria) §59(1); *Burgerlijk Wetboek* [Civil Code] (The Netherlands) §6:212(1); *Civilinis Kodeksas* [Civil Code] (Lithuania) §6.237(1); *Võlaõigusseadus* [Law of Obligations] (Estonia) §3(3), 1027; *Civillikums* [Civil Code] (Latvia) §2391 – 2392.

<sup>30</sup> Von Barr and Swann (n 6) para 4.

nicht eintritt.<sup>31</sup>

Differentiating the German claim from the French claim is the regulation of individual cases.<sup>32</sup> The second sentence of §812 is the best example of this. In effect, the second sentence posits a factor that, if fulfilled, renders the enrichment unjustified.<sup>33</sup> Latter provisions similarly govern specific cases in respect of the unjustice.<sup>34</sup> Thus, absence of basis is not the only determinant of unjustice in German law. Rather, it is first a question of basis, and then an inquiry into specific circumstances.<sup>35</sup>

The English unjust factors approach is the inverse of the absence of basis approach: it is a search for a reason why restitution *should* be granted,<sup>36</sup> rather than the civilian search for a reason why restitution should *not* occur.<sup>37</sup> Under this approach an enrichment is unjustified if the claimant can establish one (or more)<sup>38</sup> unjust factors.<sup>39</sup> As the law currently stands, there appears to be thirteen recognised factors,<sup>40</sup> although the number of

<sup>31</sup> “A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give up to him. The same obligation exists if the legal cause later lapses or if the result does not occur which the performance had been aimed at producing according to the content of the legal transaction”: BGB [Civil Code] (Germany) §812(1) (emphasis added).

<sup>32</sup> Arguably, this regulation of individual cases is required by the lack of ‘cause’ required in German contract law: Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (Kluwer Law International 1999) pt 2, 141.

<sup>33</sup> Indeed, the second sentence in §812(1) appears to share much in common with the English unjust factor labelled ‘failure of consideration’: Andrew Burrows and others, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 12.

<sup>34</sup> BGB §§813 – 817. See generally Belling (n 9) 49.

<sup>35</sup> Interestingly, this is the inverse of the scheme advocated by Birks, whereby absence of basis was to be employed in situations where the unjust factors approach was inadequate. See generally Peter Birks, *Unjust Enrichment* (Clarendon 2005).

<sup>36</sup> Edelman (n 3).

<sup>37</sup> Dickson (n 10) 115.

<sup>38</sup> Concurrence of unjust factors was discussed with approval in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558.

<sup>39</sup> Burrows and others (n 33) 31. See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 408 – 9 (Lord Hope). See generally Charles Mitchell, Paul Mitchell, and Stephen Watterson (eds), *Goff and Jones on the Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2010).

<sup>40</sup> Burrows and others lists the unjust factors as: mistake, duress, undue influence, exploitation of weakness, incapacity of the individual, failure of consideration, ignorance or powerlessness, fiduciary’s lack of authority, legal compulsion, necessity, illegality, and unlawful obtaining or conferral of benefit by a public authority: Burrows and others (n 21) 9 – 16.

factors is theoretically unlimited.<sup>41</sup> Generally, one of the recognised factors, or a justifiable extension of a recognised factor, is pleaded.<sup>42</sup>

An important qualification to the unjust factors approach is ‘that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant’s expense is not unjust.’<sup>43</sup> In this respect, the methodology of the unjust factors approach can be broadly seen as the inverse of the two-stages that characterise the German absence of basis approach. There are, however, limited exceptions where the unjust factor ‘outweighs’ the legal entitlement,<sup>44</sup> namely where granting the enrichment claim would not conflict with the allocation of risk under the contract.<sup>45</sup>

## 2. *Chapter 2 of Book VII*

Chapter 2 is entitled ‘When enrichment unjustified.’ The key provision of Chapter 2 is art 2:101, as follows:

**2:101: Circumstances in which an enrichment is unjustified**

(1) An enrichment is unjustified unless:

- (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
- (b) the disadvantaged person consented freely and without error to the disadvantage.

(2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1)(a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not

<sup>41</sup> ‘The categories of unjust enrichment are not closed’: *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19, [1994] 4 All ER 714, 720 (Sir Donald Nicholls VC).

<sup>42</sup> *Uren v First National Home Finance Ltd* [2005] EWHC 2529, 2532 (Mann J).

<sup>43</sup> Burrows and others (n 33) 32 [s 3(6)].

<sup>44</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 480 (Lord Hope).

<sup>45</sup> Burrows and others (n 33) 34 [s 3(6)]. An example of this is the Australian case of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (High Court of Australia), where restitution was awarded despite a current contract, apparently on the grounds that the contract did not account for the particular risk that arose. See also von Barr and Swann (n 6) para 72.

entitled to the enrichment on that basis.

(3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.

(4) An enrichment is also unjustified if:

- (a) the disadvantaged person conferred it:
  - (i) for a purpose which is not achieved; or
  - (ii) with an expectation which is not realised;
- (b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and
- (c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.

The drafters of Book VII claim that Chapter 2 is conceptually, and exclusively, civilian. In a paragraph entitled '[a]bsence of legal basis, not unjust factors', the drafters state that '[b]y virtue of [art 2:101] any enrichment which is not supported either by some legal basis ... is regarded as unjustified.'<sup>46</sup> Contrastingly, Smits and Mak, in a detailed analysis of Book VII published shortly before the publication of the drafters' commentaries, describe Chapter 2 as a 'a list of specific instances in which enrichment is deemed unjust, [that is] reminiscent of the "unjust factors" approach.'<sup>47</sup> Indeed, the title of Chapter 2, '[c]ircumstances in which an enrichment is unjustified,' accords with this analysis. While Smits and Mak acknowledge that Chapter 2's factors 'are much more abstract'<sup>48</sup> than the unjust factors currently recognised in English law, they nonetheless conclude that Chapter 2 is a codification of the unjust factors approach.<sup>49</sup>

Resolution of these conflicting interpretations of Chapter 2 requires analysis of the steps required for an enrichment to be considered unjustified pursuant to Chapter 2. The wording of art 2:101(i), 'an enrichment is unjustified unless,' indicates the civilian position, whereby enrichments are *prima facie* unjustified. Thus the threshold issue echoes

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<sup>46</sup> Von Barr and Swann (n 6) para 2.

<sup>47</sup> Smits and Mak (n 8) 266.

<sup>48</sup> Smits and Mak (n 8) 266.

<sup>49</sup> *ibid* 259.

the civilian absence of basis approach: is there a legal ground for the enrichment? Fulfilling either of the requirements in arts 2:101(a) or (b), however, does not render a given enrichment justified. Rather, the analysis then moves to consider the additional provision contained in art 2:101(4). Like BGB §812(1), art 2:101(4) resembles the ‘failure of consideration’ unjust factor of English law, and serves to enlarge the ‘ambit’ of what can be declared ‘unjustified’.<sup>50</sup>

Clearly, Chapter 2 does not adopt the broad absence of basis approach favoured in France. However, contra Smits and Mak, it does not constitute a list of unjust factors.<sup>51</sup> Rather, Chapter 2’s closest analogue is BGB §812(1). The two-stage analysis of art 2:101 corresponds with the two-stages mandated in §812(1). Both art 2:101 and §812(1) require the threshold of legal basis to be met, before consideration of an additional factor concerning failure of purpose. The key difference is that art 2:101 is generally more discursive than §812(1). For example, the drafters have provided a list of instances concerning consent and free performance in arts 2:103(1) and (2). In this respect, art 2:101 may echo the unjust factors approach. Ultimately, however, the similarities of method outweigh these differences. Given the centrality of art 2:101 to Chapter 2, it appears that Chapter 2 is predominantly German in conceptual origin.

### 3. Discussion

A general criticism of the absence of basis approach, as applied in both France and Germany, is that the determination of whether an enrichment is justified is an inquiry that largely takes place outside of unjustified enrichment law.<sup>52</sup> The absence of basis approach turns away from unjustified enrichment law, and makes inquiries into, for example, the law of contract.<sup>53</sup> Consequently, the civilian law of unjustified enrichment may be regarded as ‘as having little to say on the injustice question’<sup>54</sup> as the ‘details of the unjust question’ are pushed into ‘categories of the law outside unjust[ified] enrichment’.<sup>55</sup>

Zimmermann sees this as a benefit of the absence of basis approach: ‘All of this has to be determined according to the law of contract. The law of

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<sup>50</sup> Von Barr and Swann (n 6) para 81.

<sup>51</sup> Part 3 of the *Restatement of the English Law of Unjust Enrichment* provides an example of such a list: Burrows and others (n 33) 9–16.

<sup>52</sup> Andrew Burrows, ‘Absence of Basis: The New Birksian Scheme’ in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP 2006) 36.

<sup>53</sup> *ibid* 40.

<sup>54</sup> Burrows (n 52) 40.

<sup>55</sup> *ibid* 37.

restitution does not have to concern itself with these issues.<sup>56</sup> Indeed, it is from this shifting of burden that Book VII can avoid the ‘inelegance’ of the unjust factors approach. After all, he notes, ‘it is hardly conceivable that a legal system engaged with the task of rationally reorganising its law of unjustified enrichment should take its lead from English jurisprudence.’<sup>57</sup> However, as Burrows notes, an important corollary of the unjust factors approach is that it ‘keeps the law directly in touch with the way real plaintiffs actually think. The unjust factors are not only the law’s reasons for restitution but also the reasons which lay people would commonly give for wanting restitution. “I made a mistake”, “I was under his thumb”, “I gave it because I thought we were going to stay together”, and so on.’<sup>58</sup> In this respect, the unjust factors approach may be more accessible to the layperson, and less ‘abstract and decontextualized’ than Zimmerman suggests this area of law is.<sup>59</sup> Thus, while Smits and Mak are concerned that the European lawyer may not be able to grasp art 2:101,<sup>60</sup> it should be of at least equal concern that the European *citizen* will not be able to grasp art 2:101 as presently drafted. After all, as Collins notes, ‘[p]rivate law can be viewed as the constitution of civil society.’<sup>61</sup>

A more specific criticism of Chapter 2 is that it does not accord with recent EU case law. In *Masdar (UK) Ltd v Commission of the European Communities*,<sup>62</sup> the defendant Commission contracted with Helmico to establish farming organisations in Moldova and Russia. Helmico subcontracted the claimant Masdar to provide services required under the contracts between the Commission and Helmico. The Commission discovered that Helmico had engaged in fraud in completion of both the Moldovan and Russian projects. The Commission subsequently declined to pay any outstanding invoices, and requested return of all moneys paid to Helmico. Helmico’s directors promptly fled the EU, and recovery from Helmico failed. Masdar then claimed its own outstanding invoices from the Commission, arguing that the Commission had been enriched by Masdar’s performance of services in Moldova and Russia.

<sup>56</sup> Zimmerman (n 2) 407.

<sup>57</sup> ibid 416. Similar criticism are made by Smits and Mak (n 8) 266.

<sup>58</sup> Birks, *Six Centennial Lectures* (n 3) 73.

<sup>59</sup> Reinhard Zimmerman, ‘The Present State of European Private Law’ (2009) 54 *The American Journal of Comparative Law* 479, 497.

<sup>60</sup> Smits and Mak (n 8) 259. Belling shares the concerns of Smits and Mak: Belling (n 9) 58.

<sup>61</sup> Hugh Collins, ‘Why Europe Needs a Civil Code’ (2013) 4 *Euro Rev of Private L* 907, 916.

<sup>62</sup> Case C-47/07 *Masdar (UK) Ltd v Commission of the European Communities* [2008] ECR I-9761, affirming the decision of the Court of First Instance (now the General Court) in Case T-333/03 *Masdar (UK) Ltd v Commission of the European Communities* [2006] ECR II-4377.

The Court of Justice of the European Communities (now the Court of Justice of the European Union) agreed that the Commission had been enriched. However, Masdar's claim failed on the issue of whether the Commission's enrichment was 'without cause'.<sup>63</sup> Tellingly, once the Court determined that the enrichment arose from a 'contractual framework', the enrichment was justified, and the action failed. Additional factors, such as those found in the second sentence of BGB §812(1) or 2:101(4), were not considered. It therefore appears that the Court has followed the more general absence of basis approach found in French law, rather than that of German law. However, this departure is largely one of method. Both German law<sup>64</sup> and Book VII<sup>65</sup> would arrive at the same result as the Court, sans the expansive inquiry into cause. Given that codifying the extent and breadth of this inquiry would be a Herculean task, and that the overwhelming majority of EU jurisdictions employ the absence of basis approach, it appears that the adoption of the German approach to justification in Book VII was both prudent and necessary.<sup>66</sup>

### **III. IS THE ENRICHMENT CLAIM SUBSIDIARY?**

This second question illustrates the relationship between the enrichment claim and other legal principles.<sup>67</sup> Subsidiarity, in this context denotes 'a relationship between different types of claims such that one type of claim is disallowed by the presence of another claim.'<sup>68</sup> The effects of subsidiarity can vary greatly. Subsidiarity can provide a hierarchical order of claims in situations giving rise to multiple viable claims. Alternatively, subsidiary can deny the claimant a remedy at all.<sup>69</sup>

In this section, subsidiarity is outlined in respect of the comparative jurisdictions. Chapter 7 of Book VII is then partially reproduced, and compared with the approaches found in the comparative jurisdictions. The

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<sup>63</sup> Case C-47/07 *Masdar (UK) Ltd v Commission of the European Communities* [2008] ECR I-9761, para 99.

<sup>64</sup> The availability of an undue payment claim against Helmico would likely exclude any enrichment claim against the Commission: Bundesgerichtshof [German Federal Court of Justice], VII ZR 285/61, 31 October 1963 [Beatson and Schrage trans (n 10) 457].

<sup>65</sup> The enrichment of the Commission would likely be considered justified pursuant to art 2:102(a) of Book VII.

<sup>66</sup> cf Zimmerman (n 59) 498.

<sup>67</sup> Dickson (n 10) 101.

<sup>68</sup> Smith (n 6) 599. Smith breaks the general concept of subsidiarity down into 'weak' and 'strong' subsidiarity, but for the purposes of this paper, such a technical distinction is not necessary.

<sup>69</sup> Beatson and Schrage (n 10) 457.

similarities between art 7:102 and the English approach to subsidiarity indicate that art 7:102 is conceptually English. A discussion of this choice concludes this section.

### I. *National Jurisdictions*

Given that the French action *in de rem verso* is derived from equity,<sup>70</sup> it cannot replace or contradict the provisions of the *Code civil*: ‘It can only fill a gap.’<sup>71</sup> Thus, resort may only be had to the action *de in rem verso* when the *Code civil* fails to govern the situation.<sup>72</sup> This requirement was declared by the Cour de cassation in the *Clayette* case.<sup>73</sup> The operative clause in that judgment held that the *action de in rem verso* is only available if a claimant ‘ne jouissait, pour obtenir ce qui est dû, d’aucune action naissant d’un contrat, d’un quasi-contrat, d’un délit, ou d’un quasi-délit’.<sup>74</sup> A half-century later, in the *Decaens* case, the Cour de cassation further clarified the limitations imposed by subsidiarity on the action *de in rem verso*:<sup>75</sup>

Attendu que l’action fondée sur l’enrichissement sans cause ne peut être admise qu’à défaut de toute autre action ouverte au demandeur; qu’elle ne peut l’être, notamment, pour suppléer à une autre action que le demandeur ne peut intenter par suite d’une prescription, d’une déchéance ou forclusion ou par l’effet de l’autorité de la chose jugée ou parce qu’il ne peut apporter les preuves qu’elle exige ou par suite de tout autre obstacle de droit.<sup>76</sup>

<sup>70</sup> *Boudier*, Cour de cassation [French Court of Cassation], 15 June 1892 reported in (1892) *DP* 1, 596.

<sup>71</sup> Beatson and Schrage (n 10) 427. The action *en répétition de l’indu*, and other enrichment actions codified in the *Code civil*, are not subsidiary: von Barr and Swann (n 6) 1.

<sup>72</sup> Von Barr and Swann (n 6) para 103. See also O’Connell (n 5) 9.

<sup>73</sup> Cour de cassation [French Court of Cassation], S.1918.I.41, 12 May 1914.

<sup>74</sup> ‘[The claimant] does not have at his disposal, to obtain what is due to him, any action arising from a contract, quasi-contract, a delict or a quasi-delict’: Beatson and Schrage (trs) (n 10) 427. See generally Dickson (n 10) 116.

<sup>75</sup> Beatson and Schrage (trs) (n 10) 427.

<sup>76</sup> *Decaens*, Cour de cassation [French Court of Cassation], 70-10415, 29 April 1971 reported in (1971) Bull civ n° 277, 197 (“Considering that the action founded on unjustified enrichment can only be admitted if there is no other action open to the plaintiff; that in particular it cannot be admitted in place of another action which the plaintiff cannot bring because of prescription, a forfeiture, a foreclosure or because of the effect of *res judicata*, or because he cannot produce the evidence necessary for the success of the action or because of any other obstacle of law.”) [Beatson and Schrage (trs) (n 10, 428). cf *Codice civile* [Civil Code] (Italy) art 2042.

This ‘strict subsidiarity’<sup>77</sup> means that if any other claim is available *in law* for the kind of loss in question, then the action *de in rem verso* is excluded.<sup>78</sup> Where a contractual, tortious or other claim is, however, denied *in fact*, the action is allowed. Thus a contractual claim barred by time-limits or evidentiary issues excludes the enrichment,<sup>79</sup> but the insolvency of one of the contracting parties in a third party enrichment case will not prevent an enrichment claim against that third party.<sup>80</sup>

German enrichment claims, being grounded in the BGB, are generally not subsidiary. A claimant may invoke any cause of action, and if the requirements of that claim are satisfied, other claims are to that extent extinguished.<sup>81</sup> The primary exception to this principle first appeared in V ZR 130/94.<sup>82</sup> In this case, the claimant leasee had a contract with the defendant landlord such that the claimant could purchase the leased property at a reduced price if the claimant maintained the property for the leasehold’s duration. The claimant maintained, and carried out construction on the leased property, substantially increasing its value. The defendant then sold the property to a third party. The claimant made contractual claims, and also argued, pursuant to BGB §812, that the defendant should give up the profit. The contractual claims failed because the right to purchase in the leasehold contract required notarial certification pursuant to BGB §313(1). Further, the Bundesgerichtshof held that, as a matter of interpretation, the specific provisions of the BGB governing the owner-possessor relationship<sup>83</sup> prohibited recourse to the general enrichment provisions contained in the BGB.<sup>84</sup> It therefore appears that the enrichment action of §812(1) will yield to sufficiently exhaustive provisions of the BGB.

Subsidiarity also applies within unjustified enrichment law itself, where the

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<sup>77</sup> Zimmermann (n 2) 420; Paolo Gallo, ‘Unjust Enrichment: A Comparative Analysis’ (1992) 40 *The American Journal of Comparative Law* 431, 465.

<sup>78</sup> Dickson (n 10) 113; von Barr and Swann (n 6) para 1.

<sup>79</sup> Dickson (n 10) 116.

<sup>80</sup> Recent case law has, however, challenged the traditional understanding of the subsidiarity of the action *de in rem verso*. For example, in one case the action *de in rem verso* was not excluded despite the availability, but lack of proof, for a contractual claim: Cour de cassation [French Court of Cassation] 07-13902, 5 March 2008. See generally von Barr and Swann (n 6) para 1.

<sup>81</sup> von Barr and Swann (n 6) para 3.

<sup>82</sup> Bundesgerichtshof [German Federal Court of Justice], V ZR 130/94, 29 September 1995 [Beatson and Schrage (trs) (n 10) 448–9].

<sup>83</sup> BGB [Civil Code] (Germany) §§994 – 1003 [Beatson and Schrage (trs) (n 10) 576 – 585].

<sup>84</sup> Bundesgerichtshof [German Federal Court of Justice], V ZR 130/94, 29 September 1995 [Beatson and Schrage (trs) (n 10) 448 – 9].

condictions based on performance (§812(1)) has priority over other condictions (which are thus subsidiary).<sup>85</sup> The primacy of the performance claim is primarily felt in respect of third party enrichment cases, where the claimant has enriched the defendant pursuant to the claimant's contract with a third party. Subsidiary denies a claim against the defendant in such situations,<sup>86</sup> because the claim should be for undue payment against the third party:<sup>87</sup> 'If the enriched person has received a benefit as a result of another's performance, a condiction which is not based on performance cannot found a claim in relation to that enrichment – even for a third party who is seeking to recover the benefit from its recipient.'<sup>88</sup> The particulars of this rule are, however, controversial in many respects.<sup>89</sup>

Enrichment claims in English law are generally not considered to be subsidiary.<sup>90</sup> Restitution may be claimed concurrently with another claim, such as a claim in tort.<sup>91</sup> The practical limitation is, like German law, that 'satisfaction of more than one claim is not permitted where it would produce double recovery'.<sup>92</sup> If both claims are successful, election between claims is made at judgment.<sup>93</sup> English law, however, does not need to rely on subsidiarity to limit enrichment claims from encroaching on other areas of law. Such limitation is instead inherent in the unjust factors approach, which restricts operation of English unjustified enrichment law to particular factual circumstances.

## 2. *Chapter 7 of Book VII*

### **7:102: Concurrent obligations**

- (1) Where the disadvantaged person has both:
  - (a) a claim under this Book for reversal of an unjustified enrichment; and
  - (b) (i) a claim for reparation for the disadvantage (whether

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<sup>85</sup> Bundesgerichtshof [German Federal Court of Justice], VII ZR 85/69, 27 May 1971. See generally Beatson and Schrage (n 10) 457.

<sup>86</sup> Smith (n 6) 619; Zimmermann (n 2) 420.

<sup>87</sup> Interestingly, the situation in *Boudier* was a third party enrichment case that would be denied under this principle.

<sup>88</sup> Von Barr and Swann (n 6) para 5.

<sup>89</sup> *ibid* para 5.

<sup>90</sup> Dickson (n 10) 105.

<sup>91</sup> *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, [1995] 2 AC 145, 196 (Lord Goff).

<sup>92</sup> Burrows and others (n 33) 5 [s 1(4)].

<sup>93</sup> *United Australia Ltd v Barclays Bank Ltd* [1941] 1 AC 1 (HL) 30 (Lord Atkin).

against the enriched person or a third party); or  
 (ii) a right to recover under other rules of private law as a result of the unjustified enrichment,

the satisfaction of one of the claims reduces the other claim by the same amount.

Clearly, Chapter 7 does not consider the enrichment claim to be subsidiary to any other claim. Instead, there is free concurrence of actions between the enrichment claims and other claims.<sup>94</sup> The result of this, as the drafters of Book VII note, is that Book VII does not conceptualise unjustified enrichment as a ‘merely subsidiary field of law’ but rather as a separate and complete component of the law of obligations.<sup>95</sup>

Analogising art 7:102 to the law of the comparative jurisdictions clearly fails in respect of France and Germany. Unlike France, there is no mention of the distinction between the availability of claims in law or in fact. Unlike Germany, there is no primacy of certain enrichment claims.<sup>96</sup> The English approach, however, fits with the clear and precise provisions of Chapter 7, as does the modern English understanding of unjustified enrichment as part of the law of obligations.<sup>97</sup> It therefore appears that Chapter 7 is predominantly English in conceptual origin.

### 3. Discussion

Why should a claimant not have a free choice between claims under contract, tort, and unjustified enrichment? Indeed, many advantages flow from Book VII’s adoption of the English approach to subsidiarity. On a conceptual level, the subsidiarity of the enrichment claim can be criticised on the grounds that imbuing ‘another remedy with the force to exclude the action for enrichment ... amount[s] to declaring the enrichment justified, as soon as another legal remedy is available.’<sup>98</sup> This is akin to the position taken in France, where subsidiarity is defended on the grounds that whoever has another action available in law cannot have suffered the necessary ‘appauverissement’.<sup>99</sup> As Zimmermann notes, ‘[t]his argument is not convincing, since it could equally be argued, the other way round, that someone who has an enrichment action cannot be said to have suffered

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<sup>94</sup> Jan Smits, ‘A European Law on Unjustified Enrichment?’ (n 2) 158.

<sup>95</sup> Von Barr and Swann (n 6) 92.

<sup>96</sup> Third party claims are dealt with pursuant to art 2:102 of Book VII.

<sup>97</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] UKHL 7, [1999] 1 AC 221, 227 (Lord Steyn).

<sup>98</sup> Beatson and Schrage (n 10) 464.

<sup>99</sup> *ibid* 457.

damages.<sup>100</sup>

However, by not regulating the enrichment claim to subsidiary status, Book VII once again sets itself against recent EU case law. The Court of First Instance in *Masdar* held that the enrichment claim is available 'only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed.'<sup>101</sup> The similarities of this conception with that displayed in the French case of *Clayette* are clear. In civilian jurisdictions concurrence between an enrichment claim and all other claims 'is often seen as a possible threat to other fields of private law because it may undermine the coherent structure of this domain: if the enrichment claims is freely available, it may mean that the law of contract and tort are circumvented by parties turning to an enrichment claim instead.'<sup>102</sup> Thus the argument for subsidiarity is that it protects 'the technical structure of the law from the disorder which would result from allowing more than one remedy on the same set of facts.'<sup>103</sup> Departure from this approach, as expressed in *Masdar* and *Clayette*, may result in disorder. For example, Smits argues that the law of unjust enrichment does not rest on a coherent principle, 'but on the need in disparate cases to fill the gaps left by other branches of the law.'<sup>104</sup> Thus, by making the enrichment claim concurrently available without first unifying every other area of private law, the gaps to be filled by unjustified enrichment law are unclear. The common rejoinder to such objections is, as Nicholas notes, to cite the English and German jurisdictions, both without apparent disorder.<sup>105</sup>

More generally, arguments concerning subsidiarity raise a long running debate about the place of unjustified enrichment in the law of obligations. Atiyah, for example, argues that unjustified enrichment should not be elevated to a separate legal subject.<sup>106</sup> Rather, it should be viewed as a principle running through several existing subjects such as property law, tort law and, most significantly, contract law.<sup>107</sup> On the other hand, Birks famously argued that the entirety of private law can be condensed to four

<sup>100</sup> Zimmermann (n 2) 420.

<sup>101</sup> Case T-333/03 *Masdar (UK) Ltd v Commission of the European Communities* [2006] ECR II-4377, para 97.

<sup>102</sup> Smits, 'A European Law on Unjustified Enrichment?' (n 2) 158.

<sup>103</sup> Beatson and Schrage (n 10) 439.

<sup>104</sup> Smits, 'A European Law on Unjustified Enrichment?' (n 2) 156; Smits and Mak (n 8) 256.

<sup>105</sup> Barry Nicholas, cited in Beatson and Schrage (n 10) 438.

<sup>106</sup> Patrick Atiyah, cited in Dickson (n 10) 109.

<sup>107</sup> *ibid.*

headings: wrongs, consent, unjustified enrichment and ‘other’.<sup>108</sup> The concurrent liability of Chapter 7 aligns with this Birksian taxonomy, and means that, as Lord Steyn noted in *Banque Financière de la Cité v Parc (Battersea) Ltd*, unjustified enrichment ‘ranks next to contract and tort as part of the law of obligations [and a] independent source of rights and obligations’.<sup>109</sup> But how does unjustified enrichment sit alongside contract and tort? Like tort, unjustified enrichment effects corrective justice, imposed by law.<sup>110</sup> Unlike tort, however, an enrichment claim is not predicated on wrongdoing,<sup>111</sup> and although enrichment claims most commonly arise in the ‘aftermath of a failed agreement,’ it is not a sub-set of contract.<sup>112</sup> In this respect, unjustified enrichment is *sui generis*, arising through neither consensus nor fault. The boundaries, therefore, of unjustified enrichment law are likely to remain a source of contention in both common law and civilian jurisdictions.

Ultimately, the degree to which the enrichment claim is subsidiary appears to depend on the approach taken to the concept of unjustified enrichment: Is it a vague principle of justice? Or is it a category of law?<sup>113</sup> Arguably, this question cannot be answered through imposition, nor through consensus, as it appears too fundamental, if not insurmountable. In this respect, it seems that the drafters of Book VII may have done better to adopt the provision specified for public law claims:

#### 7:103: Public law claims

This Book does not determine whether it applies to enrichments which a person or body obtains or confers in the exercise of public law functions.

Such a provision leaves the subsidiarity issue to be determined by the national jurisdictions. By doing so, the drafters could have better achieved their goal of presenting the DCFR as a ‘toolbox’ from which model rules, and arguments, can be drawn.

## **IV. THE WAY FORWARD**

This penultimate section first discusses how the differences in a legal system’s ‘style’<sup>114</sup> may have caused the divergent development of unjustified

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<sup>108</sup> See generally Birks (n 35).

<sup>109</sup> [1999] 1 AC 221, 227.

<sup>110</sup> Beatson and Eltjo Schrage (n 10) 3.

<sup>111</sup> Birks, *Six Centennial Lectures* (n 3) 2.

<sup>112</sup> Dickson (n 10) 103.

<sup>113</sup> Edelman (n 3).

<sup>114</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*

enrichment across Europe. The discussion then moves to potential uses of Book VII that are not hampered by the fundamental differences found between the legal systems of Europe.

Following Zweigert and Kötz, a legal system's style is constituted by five elements: history, mode of legal thinking, institutions, sources of law, and ideology.<sup>115</sup> In respect of unjustified enrichment, it appears that the second, fourth and fifth of these factors are causative of the differences between common law and civilian jurisdictions.<sup>116</sup>

The influence that differing modes of legal thinking have had on unjustified enrichment is clear. The unjust factors approach is the result of the common law's inductive mode of thinking. There is no overarching principle that describes every unjust factor, just as there is no overarching principle that explains common law contractual vitiation. This necessitates a process of analogising and differentiating. Equally, the civilian absence of legal basis approach is the product of the conceptual and deductive approach that characterises the civilian legal family.<sup>117</sup>

Consideration of sources of law provides insight into the differences between the common law and civil law, and within the civilian jurisdictions. The common law's doctrine of precedent means that once a critical mass of enrichments have been declared unjustified on a similar ground, this ground becomes law. The growth of a list of unjust factors is the inevitable result of this approach. The French action *de in rem verso* is grounded in equity, whereas the BGB regulates the German enrichment claim. The knowledge that they have arguably overstepped their authority under the civilian system may be one reason why the Cour de cassation has limited the action *de in rem verso* to a strictly subsidiary and supplementary role.<sup>118</sup>

The influence of ideology is less clear. Vranken notes that ideology may be the 'least useful criterion when distinguishing between the civil law and the common law' due to the common 'political, economic or even cultural foundations of the law in both legal families'.<sup>119</sup> Unjustified enrichment law

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(Clarendon Press 1998) 67.

<sup>115</sup> ibid.

<sup>116</sup> cf von Barr and Swann (n 60) para 8.

<sup>117</sup> See generally Vranken (n 3) para 121.

<sup>118</sup> cf *Code civil* [Civil Code] (France) art 5: 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.' ('It is prohibited for judges to decide cases in a general and regulatory manner.') [Vranken (tr) (n 3) 281].

<sup>119</sup> Vranken (n 3) para 125.

may constitute a counterexample to this general truth. As aforementioned, the common law and the civil law make diametrically opposed assumptions regarding the status of enrichments. In the former, enrichments are *prima facie* justified. In the latter, enrichments are *prima facie unjustified*. This indicates the effect of nuanced economic ideologies on the assumptions underlying private law, and the tension in European private law between jurisdictions that may favour ‘commercial justice’, rather than individualist, policy models.<sup>120</sup> However, as Brulez notes, resolution of these tensions is the task of politicians, not academics.<sup>121</sup>

Generally, ‘European legislation in the field of private law will not be able to achieve the uniformity of law sought by the internal market agenda because national courts would inevitably develop divergent interpretations of the legislation.’<sup>122</sup> In the case of the DCFR more generally, it is, as Jarvinen notes, ‘a hollow core that is to be fulfilled by specific policy approaches of each national legal system.’<sup>123</sup> In other words, the legal system employing the DCFR will inevitably be informed by its own history, language, culture and legal tradition.

Attempts at unifying unjustified enrichment law across civilian and common law systems will inevitably be hampered by these fundamental differences in style.<sup>124</sup> For example, in a precedential system utilising Book VII, case law would likely build up around 2:101(4), and 2:103. Over the years, new lists of unjust factors could arguably be founded on these provisions, thus degrading the unity that Book VII seeks. This is the inevitable outcome of the common law method and sources of law. Given these fundamental differences, even extending to the ideological level, it seems that, as Burrows warns, mixing the common law and civilian approaches ‘is a recipe for confusion and inconsistency’.<sup>125</sup> Indeed, the conflicting interpretations of Chapter 2 discussed in Section 2.2 of this paper aptly illustrate this issue.

Ultimately, it is clear that Book VII is a very different project from other recent non-legislative projects on unjustified enrichment law, such as the

<sup>120</sup> Brulez (n 16) 1047.

<sup>121</sup> *ibid* 1048.

<sup>122</sup> Collins (n 63) 921.

<sup>123</sup> Leo Järvinen, ‘Finland and the European Civil Code: A Case for Convergence?’ (2013) 2 Euro Rev of Private L 507, 553.

<sup>124</sup> The drafters of Book VII disagree: ‘[t]he existing differences in viewpoint within Europe relate predominantly to matters of terminology rather than outcomes which are desired as a matter of substance’: von Barr and Swann (n 6) para [6].

<sup>125</sup> Burrows, ‘The New Birksian Scheme’ (n 52) 50.

American Law Institute's *Restatement (Third) of Unjust Enrichment and Restitution* or Burrow's *A Restatement of the English Law of Unjust Enrichment*. Fundamentally, Book VII is not a restatement of the law, nor is it a compilation. Rather, it is a work of originality that represents a departure from what came before: a true codification of unjustified enrichment law.<sup>126</sup> Complicating the bold nature of the work is the semi-official status of the DCFR arising from the support and funding that it has received from the European Commission. As Zimmerman notes, '[i]f it were a purely academic document, the DCFR would have to be welcomed as an important contribution to an ongoing debate' yet 'the DCFR is intended to be a reference text' that 'secures its authority not *imperio rationis* but *ratione imperii*, i.e., by virtue of the European Community endorsing or adopting it.'

While the publication of a far-reaching codification with semi-official sanction is cause for concern, it is important that Zimmerman's concerns have not materialised. The DCFR is not considered a reference text; it currently remains a document of academic interest and debate. And in this respect, Book VII can play a pivotal role in developing the common European legal science and culture that is required before a 'European civil code' is possible.<sup>127</sup> There are many interesting ways in which unjustified enrichment bridges and blurs the traditional divisions between European jurisdictions. For example, while it may be generally true that 'the common law is the law of the judges, [while] the civil law is the law of the law professors',<sup>128</sup> in respect of unjustified enrichment the situation appears to be reversed. In England the contribution of scholars such as Birks, Burrows and Chambers to the English law of unjustified enrichment arguably overshadows that of English judges. Conversely, in France it was the judges of the *Cour de cassation* who derived the concept of unjustified enrichment as a '*principe d'équité*', independent of the *Code civil*.<sup>129</sup>

In light of these unique perspectives that unjustified enrichment law provides, the way forward for Book VII, or the DCFR more generally, may lie in its pedagogical uses. As Vranken notes, 'comparativism inevitably

<sup>126</sup> 'In reality, a source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible': Smits and Mak (n 8) 261.

<sup>127</sup> Järvinen (n 123) 569.

<sup>128</sup> Vranken (n 3) para 423.

<sup>129</sup> The analogy is not perfect: in Germany 'the writings of von Savigny proved largely instrumental in persuading the drafters of the *BGB* to deal with unjust enrichment (*ungerechtfertigte Bereicherung*) in general terms': Vranken (n 3) para 505.

leads to a better understanding of foreign legal systems, but it also induces a deeper understanding of the law domestically.<sup>130</sup> Comparison of a national unjustified enrichment law with Book VII is particularly illustrative of the myriad new ways that an old principle can be expressed in law, and the manner in which unjustified enrichment may be subsumed by, or separate from, the law of contract. Further, comparison of Book VII with Burrow's *English Restatement* is a most pertinent example of the different legal superstructures that arise from the deductive civilian method and the inductive common law. In this respect, Book VII is a welcome, and in light of stark differences outlined above, courageous contribution to legal education that can further the European, rather than national, study of the law of unjustified enrichment.<sup>131</sup>

## V. CONCLUSION

The conceptual origins of Book VII have been identified as predominantly German and English; the advantages and disadvantages of this approach have been discussed. In light of these findings, the penultimate section canvassed some causes for the divergent development of unjustified enrichment across Europe, and posited that the pedagogical value of Book VII may be, at present, its strongest attribute. These conclusions are tempered, however, by the limitations that are inherent in the methodology employed in this paper. Only three EU jurisdictions have been detailed; only two provisions of Book VII compared: only the 'skeleton' of unjustified enrichment has been discussed. Nonetheless, as Birks memorably writes, 'a skeleton is not a body, but a body without a skeleton is just a heap on the floor... a heap is hopeless, [but] a skeleton is not. The flesh can be put back on.'<sup>132</sup> Putting the 'flesh' on this topic would require, *inter alia*, comparison of the defences available in the national jurisdictions and under Book VII. Issues of causation and attribution would have to be explored, and the comparative jurisdictions extended to include more recent codifications, such as the Dutch *Burgerlijk Wetboek* or the Estonian *Võlaõigusseadus*. While such tasks are beyond the scope of this paper, they are surely worthy of future research.

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<sup>130</sup> *ibid.*

<sup>131</sup> cf Zimmerman (n 59) 496, 512.

<sup>132</sup> Birks, *Six Centennial Lectures* (n 3) 1.