

# UNJUST FACTORS OR LEGAL GROUND? ABSENCE OF BASIS AND THE ENGLISH LAW OF UNJUST ENRICHMENT

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*Traditionally, there are two main approaches to enrichment by transfer, the common law ‘unjust factors’ approach and the civilian ‘absence of basis’ approach. In the aftermath of the so-called ‘swaps cases’, Peter Birks proclaimed the dethronement of the unjust factors in the English system, said that English law has embraced a German-style absence of basis approach, and proposed a new system of unjust enrichment. This article proceeds in two steps. Firstly, it asks whether one of the two systems is superior to the other. Concluding that the ‘absence of basis’ approach may be conceptually clearer, it then argues that the English system should nonetheless be careful to adopt this approach for two reasons. First, this new approach may not be suited to neighbouring fields of law (especially contract), and secondly, unjust enrichment does not occupy the same place in the legal landscape in Germany and England, it is of a different normative quality.*

Keywords: Comparative law, Unjust enrichment, Enrichment by transfer, Legal transplants, Harmonisation.

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## I. INTRODUCTION

Since different routes may lead to the same result<sup>1</sup> and surely all roads lead to Rome, I shall begin by quoting a Roman: '*Iure naturae aequum est neminem com alterius detrimento et iniuria fieri locupletioem*' (It is fair according to the law of nature that no one should be enriched by loss and injustice to another).<sup>2</sup> This seems to be stating the obvious. All too often, however, the picture gets blurrier the more one zooms in. How is 'injustice' to be understood? What determines the 'just' in unjust enrichment?

The field of unjust enrichment is a vast one, so the present article is focusing on the scenario where the claimant transfers value to the defendant which was not due, what Birks calls the 'core case'. There are two main approaches to this problem, one of which we shall call the common law and the other the civil law approach.

Traditionally, the common law has dealt with this scenario in terms of so-called unjust factors, even though it has been pointed out that 'no common lawyer had heard of unjust factors before Birks introduced them in 1985', meaning that before Birks, the law of unjust enrichment was far less organised.<sup>3</sup> Civil law countries, on the other hand, favour an approach that focuses on the absence of a legal basis. As examples for a common law and a civil law system, the English and the German systems of unjust enrichment are the most prominent representatives of each legal family. These two systems are, on the one hand, deeply rooted in the system of unjust factors (England) and, on the other hand, possibly the most highly developed system of unjust enrichment in civilian countries. For reasons of simplicity and clarity, I will briefly outline both approaches by reference to the English and German systems of unjust enrichment by transfer.

In the course of a general tendency towards unification or convergence of the legal systems within the European Union, the system of unjust factors

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<sup>1</sup> The reader may forgive the pun. The 'different routes' are the different legal systems, and the 'result' is the answer to the question when restitution is due. For enrichment by transfer, which is the focus of this paper, it will be shown below that the results, that is whether there has to be restitution or not, are similar in both systems. Given the same facts of a case, restitution may have to be made due to mistake in the context of English law, or due to an absence of legal basis in the context of German law.

<sup>2</sup> Pomponius, *De Regulis Iuris*, D50, 17, 206; translation taken from Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> edn, OUP 2005) 268, (n 4).

<sup>3</sup> Steve Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28 *Melbourne University Law Review* 759, 766.

has had to face some criticism. Most notably, Sonja Meier's article 'Unjust factors and Legal Grounds'<sup>4</sup> has, if not kicked off, then at least intensified the academic discussion on whether a system based on the German model is superior to an unjust factors-based system. In fact, her arguments have managed to convince one of the champions of the unjust factors approach, Peter Birks, who in his last book famously proclaimed that '[a]lmost everything of mine now needs calling back for burning'.<sup>5</sup> Birks claimed that an English absence of basis approach was not a product of his academic creativity, but had already seeped into English case law via the so-called 'swaps cases',<sup>6</sup> which will be sketched out in due course. Although the proclamation of having to burn everything previously written might have been a little premature, it can be observed that, without doubt, Birks's book has fuelled academic discussion.

This essay will deal with two main questions. The first one is, whether it can be said that one of the two systems of unjust enrichment is superior to the other. Is one of the systems simply better suited to the type of cases that come before the courts? Can it be said that one system excels in terms of conceptual clarity? The second question is, with reference to Birks's arguments, whether English law should adopt the German approach.

For the second question, I will briefly outline the new model of unjust enrichment based on absence of basis as suggested by Peter Birks in his last book<sup>7</sup> and argue that the approach as presented might need more thought. As it is, it might not be suited to the English system of private law generally and the English system of unjust enrichment specifically. Changing the legal construction behind unjust enrichment does not only affect this field of law, but also interacts with other fields of law, most importantly contract law.

## II. THE TWO SYSTEMS

### I. *Unjust Factors*

The law of unjust enrichment is a rather young area of law in England.<sup>8</sup> In *Moses v MacFerlan*, Lord Mansfield described various circumstances in

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<sup>4</sup> Sonja Meier, 'Unjust Factors and Legal Grounds' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2002).

<sup>5</sup> Birks, *Unjust Enrichment* (n 2), xii.

<sup>6</sup> Birks, *Unjust Enrichment* (n 2), 99.

<sup>7</sup> Birks, *Unjust Enrichment* (n 2).

<sup>8</sup> Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996), 553.

which a transfer of value needs to be reversed,<sup>9</sup> but those instances were understood to be specific remedies and not a closed area of law. In 1966, the first textbook on restitution was published,<sup>10</sup> but even 12 years later, in 1978, the judiciary had not been convinced of the existence of unjust enrichment as an independent field of law.<sup>11</sup> It was not until 1991 that unjust enrichment was finally accepted by the courts in *Lipkin Gorman v Karpnale Ltd*.<sup>12</sup>

The English law of unjust enrichment (by transfer) builds upon four requirements, which have been expressed for example in *Banque Financière de la Cité v Parc (Battersea) Ltd*. The defendant (i) must be enriched (ii) at the claimant's expense. This enrichment has to be (iii) unjust and (iv) the defendant must not have a valid defence against the claim.<sup>13</sup> It is the third requirement that is of interest in this context. How does the injustice of a transfer manifest itself? The common law asks the claimant to show that the transfer was unjust. This idea has existed in the common law for centuries, even though it has not been referred to as 'unjust factors approach'.<sup>14</sup> More modern textbooks have included positive lists of unjust factors.

However, the concrete list differs from textbook to textbook. Andrew Burrows, for example, includes mistake, duress, ignorance, undue influence, exploitation, legal compulsion, necessity, failure of consideration, incapacity, illegality, *ultra vires* demand of public authorities, etc.<sup>15</sup> In his influential categorisation of unjust factors, Peter Birks distinguishes between non-voluntary and policy-motivated unjust factors. Non-voluntary

<sup>9</sup> (1760) 97 Eng. Rep. 676 (K.B.).

<sup>10</sup> Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell 1966).

<sup>11</sup> *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104 (Lord Diplock): '[T]here 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 on the civil law.'

<sup>12</sup> Christiane Wendehorst, 'Die Leistungskonditionen und ihre Binnenstruktur' in Reinhard Zimmermann (ed), *Grundstrukturen eines Europäischen Bereicherungsrechts* (Mohr Siebeck 2005) 47, 55; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578 (Lord Goff of Chieveley): 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.'

<sup>13</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475, 479.

<sup>14</sup> Mitchell McInnes, 'The Reason to Reverse: Unjust Factors and Juristic Reason' (2012) *Boston University Law Review* 1049, 1052; Hedley, 'The Empire Strikes Back?' (n 3), 766.

<sup>15</sup> Andrew Burrows, *The Law of Restitution* (3<sup>rd</sup> edn, OUP 2011).

factors concern the nature of the claimant's (non-)consent. Birks further subdivides these possible vitiations of consent into 'impaired consent' (mistake, duress, undue influence, exploitation of weakness, human incapacity, 'qualified consent' (failure of consideration) and 'no consent'.<sup>16</sup> As those factors do not cover all cases in which restitution should be granted, Birks also includes a supplementary category of so-called policy-motivated factors. Within this category, a claimant will be successful if he can show that, regardless of his intention, there is a specific reason for restitution, for example in order to 'reinforce governmental respect for the rule of law or to encourage withdrawal from illegal actions'.<sup>17</sup> An example for a policy-motivated factor, the 'Woolwich' factor, will be briefly discussed below.

However, it needs to be pointed out that if there is a legal obligation, the mere existence of an unjust factor will normally not justify the retention of the money conferred.<sup>18</sup>

As can be easily seen, the unjust factors approach revolves largely around the transferor's intent (with policy reasons acting as a corrective measure). If his or her decision to transfer a benefit has not been made freely and without vitiating factors, the benefit is to be returned. The intention to transfer cannot be said to have an equal all-importance in the so-called 'no basis' approach.

## 2. *Absence of Basis*

The German system of unjustified enrichment (rather than unjust enrichment) follows a very different model. If we can define the English approach to unjust enrichment as 'the transfer of benefit is only unjust if your will has been vitiated in a legally relevant way', the German model takes a different path.

§ 812 (1) BGB states that '[a] person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. 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.'<sup>19</sup>

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<sup>16</sup> Peter Birks, *Introduction to the Law of Restitution* (OUP 1985).

<sup>17</sup> Birks, *Unjust Enrichment* (n 2), 106; Andrew Burrows and others, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 5 [s 3(2)(b)].

<sup>18</sup> Burrows and others, *Restatement* (n 17), 6 [s 3(6)].

<sup>19</sup> Translation via [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3396](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3396); 'Wer durch die Leistung eines

This is to say that a transfer of benefit must be justified by a legal ground. Should this legal ground turn out to have been void from the beginning or if it is avoided *ex tunc*, no legally relevant justification will remain. From this it follows that if there is no basis for the transaction, it ought to be reversed. But what counts, under German law, as a valid legal ground?

As a general rule, it can be said that contracts are the most common legal grounds. Contracts of sale, lease, etc. all provide the enriched with a reason to keep the benefit transferred to him or her. Unlike English law, German law includes gifts, gratuitous use and gratuitous services in its definition of contract.<sup>20</sup> In addition, in some special cases even non-contracts can act as a sufficient legal basis. There are three different kinds of 'just factors' (as Thomas Krebs calls them in a semi-serious way).<sup>21</sup> Firstly, a valid legal basis can still be established where a contract is unenforceable solely due to shortcomings of a formal nature. By way of example, § 518 contains a requirement for gifts to be acknowledged by a notary in order to be binding. If, however, a gift is executed without having complied with this rule, it can nevertheless not be claimed back. Secondly, restitution will not be granted in cases of so-called 'natural obligations'. Natural obligations are claims that are not completely void, but merely unenforceable. Still, money that has been paid on the basis of a natural obligation may be retained by the defendant. The most important applications of this exception are gambling contracts. Although gambling contracts cannot be validly concluded, a 'debtor's' performance will not be recoverable.<sup>22</sup> Thirdly, obligations that are unenforceable because they have become time-barred continue to be a sufficient justification for retention.<sup>23</sup>

Restitution will not only follow where there has not been a legally enforceable obligation in the first place. Transactions may be avoided, that is rescinded with retroactive effect. In this case, the rules of unjustified enrichment will be applied.<sup>24</sup>

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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 nicht eintritt.'

<sup>20</sup> Gerhard Dannemann, 'Unjust Enrichment as Absence of Basis: Can English Law Cope' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law. Essays in Memory of Peter Birks* (OUP 2006), pp 364-369.

<sup>21</sup> Thomas Krebs, 'In Defence of Unjust Factors' in David Johnston and Reinhard Zimmermann (eds),

*Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2001), pp 88-90.

<sup>22</sup> § 762 (1) BGB.

<sup>23</sup> § 222 (2) BGB.

<sup>24</sup> § 142 (1) BGB.

Illegality of transactions is a special case in German unjustified enrichment law. The mere illegality of a transaction does not automatically trigger § 812 et seq. BGB even though it may render a contract void. Once an illegal contract has been executed, it depends on the nature of the legal prohibition whether the transaction can be reversed.<sup>25</sup>

It can, therefore, be said that unjust factors are reasons that justify restitution, while legal grounds act as a justification for the enriched to retain the gain. While a system based on unjust factors might be called subjective, as it focuses on the claimant's will, the *sine causa* model can be described as objective, since it builds on the factual lack of a legal justification for the transfer.<sup>26</sup>

### III. ANALYSIS

Having now briefly introduced the two systems of unjust enrichment, we can turn to the first question of this essay. How well do both approaches perform in comparison to each other? Can it be said that one of them yields fairer results than the other one, that is, is one approach more prone to rendering solutions to cases that are in accordance with ideas of justice and fairness?

Let us start with Birks's core case, the direct payment of money by the claimant to the defendant. A pays B money under the mistaken assumption that he owes him money, when in reality this is not the case. The problem now arises when the claimant desires to have this money returned to him. According to German law, the starting point is that the enrichment that has taken place is initially unjustified, unless there is a legal basis to justify it. This legal basis, as we have seen, can be a contract or a natural obligation. In the present case, there is no such legal basis, therefore the claimant will be successful.

An English claimant would have to deal with an inverse situation, namely that the enrichment would be thought of as just, unless he can show that there has been an 'unjust factor' at work that vitiated the transaction. If he can show that he was labouring under a mistake which caused the transaction, and the defendant does not have a valid defence which would entitle him to keep the money, he will be successful with his claim. As can

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<sup>25</sup> § 134 BGB.

<sup>26</sup> David Johnston and Reinhard Zimmermann, 'Unjustified Enrichment: Surveying the Landscape' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2005), 5.

be seen, the results in both systems are the same for this core case.

### 1. *The 'swaps cases'*

Now let us turn to a series of cases that proved to be very important to the discourse on unjust enrichment law, the so-called 'swaps cases'. The cases shall be briefly sketched: an interest swap is, in essence, a mutual loan. While one party agrees to pay interest at a fixed rate, the other one pays a floating charge that varies over the course of the loan. In the early 1990s, a lot of local (UK) authorities were parties to such arrangements. When the House of Lords decided in 1992 that such contracts were void because they exceeded the authorities' money management powers, the question as to restitution arose. Some contracts had already been fully performed, others had not. On which ground could restitution be granted? Following the German approach, the solution would simply be that the contract has been declared void and therefore, the transactions have to be reversed for want of legal ground.

The situation presents itself as slightly more complicated if one were to adhere to the unjust factors approach. The parties had not been acting mistakenly, given that the contracts were not void at the time they were entered into. Restitution was finally granted on the basis of 'absence of consideration'.<sup>27</sup> Additionally, in *Kleinwort Benson v Lincoln CC*, it was decided that restitution could also be granted because of mistake of law.<sup>28</sup> Again, the destination of the restitutionary journey remains the same, it is only the routes that diverge.

### 2. *Mistake of Law*

This generous application of the unjust factor of mistake has led to some discussion. At common law, the same mistake can work on two levels. On a 'lower' contractual level it may be substantial enough to make the contract, which underlies a transfer, voidable. On a 'higher' level or in unjust enrichment, it may give rise to a claim for restitution. So, even if it is one mistake, it is taken into account in two different fields of law.

Sonja Meier has looked into the relationship between the mistake that triggers unjust enrichment rules and the mistake that avoids the underlying contract. She contends that 'it is not possible to differentiate mistakes in restitution without resorting to a legal-ground analysis',<sup>29</sup> pointing out that

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<sup>27</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890; *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890; Birks, *Unjust Enrichment* (n 2), 110; the implications of this decision will be discussed in the next part.

<sup>28</sup> *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL).

<sup>29</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 53.

English law has given some relevance to a legal ground in denying recovery in the case of a mistaken payment of an existing obligation.<sup>30</sup> She has argued that in actuality what the common law rules on which mistakes lead to restitution really deal with is an analysis of the existence of a legal basis.<sup>31</sup> For this, she mentions two examples.

Firstly, she discusses the rules on mistake of law. In English law, the mistake of law has a turbulent history. While mistake of fact had always been a reason for recovery of a payment, *Bilbie v Lumley*<sup>32</sup> rendered a mere mistake of law legally irrelevant. However, following the swaps cases (which have been discussed above),<sup>33</sup> mistake of law is – once again – recognised as a valid ground for recovery.

The question whether recovery is possible based on a mistake of law is particularly relevant for natural obligations. Natural obligations are contracts which are not void, but merely unenforceable. In *Moses v MacFerlan*, a so-called negative list of unenforceable claims has been established by Lord Mansfield. A claim:

‘does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.’<sup>34</sup>

This list has regained relevance because of the abolishment of the mistake of law rule. Does this mean that recovery is now possible for all payments made in discharge of a natural obligation? According to Meier, this inconsistency reveals the reasoning behind the special status of a mistake of law: ‘This (...) obscures the true reason why recovery is excluded: not because of the nature of the mistake, but because of the obligation on which the claimant paid: an obligation which provided the defendant with a justification to keep the benefit.’<sup>35</sup>

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<sup>30</sup> *Steam Saw Mills v Bearing Brothers* [1922] 1 Ch 244.

<sup>31</sup> Meier, ‘Unjust Factors and Legal Grounds’ (n 4), 56.

<sup>32</sup> (1802) 2 East 469.

<sup>33</sup> Notably *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095.

<sup>34</sup> *Moses v Macferlan* (1760) 2 Burr 1005 (KB).

<sup>35</sup> Meier, ‘Unjust Factors and Legal Grounds’ (n 4), 56.

### 3. *Payment in Doubt*

The second example deals with the situation in which a claimant makes a payment in order to discharge an obligation which he or she is not sure exists.

When the payer is unaware of the invalidity of the obligation, the situation presents itself as fairly straightforward. While German law focuses entirely on the circumstance that there is, in fact, no obligation (with the possible defence of knowledge in case the claimant knew of its non-existence), English law takes the other route and asks the claimant to show a mistake. As long as the claimant does not have any doubts about his liability, the outcomes in both systems are the same. The results only diverge if the payer is not sure whether or not he or she is bound to pay.

The case of *Woolwich v IRC*<sup>36</sup> can be taken as an example. The Inland Revenue demanded taxes from the Woolwich Building Society, which it was not allowed to levy, thus acting *ultra vires*. The Woolwich Building Society submitted to the claim, but expressed a reservation. After having challenged the tax and having it repaid, Inland Revenue refused to pay interest on the amount. In order to have a restitutionary claim on the interest, the Woolwich Building Society would have had to show that there had been an unjust factor. However, it had not been labouring under mistake (or any other unjust factor) because it knew that Inland Revenue was acting *ultra vires*. Eventually, the case was decided in favour of the Woolwich Building Society for reasons of policy.

In German law, there is a policy to limit recovery for payments made in doubt. Following the good faith principle, the defendant should be able to rely on the conduct of the claimant. If there is a payment, there is an assumption of its intended finality. However, the claimant can make an express reservation. In doing so, he or she retains the option of recovery.

In England, the payer in doubt has two options: he can either submit to the claim, pay, and thus exclude recovery (because doubt seems to exclude the possibility of labouring under a mistake of any kind), or he can refuse to pay and litigate. That means that nullity does not automatically trigger restitution in English law, although for the majority of cases there will be restitution on the basis of an unjust factor.<sup>37</sup>

Meier criticised this approach as impractical. The question of liability is

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<sup>36</sup> *Woolwich Equitable Building Society v IRC* [1993] AC 70, 161.

<sup>37</sup> Krebs, 'In Defence of Unjust Factors' (n 21), 78.

usually unclear to both parties and not solely to the claimant.<sup>38</sup> To her, an approach that tries to reconcile the problem of submission with a system of unjust factors just misses the goal. Even if one were to introduce new unjust factors like 'transactional inequality',<sup>39</sup> it would only distract from the actual reason for recovery, which is the absence of a legal basis. She advocates a submission principle that takes the form of a defence in case the defendant was ignorant of the claimant's doubt.<sup>40</sup>

By way of summary, it can be noted that the unjust factor approach and the absence of basis approach both yield essentially identical results.<sup>41</sup> That means that 'English law certainly allows a plaintiff to sue in most of the situations where he would have a claim for enrichment on the Continent'.<sup>42</sup> The difference, however, lies in the route that is taken to get there. Whereas English law assumes that an enrichment is 'just' as long as there is no unjust factor vitiating the transfer, German law has a different starting point. According to German logic, the enrichment is initially unjust and must be justified by a legal ground. German law is therefore 'looking for 'justification' rather than 'injustice'".<sup>43</sup> For reasons of elegance and conceptual clarity, the absence of basis approach could seem preferable to some. However, it seems to be a matter of juridical taste whether elegance and conceptual clarity are categories that should be relevant in this context.

Peter Birks seems to have been convinced. But should English law really jump the unjust factors ship and join the legal ground force? This shall be examined in the following paragraphs.

#### **IV. AN ENGLISH SYSTEM OF ABSENCE OF BASIS?**

This leads us to the next question that shall be dealt with. Accepting that the absence of basis approach displays some advantages to looking for unjust factors (conceptual clarity and elegance), would it be the next logical step for the English system to adopt this approach?

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<sup>38</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 60.

<sup>39</sup> Peter Birks, 'No Consideration: Restitution After Void Contracts' (1993) 23 *University of Western Australia Law Review* 233.

<sup>40</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 61.

<sup>41</sup> Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15/3 *Oxford Journal of Legal Studies* 403, 414; cf. Hedley, 'The Empire Strikes Back?' (n 3) pp 766-769.

<sup>42</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir, 2<sup>nd</sup> edn, Clarendon Press 1992), 590.

<sup>43</sup> Hedley, 'The Empire Strikes Back?' (n 3), 766.

### 1. *Transplanting a Legal Concept*

Before dealing with this question, it is useful to first very briefly outline the theoretical background in comparative law that such a potential transplantation assumes. The discussion about the 'transplantability' of legal rules, institutions, etc. is an old one in comparative law. On one end of the transplantability spectrum, it is asserted that law as a system is closed in itself and functions autonomously, without the necessary influences of culture and society. Theorists on the other end of this spectrum believe that law is to a great extent a product of other, meta-legal factors, like culture, sociology, psychology, philosophy, etc. It is these two ends of the spectrum that I restrict the account of this debate to.

The expression 'legal transplants' was coined by Professor Alan Watson in his 1974 book 'Legal Transplants. An Approach to Comparative Law'. In this book, he examines the history of legal developments and comes to the conclusion that the main motor of legal progress has always been a vivid practice of borrowing (one could almost say stealing) legal rules and institutions from other systems.<sup>44</sup> He comes up with numerous historic examples, e.g. the adoption of Roman systematics in Scottish law.<sup>45</sup> In demonstrating the possibility and indeed practice of implanting foreign legal building blocks into another system, Watson opposes what William Ewald calls the 'mirror theories' of law.<sup>46</sup> Mirror theories are theories that assume, 'sometimes explicitly, more often tacitly, that the law changes in response to forces external to law - that law reflects the power relations of society, or the workings of the market, or the ideology of possessive individualism, or the promptings of the judicial sub-conscious, or the cunning of the *Weltgeist*, or the self-interest of the dominant class, or the political ideology of the age; that, because law does not possess an autonomous existence, legal scholars should steep themselves in other disciplines, such as sociology, or anthropology, or philosophy, or economics, or literary criticism, or critical theory.'<sup>47</sup>

One of the most vocal proponents of this view, i.e. the view that the law is an expression of 'something else', of values that underlie a particular society, is Pierre Legrand. He emphasises the importance of legal culture

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<sup>44</sup> Alan Watson, *Legal Transplants. An Approach to Comparative Law* (2<sup>nd</sup> edn, The University of Georgia Press 1993) 95.

<sup>45</sup> Watson, *Legal Transplants* (n 44), 36 ff.

<sup>46</sup> William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43/4 *American Journal of Comparative Law* 489, 492; for examples of such theories see Watson, *Legal Transplants* (n 44) 21ff and Lawrence Friedman, *A History of American Law* (1<sup>st</sup> edn, Simon & Schuster 1973), 595.

<sup>47</sup> Ewald, 'The Logic of Legal Transplants' (n 46), 490.

to the meaning of rules, therefore closely tying together sociological, philosophical and legal aspects. Others have identified factors that might play into the understanding of law within a particular culture – in addition to ‘black letter law’, the social acceptance thereof, the role of courts, judges and the legal profession, the notion of what law is in a particular society in general, legal reasoning and methodology, etc. may all play into the particular appearance of law in a given culture.<sup>48</sup> Therefore, to Legrand, rules are inseparably intertwined with cultural aspects.<sup>49</sup> This is why legal transplants (of rules) are impossible to Legrand and others at this end of the spectrum. ‘Anyone who takes the view that ‘the law’ or ‘the rules of the law’ travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage.’<sup>50</sup>

The problem with Legrand is, however, not least a political one. If we believe that legal cultures or systems or however one wishes to group them, are so insurmountably different, the underlying assumption must be that, for example, a German citizen *per se* is essentially different from a French citizen *per se* or an English citizen *per se*. This would open the gates to all kinds of generalisations and prejudices. Of course, it would be a futile exercise to deny the obvious differences in the legal systems, but conversely it would be inappropriately fatalist to assert their ‘unchangeability’, or indeed to understand culture as a homogeneous unit. As Watson says himself, ‘[m]uch about Legrand’s approach and our disagreement is revealed by his statement (...) that the word *Brot* in German means something different from the French word *pain*. (...) *Pain* in French and in France is not the same as *pain* in French and in France. For a poor village housewife ‘bread’ has not the same meaning as for the wealthy Parisian businessman. (...) It is banal to notice that the same legal rule operates differently in two countries: it operates to different effect even within one.’<sup>51</sup>

The influence of such cultural differences (national or regional) should not be overemphasised. History has shown that legal borrowing has been going

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<sup>48</sup> David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2007), 7, pp 24-6.

<sup>49</sup> Anthony Forsyth, ‘The ‘Transplantability’ Debate in Comparative Law and in Comparative Labour Law: Implications for Australian Borrowing from European Labour Law’ (2006) University of Melbourne Working Paper Series, Working Paper No. 38 via <http://www.law.unimelb.edu.au/files/dmfile/wp381.pdf>, 5.

<sup>50</sup> Pierre Legrand, ‘The Impossibility of ‘Legal Transplants’ (1997) 4 *Maastricht Journal of European and Comparative Law* III, 114.

<sup>51</sup> Alan Watson, ‘Legal Transplants and European Private Law’ (2000) 4/4 *Electronic Journal of Comparative Law* via <http://www.ejcl.org/ejcl/44/44-2.html>.

on for centuries, or indeed millennia, and in many instances successfully (e.g. the *Bürgerliches Gesetzbuch*, which united the previously fragmented laws in what is Germany today, or the acceptance of the Uniform Commercial Code by all states of the USA).<sup>52</sup> So on a practical level, the possibility of transplanting legal rules or institutions is a historical fact.

## 2. *Transplanting the 'Absence of Basis' Approach?*

After this brief theoretical excursion, let us return to the question that has been posed earlier, which is whether English law should adopt the 'absence of basis' approach. In this context, the 'swaps cases', which have been discussed above, are of particular interest. They constituted an important landmark in the academic discourse on the law of unjust enrichment in England. Not only did they reintroduce 'mistake of law' as a ground for recovery,<sup>53</sup> but also they caused Peter Birks to overthrow his previous model of unjust enrichment. Birks understood the granting of restitution based on failure of consideration as a dethronement of the system of unjust factors – what 'failure of consideration' really meant is that there was no contract. Birks could come to this conclusion only by re-examining the concept of 'consideration'. He asserted that the consideration that fails in an unjust enrichment context is the same that would conclude a contract, and does not merely concern counter-performance.<sup>54</sup> The court had therefore engaged in a legal ground analysis.<sup>55</sup>

In the aftermath of these cases, Peter Birks therefore attempted to combine the common law and the civil law approaches and suggested a new system of unjust enrichment for English law. His most radical change is that he replaced the positive requirement of an unjust factor with the negative requirement of an absence of basis. In order not to completely give up on the traditional system, unjust factors feed into the 'super category' of no basis. Whether there is a basis or not depends on the nature of the enrichment. Birks distinguishes between participatory and non-participatory enrichments, further subdividing the first category in obligatory and voluntary enrichments. In non-participatory enrichments, on the other hand, the benefit may be claimed because the claimant did not participate in the acquisition of the gain. In obligatory enrichments,

<sup>52</sup> Watson, 'Legal Transplants and European Private Law' (n 51).

<sup>53</sup> *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL); Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (n 41), 414.

<sup>54</sup> Birks, *Unjust Enrichment* (n 2), 118; for the different meanings of 'consideration' see also Graham Virgo, 'Failure of consideration: myth and meaning in the English law of restitution' in David Johnston and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (CaCUP2002), 103.

<sup>55</sup> Birks, *Unjust Enrichment* (n 2), pp 117-118; critically: Hedley, 'The Empire Strikes Back?' (n 3), pp 771-772.

the benefit was transferred without an obligation, while in voluntary enrichments the benefit has been transferred in expectation of a purpose to come about which subsequently fails.

This Birksian model faced a lot of criticism. Andrew Burrows has pointed out that the results are mainly the same, regardless of which approach is applied to cases, which also has been shown here previously.<sup>56</sup> Concerning the elegance and ease of application of both systems, Burrows holds that they are superficial.<sup>57</sup> He gives two main reasons for this conclusion.<sup>58</sup>

Firstly, Birks's wide notion of gift is problematic. In his concept of by-benefits, Birks understands as gift benefits transferred upon the defendant, but which are not unjust enrichment.<sup>59</sup> This is the case if, for example, the defendant, who lives in the flat above the claimant, profits from the claimant's heating. To understand this as a gift indeed seems a bit far-fetched. It could probably just as well be assumed that the claimant would prefer to keep all of the heating energy to him- or herself, were this technically feasible. To see donative intent in an act that is a result of lack of alternatives is pushing the notion of a gift a little too far. The claimant's intent cannot be simply assumed.<sup>60</sup>

The second point corresponds to a point that has been made by Sonja Meier (see above). However, while for her it is problematic that an unjust factors approach treats the same factual mistake on two different levels (contract and unjust enrichment), Burrows criticises Birks's model for it 'pushes out of sight many of the difficult questions of law that are dealt with 'up front' under the common law approach'.<sup>61</sup> From a conceptual perspective, it is hard to understand why this should be detrimental to the elegance of a system. Separating the question of whether there is a basis or not from the rules on unjust enrichment can only contribute to an enhanced clarity of the subject. Ultimately, he does not altogether dismiss Birks's model, but suggests its use as a point of reference for a 'cross-check' in difficult cases.<sup>62</sup>

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<sup>56</sup> Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Andrew Burrows and Alan Rodger, *Mapping the Law. Essays in Memory of Peter Birks* (OUP 2006) 33, 44.

<sup>57</sup> Also Chris L Hunt, 'Unjust Enrichment Understood as Absence of Basis: a Critical Evaluation with Lessons from Canada' (2009) Oxford U Comparative L Forum 6 at [ouclf.iuscomp.org](http://ouclf.iuscomp.org).

<sup>58</sup> Burrows, 'Absence of Basis: The New Birksian Scheme' (n 56), 45-48.

<sup>59</sup> Birks, *Unjust Enrichment* (n 2), 158.

<sup>60</sup> See also Hedley, 'The Empire Strikes Back?' (n 3), 780.

<sup>61</sup> Burrows, *The Law of Restitution* (n 15), 111.

<sup>62</sup> Burrows, *The Law of Restitution* (n 15), 114; However, one may be left to wonder

On the more favourable side of reception, it has been said that a shift to the absence of basis approach is feasible in English law and has its advantages, like speeding up the process of legal development.<sup>63</sup> However, in order for a no basis approach to dovetail with the general English law, a few adaptations would have to be made, as Dannemann points out. First and foremost, English law would have to recognise certain agreements outside of contract law as valid legal bases, such as gratuitous services, gratuitous use, gifts and trusts. As it stands at the moment, the law on what qualifies as a legally binding contract under English law is very restrictive. German law recognises a greater range of agreements as contracts. Secondly, more attention would have to be given to the distinction between merely unenforceable and void contracts, considering the latter are altogether unfit to provide a justification for retention.<sup>64</sup> Finally, English law would have to find new solutions to cases like *Woolwich v IRC*, where the claimant performs under protest (see above).<sup>65</sup>

### 3. *Unjust Enrichment in the Legal Landscape*

In this last section, the place of unjust enrichment law in the whole of private law shall briefly be examined. Why is that important? It is a question of whether one can compare the functions that unjust enrichment law has in the German system to that in the English system. It is vital to the question of whether the English system should adopt the continental approach to examine whether the law of unjust enrichment has the same function and place within the whole of the law. If that is not the case, one would be comparing apples with pears.

Can unjust enrichment law be perceived as a uniform or unified system of law in its own right or is its role rather that of a gap-filler which is applied to the 'leftovers' of contract and tort law? Stephen Smith and Peter Jaffey have made two distinctions that can be used for the purpose of locating unjust enrichment.

What is the law of unjust enrichment? Having started out as a part of the catch-all category of quasi contracts in Roman law, it has without doubt gained in substance over the last centuries. But where can we locate it now in the interplay of the different legal areas?

Stephen Smith has divided the different approaches to the law of unjust

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what value there is in a principle that cannot be universally applied.

<sup>63</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), 377.

<sup>64</sup> Also: Burrows, 'Absence of Basis: The New Birksian Scheme' (n 56), 47.

<sup>65</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), pp 376-377.

enrichment in what he calls the unitary and the pluralist approach.<sup>66</sup> While the unitary approach is, in short, the civilian approach which has a single overarching principle, the pluralist approach corresponds to the system of unjust factors. Smith bases this distinction on an analogy with tort law. Here, similarly, the fault lines between the civilian and the common law can be traced along either the plurality of torts or the one principle of tort law (*Schadenersatz*).

In contrast, Peter Jaffey has looked into what he calls the strong theory and the weak theory of unjust enrichment.<sup>67</sup> Both theories deal with the nature of the defendant's duty to give back the benefit obtained. On the one hand, the weak theory of unjust enrichment merely says that 'there are claims that arise from the receipt of a benefit by the defendant and that serve to transfer the benefit from the defendant to the claimant.'<sup>68</sup> This does not tell us anything about where the claims come from or why they should be given back. 'To state that something amounts to unjustified enrichment is merely a conclusion, that because the enrichment is unjustified it should be returned, restored or made over to the person properly entitled to it. That conclusion is in need of supporting normative argument. But what sort of argument?'<sup>69</sup> A weak theory of unjust enrichment points toward a field of law different from unjust enrichment to make clear which types of enrichment are just or unjust.

On the other hand, the strong theory recognises unjust enrichment as a field of law which is equivalent to either contract or tort. All claims arising having received a benefit can be based on one principle, which unites the whole of the law of unjust enrichment. The strong theory of unjust enrichment implies that the duty to restore finds its reason in the legal realm of unjust enrichment rules. Therefore, the strong theory is a normative theory.

According to Jaffey, many common law writers accept the 'strong theory' as a given and unjust enrichment as a 'tertium quid', a separate domain of private law.<sup>70</sup> Indeed, it appears that the civilian approach would adhere to

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<sup>66</sup> Stephen A Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in R Chambers, C Mitchell, J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009), pp 202-206.

<sup>67</sup> Peter Jaffey, 'Two Theories of Unjust Enrichment' in J W Neyers, M McInnes, S G A Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004).

<sup>68</sup> Jaffey, 'Two Theories of Unjust Enrichment' (n 67), 141.

<sup>69</sup> David Johnston and Reinhard Zimmermann, 'Unjustified Enrichment: Surveying the Landscape' (n 26), 628.

<sup>70</sup> Jaffey, 'Two Theories of Unjust Enrichment' (n 67) 163; Birks, *Unjust Enrichment* (n

Jaffey's 'weak theory' and Smith's unitary approach. In the words of Reinhard Zimmermann, '[i]t is difficult to see why the law of unjustified enrichment should be saddled with the task of sorting out the fate of the contractual relationship between recipient and transferor.'<sup>71</sup> Similarly, Gerhard Dannemann describes the German law of unjust enrichment as dovetailing with the law of contract in the BGB.<sup>72</sup> Jan Smits talks of the 'residual character of restitution law'.<sup>73</sup> Although a member of the common law academia, James Gordley argues in a similar vein. The law of unjust enrichment is not a complete field of law in its own right, but rather a means to cater to 'the need in disparate cases to fill gaps left by other branches of the law'.<sup>74</sup> Despite the seemingly denser, more unified structure of unjust enrichment law in Germany, the law of unjust enrichment by transfer acts more like an *automaton* following one overarching principle, the reversal of enrichments (whose unjustness needs to be determined by a legal norm that lies outside of the law of unjust enrichment itself). It takes effect once an unjust enrichment has been detected (due to the lack of legal ground). Almost parasitic in its essence, it does not aim to establish rules on when an instance of enrichment is unjust.

But what does this mean for our present enquiry? The answer is two things. First, it shows that the place and function of unjust enrichment are substantially different in Germany and England. While in Germany it has a distinctly residual character depending strongly on legal norms outside of unjust enrichment, England's unjust factors are structurally parallel to tort law, which means English unjust enrichment is more independent from other fields of law. Secondly and as a consequence, one should be careful to implant a foreign concept to another legal system. In order for England to embrace an absence of basis approach, many adaptations would have to be made, specifically to the law of contract.

## V. CONCLUSION

Whether unjust factors or absence of basis, the different approaches of common law and civil law systems seem deeply engrained in the scholars'

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<sup>71</sup> Zimmermann, 'Unjustified Enrichment. The Modern Civilian Approach' (n 41), 416.

<sup>72</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), 363.

<sup>73</sup> 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), 157.

<sup>74</sup> James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (OUP 2006), 419.

minds. In this essay, both systems have been sketched in broad strokes, and then analysed and compared. By way of conclusion, it can be said that even though the results may be the same or at least very similar, the absence of basis approach has a slight advantage over the unjust factors approach in that it is conceptually clearer and seems more straightforward in its application.

Even if the elegance has been called 'superficial' by some, it appears that having one principle that applies to all cases is preferable to having to deal with a vast casuistry that will need to resort to adventurous explanations in order to achieve results that are in accordance with ideas of justice and fairness.

Regarding the question whether the English law should adopt this conceptually clearer approach, the consequences of this conceived preference are, however, limited. Unjust enrichment occupies different areas in the legal landscapes of German and English law, therefore simply implanting a foreign concept will inevitably produce problems.