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UNJUST ENRICHMENT

*Lionel Smith**

The law of unjust enrichment is something of a lost child in every legal system. In a wide range of situations, the law requires that a defendant who has been enriched at the expense of a plaintiff make restitution to that plaintiff, either by returning the very substance of the enrichment, or, more often, by repaying its monetary value. But only if the enrichment is unjust, or unjustified: a gift, for example, is a justified enrichment. This generic description of the scope of the subject can hardly give an inkling of the range of situations in which it plays a role. Some examples include the payment of money by mistake, as when a debtor pays more than they actually owe; improvements to another person's property, whether or not caused by a mistake regarding ownership; the payment of another's debt; and the work done by a partner, perhaps over many years, in a cohabitational relationship.

This wide range of operation leads us immediately to see one of the most striking examples of diversity among modern legal systems in a field of basic private law. At one extreme—as in, on some views, the modern common law—all or almost all of the law of unjust enrichment has been conceptually unified into a single legal category. At the other extreme—as in Roman law and the old common law, but also as in modern French and Quebec law, and also Jewish law—we see instead a miscellany, a multitude of single instances, particular claims or actions which address particular difficulties. Especially in uncodified systems, whether common law or civil law, the question whether a unified or disaggregated approach is more appropriate is one of the live issues of the early twenty-first century.

The law of unjust enrichment, then, is a concrete example of the intellectual phenomenon that sets lumpers against splitters and hedgehogs against foxes. Many are the debates about terminology, classification, and taxonomy in this field of law. One example will suffice. The defendant and the plaintiff make a contract by which the plaintiff is to pay \$100 in ad-

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vance and the defendant will repair the plaintiff's damaged painting. The money is paid but then the painting is stolen; this renders the contract impossible of performance, and brings it to an end. The plaintiff can get his money back. In German law, this is a claim in unjust enrichment. In French law, this case was not expressly dealt with by the Civil Code until the reform of 2016; now, as in Quebec since 1994, the Code recognizes it as a claim for restitution, but not one founded on unjust enrichment. In the common law, torn between the dictates of history and the systematizing efforts of twentieth century jurists, it might be a claim based on a "total failure of consideration," or it might be a claim in unjust enrichment, depending upon whom one asks.

In common law and civil law alike, this branch of the law is often ascribed to equity; and in the common law, even the claims that were recognized in the courts of common law, before the fusion of common law and Equity, were characterized as equitable by the common law judge, Lord Mansfield. This is because the law of unjust enrichment has a mission of fixing what would otherwise be unjust. But it is more than that: it is also the case that much of the law of unjust enrichment seems to be about fixing injustices that the law itself is in danger of creating. One reflection of this is that there is no corresponding field of inquiry in moral philosophy. Different moral theories may have different explanations for why we should keep our promises, or refrain from hurting one another, or damaging or stealing one another's property; the law of contracts, the law of extra-contractual wrongs, and the law of property represent the legal system's approaches to the same kinds of problems. But moral philosophers do not discuss unjust enrichment, unless perhaps they have first learned something about the law. If we think about the case of the stolen painting, a moral philosopher might say—as might any non-lawyer who considered the problem—that the defendant should return the money because it doesn't really belong to him. But the lawyer cannot accept this; the law has rules that determine when the ownership of money and other goods is effectively transferred, and in a case like this, the ownership of the money passed to the defendant. It does belong to him, and the supervening impossibility of performing the contract does not change this. A more nuanced extra-legal analysis might be that the defendant must make restitution because he did not perform his side of the bargain; he never earned the money, even though this was not his fault. This analysis makes sense, but the lawyer needs to translate it into her own categories, and more importantly to explain how it generates a legal obligation. When the money was paid, it was legally due and owing. So there is no legal defect there, and no reason to repay has yet arisen. Later, the contract becomes impossible of performance. The law's response to this is to say that the defendant is not legally obliged to perform his side of the bargain. Now, to find a legal obligation on the defendant to make restitution of the payment, the lawyer has two options. One is to find an implicit

condition attached to the payment, requiring a refund in the case of impossibility; but this cannot, without make-believe, solve the ordinary case. The other is to generate an explanation that lies outside of promising, outside of wrongdoing, and outside of the law of ownership. That is the vocation of the law of unjust enrichment. Like the law of wrongs, it creates obligations that arise by operation of law; but like the law of contract, it creates obligations that do not depend on wrongdoing.

Since it plays this role of fixing problems, it is perhaps not surprising that the law of unjust enrichment finds itself torn between being a collection of single instances and being a unified body of law, which steps in whenever there is an unjustified transfer of wealth from one to another. But there are still more difficulties of categorization. Sometimes, a defendant infringes the plaintiff's rights and profits thereby. We might take the case of a defendant who is building on his own land, and who systematically trespasses on the plaintiff's neighbouring land in the construction work. Let us assume that the defendant saves \$500 by this trespass; but we might also assume that the plaintiff suffers no loss, his land being unaffected by the trespass. This is not a case of a transfer of wealth, but of a profitable infringement. Many civilian systems are committed to the proposition that loss on the plaintiff's part is an essential element of a claim for wrongful conduct. This pushes them to say, if they want to allow the plaintiff to claim the \$500 in our example, that it is a case of unjust enrichment. Under this approach, however, it becomes even more difficult to unify the law of unjust enrichment. While this case shows an enrichment of the defendant, it does not show any loss for the plaintiff, as did the case of the payment for the repair of the painting. So the law of unjust enrichment could not be just about transfers, but instead must be seen as focusing on the defendant's gain, and as deploying a range of normative reasons as to why that gain must be returned or surrendered.

The attempts in some systems to unify the law of unjust enrichment have inspired different strategies. One is to try to describe all, or most, of the field as being concerned with enrichments that have no legal justification. This epistemic approach could be said to find some roots in Justinian's restatement of classical Roman law, and it is exemplified to some extent in modern German law and in some accounts of the common law. The Canadian common law has been trying since 1980 to work with an idea of transfers of wealth that have "no juristic reason." But it remains a difficult question whether a field of knowledge or a reasoning category can be defined by the absence of something. The approach of French and Quebec law, and of more traditional common lawyers, has been simply to list the single instances where claims are allowed. The concern is less with the absence of a justification for the defendant's enrichment, and more with positive reasons why the enrichment is unjust: for example, that the plaintiff paid money to the defendant while under a mistake, or

under compulsion or undue influence. This approach makes it difficult to be sure that we are dealing with something that has a conceptual unity, as the unity among the disparate problematical situations is not plain.

There is little consensus, then, across and within Western legal systems, on the status of unjust enrichment as a legal idea. Is it a single source of obligations, a single cause of action, which is capable of being implemented in lots of different ways? Or is it rather a principle, a broad idea capable of bringing together a multiplicity of claims, each of which is based on a distinct juristic justification? Unjust enrichment steps in to fix things that have gone wrong for many reasons and in many different contexts. Moreover, what may go wrong, and how it may go wrong, can be entirely different from one system to another, since it can depend on the contours of other legal categories. Although there are many advocates in many legal systems for the best approach to unjust enrichment, its multifarious vocation guarantees that difference will continue to prevail over commonality.
