ON OBLIGATIONS THAT ARISE FROM UNJUSTIFIED ENRICHMENT*

E.J.H. Schrage
Professor of the University of Amsterdam

1. Introduction

In a project that envisages codification of the private law a thorough reflection upon the sources of obligations is inevitable. People living in society may enter into transactions, cause each other harm, and confer benefits on each other. The law of obligations regulates these activities. It is concerned with the allocation of the gains and losses, the enrichment and impoverishment resulting from these activities. Traditionally, lawyers are used to distinguish between contract and tort (delict). Contract law regulates the creation, performance and discharge of agreements voluntarily entered into, and provides remedies for breaches of those agreements. The law of tort is concerned with the prevention of wrongfully inflicted harm and with compensating those who are wrongfully harmed. Most obligations arise either from a contract or a tort, but from the days of Roman law onwards it is felt that these two categories (contract and tort) do not embrace all that lies within the law of obligations. The Roman lawyer Gaius recognised a third category of obligations *ex variis causarum figuris* and via the Institutes of Justinian the concept of unjust enrichment as a third source of obligations reached the Civil law.

The Common law, however, initially withered unjust enrichment with judicial scorn. As late as 1923 a distinguished English Lord Justice, Scrutton LJ, had dismissed the concept of unjust enrichment as *well-meaning sloppiness of thought*[1], whereas in 1978 Lord Diplock denied the existence of any *general doctrine* of unjust enrichment[2]. The last decade of the last century, however, began to show a totally different picture. In a series of notable judgements, beginning with *Lipkin Gorman* v. *Karpnale Ltd.*[3] the House of Lords made clear that restitution is, like tort and contract, an integral category of the Common law.

It would be unwise to underestimate the differences between the Common law and the Civil law, but undoubtedly the two most important European legal families are on the track towards a certain convergence. The law of obligations at either side of the Channel recognises a threefold division of the sources of obligations. Consequently, any new project that envisages codification of the law of obligations

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2. Holt v. Markham [1923] 1 KB 504, 513.

3. Orakpo v. Manson Investments Ltd. [1978] AC 95, 104.

4. Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, also published in *Beatson and Schrage*, Cases, Materials and Texts on Unjust Enrichment, Oxford 2003, Chapter 2, 2.E.2.

has to face the challenge of a thorough reflection upon the relation between the law of contract, the law of tort and the law of unjust enrichment. We will elucidate this statement by drawing the attention to the last successful codification of the whole of private law, the Dutch Civil Code of 1992. We will focus upon the remedies for unjust enrichment, but we will place them in their historical and comparative context, thus showing that both the Common law and the Civil law had to overcome a considerable number of hurdles on their roads towards recognition of unjust enrichment as a separate source of obligations, alongside with contract and tort.

2. From old to new law[5]

Article 1269 of the Dutch Civil Code of 1838 (hereinafter referred to as "the old law" or "BW*old*") stated the following principle: *All obligations arise either from agreement of by operation of law.* This article of the Code took centre stage in a case, which – in the words of the then Advocate-General at the Dutch Supreme Court (*Hoge Raad*) Loeff – "might be considered to be of extraordinary importance for the life of our law". The reason why this case was so important was because, according to the Advocate-General, it dealt with nothing less than the question whether the unwritten law allows an application of good faith (outside the narrow confines of the law of contract) which is so broad that this notion could (apart from the concepts of *agreement* and *tort* form an independent source of obligations[6].

The answer to the question was not self-evident. While the old Civil Code was in force a variety of authors defended the view that civil obligations that did not emanate from the Code should be recognized, either directly on the basis of the unwritten law or by raising obligations of morality and decorum to the level of enforceable obligations.

With regard to the doctrine of unjustified enrichment this issue boiled down to the question as to whether Dutch law – in addition to the instances specifically regulated by the 1838 Code – also recognized a general action, in terms of which

5. There are two recent introductions to our theme in print: (1) *A.S. Hartkamp*, ongerechtvaardigde verrijking naast overeenkomst en onrechtmatige daad in WPNR 6440 (2001), p. 311-318 6441, p. 327-224, also published under the same title as his inaugural address at the Univeristy of Amsterdam, Amsterdam 2001 (Vossiuspers), and previously as Unjust Enrichment and the Law of Contract, the Hague, London, New York (Kluwer Law International) 2001, p. 25-32; (2) *G.E. van Maanen*, Ongerechtvaardigde Verrijking. Een handleiding voor raadsheren en studenten, met gratis stappenplan [Are Aequi Cahiers Privaatrecht deel 11], Nijmegen 2001.

6. In his advice to the Supreme Court relative to the case De v.o.f. Bouwbedrijf J.V. Quint en J. de Poel in liquidatie te Heerlen en haar firmanten J.V. Quint en J. de Poel, beiden te Heerlen, H.M.W.H. te Poel te Amsterdam, HR 30 januari 1959, with a footnote by *Veegens;* AAE VIII (1959), 171, Beekhuis, also published in the casebook: Jurisprudentie en Annotaties, Ars Aequi, Privaatrecht 1950…1985, Nijmegen 1985, p. 203-208.

every instance of unjustified enrichment could be nullified. The phrase "specific instances specially regulated in the Code" contemplated, among other things, (a) the rule of the former article 630 BW*old* ff. (which concerned the right of the bona fide possessor to claim his or her necessary expenses that were spent in the preservation or and/or to the advantage of the object concerned) as well as (b) the rules contained in article 658 BW*old* ff. (which regulates the taking of benefits from, respectively, movable and immovable property) plus (c) the right of a builder (etc.) to claim recompense for the value of the building materials as well as the wages paid to his or her workers and (d) the general obligation on an owner, to whom goods have been returned, to compensate the possessor for the necessary expenses which he or she had incurred (article 1400 BW*old*). In the nature of things the *condictio indebiti* (article 1395 BW*old*) also fits into this scheme in terms of the old law, since in that dispensation the connection between the notion of enrichment and the *condictio indebiti* had not yet been severed. So, too, *restitutio in integrum* consequent upon the nullification of an agreement as a result of the incapacity of one of the parties (article 1487 BW*old*), as well as the *actio negotiorum gestorum contraria* (the claim of the unauthorized administrator for compensation of his expenses (article 1393) Bw*old*) and the *actio de in rem verso*, with which juristic persons and members of a corporate entity may be sued up to the limit of the enrichment which ensued as a result of a juristic act performed by someone who was not legally competent (article 1693). In addition, one also needs to consider certain specific provisions, such as article 1251 BW*old*, in terms of which the third-party possessor has a claim against a creditor who holds a hypothec. This claim is for the increase in value that the hypothecated property has undergone as a result of the improvements brought about as a result of expenditure by the third-party possessor. Other (comparable) claims which fall under this heading are (a) that of the buyer who has to tolerate his seller making use of a right to re-purchase (article 1568 BW*old*); (b) that of the unpaid artisan against the owner of property, (where in his capacity as a sub-contractor, the artisan had agreed to construct a building on the land) up to the amount in which the owner remains indebted to the main contractor.

Could it be said that a single principle united all the claims enumerated in the 1838 Code and, furthermore, if there were such a single principle, was its nature such that it could be said that in Dutch private law there existed, apart from these specifically mentioned claims, a general action with which *every* instance of unjustified enrichment could be claimed? This action would, in the nature of things, not be set out in the Code, but would be founded on tradition and equity. *Marcel Henri Bregstein* (1900-1957) was most prominent among those who advocated a positive answer to this question. This he did in numerous publications: first in his

thesis and then in a series of articles published in the WPNR[7]. Although he attracted much support, there were also those who actively opposed his views. The answer to this question was obviously not self-evident. Indeed, when Professor *E. M. Meijers*, by virtue of the Royal Decree of 25 April 1947, was given the task creating a draft for a new Civil Code, he put 50 questions to the Second Chamber of the States-General, and the 18th question addressed precisely this issue:

Must the Code contain a general article in which it is stipulated that anyone who is enriched at the expense of another without adequate legal ground is liable to made good the damage suffered by the other party to the extent of, at most, the amount in which he himself has been enriched, or must the Code restrict itself to the enumeration of a few specific instances in which this claim should be recognized?

A majority of a commission of the Second Chamber, which considered the questions, opted for the second possibility, but the Second Chamber itself did not agree and opted for the first possibility. In the meantime however, the position in the courts was as follows: The lower courts tended regularly to follow *Bregstein*, but the Advocate-General (Loeff) made it very clear that the *Hoge Raad* would have the last word in the in respect of the old law in the then still-to-be-decided *Quint-te Poel* case. All avenues along which the issue could yet again be sidestepped were now closed[8]. Now the *Hoge Raad* was squarely faced with this question: «Does the law of the Netherlands recognize – on the strength of the Civil Code of 1838 – a general enrichment action, or does it not?

But there was also a preliminary question that had to be kept in mind, namely: "Is the distinction between the two approaches of any importance at all"? Even a cursory examination of the issue seems, however, to point in the direction of an affirmative answer to this question. *Van Oven* described the specific rules as rules which "applications of the general rule, which (oftentimes) coincidentally appear in the Civil Code"[9]. This statement of his seems to imply that this system of specific rules (drawn from Roman law), as set out in the Civil Code of 1838, not only appear more or less accidentally where they do, but also that it has all the characteristics of a rather ragged quilt. *Bregstein*, again, went to rather great lengths to find as many examples as possible to demonstrate that the system as laid down in the Civil Code of 1838 was lacking and that, therefore, a satisfactory solution could

7. *M.H. Bregstein*, WPNR 4043-4046 (1948) 4300, as for now easily accessible in *M.H. Bregstein*, Verzameld Werk I, p. 265-310, resp. p. 312-313, Zwolle 1960.

8. The problem had been successfully avoided in a number of cases, e.g. the decision of the Hoge Raad of 24 February 1938, NJ 1938, 952 – in which a contract legitimated the enrichment, so that it could not be termed unjustified – and in the decision of the Hoge Raad of 29 June 1956, NJ 1956, 450 – in which the action flowing from article 1395 BWold, the condictio indebiti was implemented against an unauthorized agent, because the later had himself profited from the payment that was not due.

9. WPNR 4673, p. 178.

be reached only by recognizing a general enrichment action[10]. *Meijers* sided with *Bregstein* and took over these examples in the so-called "*Memorie van Toelichting*" (literally: "Memorandum of Elucidation") to art 6: 212 of the draft of the new Civil Code. They did not, however, convince everyone. Langemeijer was given to referring to these examples as "a few pitiful instances". *Von Caemmerer*, on the other hand, saw the choice between a system of specific rules or a system based on one general action as essentially one about legislative technique. The *Quint-te Poel* decision had to bring clarity. The facts of the case were as follows: The building contractor *Quint* claimed initially from *Heinrich te Poel* and his brother *Hubertus te Poel* the payment of Dfl. 25,476.31 with interest and costs as the consequence of a contract concerning the building of several shops and dwelling places on a site which eventually turned out to be owned by *Heinrich te Poel*, although *Quint* had only negotiated with Hubertus and eventually had concluded the contract with the latter. Consequently Hubertus had acquired ownership in the buildings. *Quint* brought two grounds forward for his claim. He brought primarily an action in tort, stating that the two brothers had committed conspiracy and secondly an action for unjust enrichment.

The High Court (Court of first instance) swept the first argument immediately from the table, holding that there was no evidence for such a statement, but on the second ground it ruled "that *Quint* had cited as a subsidiary ground for his claim: unjustified enrichment of *Heinrich te Poel* at the expense of *Quint*; that an action founded on this legal ground is in line with the notion, found in different places in the civil law, of recognition of a claim for the restitution of unjustified enrichment, which action is based on reasonableness and equity. Its existence may be assumed, as being the legal principle that leads to the obligation enshrined in the Law, even if the obligation itself is not enacted and regulated in the Code; that for the success of such enrichment action compliance with the following requirements is required: a patrimonial increase on the one hand, flowing from a patrimonial decrease on the other hand, and that without cause or justification, no other action being available, or, in the event of the impoverished party having an action against a third party, but this action nevertheless, because of special circumstances – the most important of which being the insolvency of the third party – being ineffective; that in the opinion of the Court, according to the facts proven by *Quint*, these requirements have, *in casu*, been met".

The Court of Appeal, however, reversed the judgement: "that it has been established in this matter that the claim of *Quint* against *Heinrich te Poel* is not founded on contract, although *Quint* bases *Heinrich te Poel's* obligation on the facts

10. *M.H. Bregstein*, Ongegronde vermogensvermeerdering [Report for a meeting of the Association Henri Capitant in the Hague on 11 May 1948, WPNR 4043-4046, p. 240; also published in *M.H. Bregstein*, Verzameld Werk I, Zwolle 1960, p. 265].

stated therein, from which, also according to the judgment against which the appeal is brought, against which particular finding no objection is made, it was established that no delict on the part of *Heinrich te Poel* against *Quint* is apparent, which nevertheless in the opinion of *Quint*, with which the court *a quo* agrees, constitute an unjustified enrichment of *Heinrich te Poel* at the expense of *Quint*, creating an obligation for *Heinrich te Poel* to pay to *Quint* a sum of money equivalent to the enrichment, to the extent that *Quint* has been impoverished by the same facts";

"that likewise it is established that the facts, as they were alleged in the summons and proven at trial, do not create any obligation of *Heinrich te Poel* towards *Quint* by virtue of any statutory provision";

"that, furthermore, the Court *a quo* has granted the claim on the grounds of the consideration "that an action founded on the legal ground "unjustified enrichment of a at the expense of b" is in line with the notion, found in different places in the civil law, of recognition of a claim for the return of unjustified enrichment, which action is based on reasonableness and equity. Its existence may be assumed, as being the legal principle that leads to the obligation enshrined in the Law, even if the obligation itself is not enacted and regulated in the Code", and that it is against this part of the judgment that *Heinrich te Poel's* first ground of appeal is directed";

"that this Court considers this ground of appeal to be valid";

"that art. 11 of the Code, containing the General Provisions of the Legislation of the Kingdom, enjoins the judge to adjudicate according to the Law and that the judge is, therefore, not free to create private law obligations which have not been enacted and regulated by the Code";

"that art. 1269 of the B.W. exhaustively regulates the manner in which obligations may arise, that is, otherwise than from contract, from the Law, from which it follows logically that facts other than contract, to which the Code does not attach the legal consequence of an obligation, cannot give rise to any obligation";

"that reasonableness and equity, to which an appeal was made in the judgment *a quo*, cannot in themselves give rise to any obligation and cannot form the basis of any claim in law";

"that neither can the consideration that the legal principle from which the obligation desired by *Quint* flows, find application in the rules which have been incorporated in the Code, since it is the rules which the judge has to apply and not a principle underlying a rule which has however not been expressed in the Code nor concretised into a legal norm";

"that the Court also does not find any foundation for the action under consideration in the provision of art. 1389 of the B.W. on which *Quint* has relied, in the footsteps of *Bregstein*, since the provision merely groups the obligations which arise from the Law due to human acts into those which flow from lawful acts and

those which flow from unlawful acts but in no way contains the principle mentioned in the previous paragraph nor any provision concerning any obligation arising from a lawful act, inasmuch as such obligation does not arise in terms of another statutory provision from such lawful act";

"that, lastly, the tradition which existed before the introduction of the *Code civil* and in the old Dutch law, which indeed knew the action wanted by Quint, can also not lead to the conclusion that this action exists in our current law of more than a century as having been tacitly incorporated therein, since the very purpose of the codification had been to render as law only that which was formulated in the code and this idea has been so pervasive, in spite of the fact that it has long been realised that living law can never be entirely contained in written rules and that interpretation of the rules by judges is indispensable, that for more than a hundred years no-one has thought of regarding a rule which is not at all formulated in the code as having been tacitly incorporated in it, whence, in the opinion of the Court, the pre-1800 tradition has, in the Netherlands at least, in any event, become lost";

"that the fact that the draft new civil code expressly creates a claim on the grounds of unjustified enrichment does not prove that the current law, which does not contain such a provision, knows such a claim";

"that the Court therefore considers the action originally instituted by Quint as not founded on any provision of the Law, which implies that the facts stated by Quint as its foundation cannot sustain the claim";

The Court of Appeal dismissed the claim. Quint had taken recourse to two arguments: a historical argument and a systematic one. In his opinion, Dutch law from before the codification of 1838 had known a general remedy for unjust enrichment and Parliament had never had the intention to abrogate this general remedy, which in itself is in accordance with all those specific instances which are to be found at numerous places in the Civil Code. The Court of Appeal considers the pre-1800 tradition as "lost" and found that the division made in the Code of the sources of obligations does not leave room for a third general remedy alongside with the codified claims in tort and in contract.

The Supreme Court (*Hoge Raad)* dismissed the appeal against this judgement. The *Hoge Raad* held:

"that in this matter the question arises whether an owner of immovable property who has been enriched by the application of the rule of accession is obliged to indemnify, to the extent of his enrichment, the person who has attached the improvements;

that the code has regulated such instances in the case of attachments having been effected by a holder of a limited real right (artt. 762, 772 and 826), but that these – mutually differing – regimes, relating as they do the unique nature of the real rights

concerned, cannot be of decisive importance in this matter;

that, however, in terms of art. 658 and 1603 a landowner cannot be required to return, by the payment of a sum of money, the enrichment which he has enjoyed as a result of the possessor or lessee of the land having effected attachments to it;

that it would be unacceptable that a claim which is denied to a possessor and a lessee should be accorded a contractor effecting attachments in pursuance of a contract concluded with a lessee and who suffers damages due to the fact that his co-contractor appears to be unable to pay;

that the provision in art. 659 does not detract from this, since Quint is not entitled to the special protection which is accorded the *bona fide* possessor, having had the opportunity, by consulting the public registry, of ascertaining that she was about to build on land which did not belong to her co-contractor but only, according to her own testimony, availing herself of it after having completed the building work;

Considered that, in the premises, the Court of Appeal – albeit not on correct grounds – rightly denied Quint's claim, the appeal cannot succeed;

Appeal denied. (Costs f 900).

The *Hoge Raad* rejected the opinion of the defendant that it must be deduced that from the words "*uit de wet*" ("in terms of the Code") that each and every obligation must be founded directly on an article in the Code. However, the *Hoge Raad* opined, it follows from these words "that in instances not specifically dealt with in the Code, the solution that must be adopted is one that fits into the system of the Code and links up with those instances which are specifically regulated". Under the heading of "instances which are specifically regulated" it is appropriate, said the *Hoge Raad*, to take into account the situation where improvements have been made by such holders of limited real rights as, among others, quit renters and usufructuaries (as set out in Articles 762, 772 and 862 Civil Code (old)).

This instance did not, however, lend itself to analogical application to the facts of *Quint-te Poel*. The second instance is that of Articles 658 and 1603 Civil Code (old)), from which the *Hoge Raad* deduced that it could not be expected of a property owner to restore, through the payment of a sum of money, the enrichment that he had enjoyed as a result of improvements to the land made by a possessor or lessee. The last instance was that of the *bone fide* possessor who enjoys special protection in terms of Article 659 Civil Code (old).

The *Hoge Raad* considered only the second group of examples to be applicable by analogy to the case in point, but this did not produce a satisfactory result for *Quint*:

"It is unacceptable that a claim, which the law denies to a possessor and to a lessee, should be afforded to a contractor who, in the course of giving effect to an

agreement entered into with the lessee makes improvements, and then suffers harm due to the fact that the other party to the contract is apparently not able to pay".

The *Hoge Raad* did not allow the appeal[11]. An enrichment action which is not to be found in the Code can only receive recognition if it would fit into the system of the Code as a whole. It does not follow, however, from Article 1269 Civil Code (old) that each and every obligation that does not emanate from a contract should directly be founded upon an article in the Code. The words "*uit de wet*" in that article should be understood thus: In instances that are not specifically dealt with in the Code, the solution which fits into the system of the Code *and* links up with those instances that *are* included in the Code. In short, the Civil Code of 1838 did not contain a general rule that an obligation rests on those who were enriched without legal ground at the expense of the patrimony of another to render that other person harmless in the amount that they have been enriched.

Consequently, the legal situation under the codification of 1838 was made completely clear: Dutch law did not recognise a general remedy for unjust enrichment; it knew only a (rather limited) number of specific instances.

3. From specific instances to a general rule

Neither the question posed by Meijers to the Second Chamber, nor that of Loeff in the run-up to the *Quint-te Poel* case were typically Dutch. Furthermore, they were not typical for the 1950's either. Since the time of the Glossators, that is to say ever since the 13th century, there has been a constant and widespread view (led off by *Martinus Gosia*) that tended towards the recognition of a general action aimed at the restitution of benefit which had been unjustifiably drawn. Mostly, however, this view was nothing more than a sub-current. For a long time the main current was one in which the view that the carefully constructed system of remedies in the area of obligations could very easily come apart at the seams if the legal order were to allow a general action based on unjustified enrichment. The French Civil Code therefore limited itself to recording, taking *Pothier* as an example, the classical Roman law actions – and the Dutch Civil Code of 1838 followed this example. Nevertheless, the quest for an underlying principle, which would unite all the specific actions, continued to excite legal minds, both within and without the Netherlands. In preparing the draft of the new codification, *Meijers* often sought inspiration across the border and noted that many legal systems, including the most

11. The Supreme Court maintained this line of thought in the case of Gemeente Katwijk v. Mr. Vroom q.q., HR 18 April 1969, NJ 1969, 336, with a footnote by *G.J. Scholten* and more recently in HR 6 October 2000, NJ 2001, 167. In the latter decision the difference between the old and the new law are explicitely mentioned. Compare also Hof Arnhem 5 November 1974, NJ 1975, 378 (H.C.F. Schoordijk, WPNR 5356); Hof Amsterdam 7 May 1975, NJ 1976, 110 (on which case F.T. Oldenhuis, WPNR 5415-5416); Hof the Hague 28 April 1977, NJ 1977, 606.

important recent codifications, had in the meantime chosen a regime which included a general rule, even if it was nowhere unfettered.

France offered a good example. The decision in the *Boudier* decision was, at the time, a huge surprise, because it impliedly recognized a general enrichment action for which no basis could be demonstrated as existing in the *Code Civil*[12]. The decision was not unanimously welcomed. It was feared that once again a Trojan horse had been brought inside the walls that would undermine a well-built system, or, making use of another metaphor, that this decision had opened the sluices so wide that the stream would become a flood.

Around the turn of the 19th to the 20th century one saw, as a result of these sentiments, a concerted effort to define the notion of unjustified enrichment and to fence it in within specific boundaries. A decision of the *Cour de Lyon* of 1828 may serve as an example. A woman had for many years cared for her friend, with whom she had co-habited without their having been married. When the relationship came to an end she claimed compensation for services rendered. The claim initially seemed to be barred by the provisions of art 1376 C.c.[13], but the court held that the man had been enriched and that that enrichment could not be justified by liberality nor by contract. Therefore, it held that this instance of enrichment was unjustified and allowed the claim[14]. This case, however, remained a solitary decision. The claim of a sister who had for many years saved her brother the cost of a char was not allowed, because she did not succeed in proving the agreement which she averred existed and which formed the basis of her support, even though the court conceded that he had been enriched as a result of the services rendered by his sister[15]. In the same vein, a claim by a daughter-in-law, who lived with her parents-in-law and had helped them for many years with their farm, was refused. The court held that the enrichment of the parents-in-law had not been unjustified, since it had its *cause contrepartie* in the accommodation and subsistence, which the parents-in-law had

12. Cass. Req. 15 June 1892 Patureau-Miran v. Boudier, S. 1893.1.28, note *Labbé;* D. 1892.1.596.

13. Art. 1376 C.c. Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à celui de qui il l'a indumment reçu.

14. Les services fournis gratuitement pendant plusieurs années par une femme à un homme dont elle est la fiancée et la concubine procurent au patrimoine de ce dernier un enrichissement qui ne reposant pas sur une liberalité, ni sur un contrat à titre onéreux, est dépourvu de cause juridique CA de Dijon, 7 Febr. 1928, D.P. 1928, 2, 169, note *Voirin*, Gaz. Pal. 1928, 1, 501, RTDciv. 1928, p. 423, obs. Demogue. *Christian P. Filios*, L'Enrichissement sans cause en droit privé français. Analyse internes et vue comparatives [Publications of the Hellenic Institute of International and Foreign Law 21], Athènes-Bruxelles 1999, p. 216; p. 239-240, footnote 388; p. 317 footnote 336.

15. Cass. civ. 1er 19 Déc. 1960, Bull. Civ. I no. 550; compare Cass. civ., 9 June 1979, Jeanne Roelandt v. Philippe Lavillaugouet, Gaz.Pal. 1979.2.1. For the Common law especially *J. Beatson,* The Use and Abuse of Unjust Enrichment. Oxford 1991, p. 30.

provided for the same number of years to their daughter-in-law[16].

In these cases emphasis was placed on three criteria in terms of which the general action for unjustified enrichment in French law, the *action de in rem verso* could be outlined. It is, of course, very necessary to determine the limits of the action: The simple fact that the unjustified enrichment was only recognized as a source of obligations after the categories of contract and tort had reached full maturity, brings in its wake that several themes, which seem theoretically to be part of the doctrine of unjustified enrichment, in reality had long been allocated to either the law of contract or the doctrine of tort. J.P. Dawson, some fifty years ago, put it thus: "[A] principle that is recognised late in the development of a legal system has to struggle for a place in the legal firmament because it cuts across other principles already expressed in doctrine and reinforced by rules"[17].

Well, the French judge specifically considered the following: (1) the enrichment of the defendant; (2) at the expense of the claimant; and (3) the question whether there was a justification (*cause contrepartie*) for the shift in assets, and with the help of these three criteria fenced off the action on the basis of unjustified enrichment[18]. And, indeed, an action aimed at redressing every patrimonial transfer at the expense of another would totally miss the point, even if the action were to be tempered by the notions of reasonableness and equity. But, of course, such an incarnation of the general action does not exist. Nowhere in the world do we find an enrichment action which can be described as an action founded purely on equity. As Evans L.J. – a judge in England – once put it: "Notwithstanding its roots in naturally justice and equity, the principle does not give the courts a discretionary power to order repayment whenever it seems in the circumstance of the case equitable to do so"[19]. English law draws the boundaries of the law of enrichment in a similar manner (but they add a 4th element): (i) Is the defendant *enriched*? (ii) Was the enrichment at the plaintiff's *expense*? (iii) Was the enrichment *unjust*? (iv) Does the defendant have any *defences*[20]?

At the other side of the spectrum, there is hardly a jurisdiction in which there is a rigid adherence to the old actions of Roman Law. Even in a jurisdiction such as South African law, regarded as conservative in this area and in which the old

16. Cass. civ. 1re, 26 Mai 1965, Bull. Civ. I, n. 343, D. 1965, J. 628.

17. *J.P. Dawson,* Unjust Enrichment: a comparative analysis: a series of lectures delivered under the auspices of the Julius Rosentbal Foundation at Northwestern University School of Law, in April 1950, Boston 1951, repr. Buffalo, N.Y. 1999, pp. 39-40.

18. The same criteria are still to be found in the law of South Africa. Confer the judgement by Tindall J. in the case S. Polwarth and Co. (Pvt) Ltd v. Zanombair and Others [1972] 2 SA 688 ®, quoted by *S. Eiselen and G. Pienaar,* Unjustified Enrichment. A Casebook, Durban 1999, p. 26.

19. Kleinwort Benson Ltd v. Birmingham City Council [1997] QB 380, 387.

20. Thus Lord Steyn in Banque Financière de la Cité v. Parc (Battersea) Ltd [1998] 2 WLR 475.

actions play a larger role than the underlying principles, space has in latter years been created for *ad hoc* actions, even though only in *certain circumstances*[21].

In what follows we will examine the criteria that have been accepted in the literature and case law for the purpose of giving definition to the general action of the basis of unjustified enrichment. Originally, three criteria were commonly mentioned, but the number rose steadily in course of time and currently there are, in principle, seven criteria: (1) the enrichment of the defendant; (2) the impoverishment of the claimant; (3) at the expense of the claimant; (4) without there being a justification in the Code or in a contract for such enrichment: (5) [the recognition of] the subsidiarity of the enrichment action; (6) the plaintiff himself should not have been at fault (7) while the impoverished party should not have acted at his own risk and for his own interest. Finally, we will devote some attention to a new public-law dimension to the doctrine of unjustified enrichment and to the influences of European law on the doctrine. Remarks of a comparative nature will not be dealt with in a separate paragraph, but will be blended into the discussion wherever relevant.

4. Enrichment

The action based on unjustified enrichment presupposes *enrichment* on the part of the defendant[22]. The simplest examples are those instances where there has been a direct transfer of patrimony between the parties, e.g. unowed payments. Immediate restitution is obligatory, even if the payment had been made as a result of a clear mistake to an insolvent after his having been declared bankrupt. The fact that the law does not attach any preference to claims based on unjustified enrichment and also does not directly indicate any other ground for preference, does not allow the conclusion to be drawn that the curator is permitted to add the amount of the unowed payment to the insolvent estate and to treat the claim for its return as a concurrent claim, thus using the payment made in error to the advantage of all the creditors of the estate.

Equity demands that those who pay a curator as a result of an indubitable mistake should have all the harm that suffered in consequence of this up to the amount in which the estate has been enriched. The special position of a curator requires that one should be able to rely on him not allowing third parties from becoming victims of payments such as the one described here, which are, of course,

21. Brooklyn House Furnishers Ltd v. Knoetze and Sons 1970 (3) SA 264 (A), at 271 E-F.

22. According to the new Dutch Civil Code this statement needs not to be true in every case of mistaken payments. Thus already on the basis of article 6:207 BW HR 11 October 1985, NJ 1986, 322 (m.nt.MS en G), AA 1986, p. 493 (E.M.H. Hirsch Ballin), AB 1986, 84 (m.nt. *FHvdB*).

unavoidable in practice. The nature of this obligation to reverse the enrichment demand that the curator should give effect to it as soon as possible, without awaiting the winding up of the estate and without regard to the interests of other creditors. Furthermore, the nature of the obligation also dictates that the curator may not demand a contribution to the general costs of insolvency. He may only subtract the reasonable costs incurred as a result of the payment having been made and it having to be repaid[23].

Indirect enrichment (such as, for example, enrichment brought about by a third party) brings in its wake a new dimension of complication. Saving an expense may also bring about enrichment *eo ipso*. A hallowed example stems from French law: Sieur Guy had had street lamps installed in the parish of Saint Chinian, but he received no payment since the formalities necessary for a valid contract had not been complied with. Nevertheless, the parish was considered to have benefited and had to part with the amount of its enrichment in favour of Guy[24]. A more recent example is the German *Flugreise-Fall*[25]. A minor travelled on a valid ticket from Munich to Hamburg, but on arrival in Hamburg managed to board again, unnoticed by the crew. In this way he was able to fly to New York. In terms of German law he was held to be obligated to pay the price of the ticket because the performance delivered by the air carrier was characterized as a *Leistung*, which was eligible to be recovered in terms of the provisions of §812 BGB. Dutch law is able to achieve the same result without having to make the complicated distinction between *Leistungskondiktionen* and *Nichtleistungskondiktionen* (art 6:203 Civil Code (new)). However, it is – at the very least – doubtful whether English law or French law could reach this outcome. A Dutch example in which (under the new Dutch Code) the enrichment action could profitably have been employed – was that of the *Katwijkse haven*[26]. Does a party to contract in the making have a claim to repayment if he, trusting that the contract will indeed come into being, already performed (a part of) that which he would have been obliged to perform were it to have come into being, but the contract then does not materialize? The contractor in this case had already begun with dredging operations (at the insistence of a government official) when the contract was awarded to another. With an appeal to articles 1487 and 1488 Civil Code (old), he attempted to get payment for his services, but to no avail. These legislative provisions pertained to performances made in terms of a contract which was later declared to be void. A performance made without there being any obligation and with no more than a hope that it would

23. HR 5 September 1997, NJ 1998, 437.

24. Commune de St Chinian v. Guy, Cass. Req., 15 July 1873, D.1873.1.457.

25. BGH 7 January 1971, BGHZ 55, 128; JZ 1071, 557.

26. HR 18 April 1969, NJ 1969, 336 (m.nt. *GJS*).

be accepted, could, of course, not be equated with the situation envisaged in these articles. Likewise, no other provision in the Code (nor indeed the systematic structure of the Code) admits of the conclusion that those who benefit from a performance such as this one are obliged to make good the harm that might have been suffered by the person making the performance in question. This case was decided on the strength of the old law. It is not entirely clear whether the case would be decided differently in terms of the new law. The English case of *Regalian Properties v London Docklands Development Corporation* is a comparable one and there, too, the decision went against the contractor[27]. It was accepted there that anyone who knowingly incurs costs in the preparatory stages of a contract does so entirely at his own risk and for his own account, unless the contrary had been agreed. We return to this question below.

A further example of the kind of difficulties of interpretation that arise in connection with the concept of *enrichment* is provided by the case of *The State v Meijer*[28]. Meijer had indicated that he *did not want* the repayment of the amount of tax that he had overpaid to be transferred to a bank account held in his name, as was customary in such cases. That is perfectly acceptable. It is true that, in terms of article 6:114 Civil Code (new) the debtor in respect of an obligation to pay a sum of money is entitled to fulfil this obligation by depositing the amount due in a giro account held in the name of the creditor. But the creditor may prohibit payment in this way. In such a case the obligation of the debtor would not be fulfilled if he were to use this method of payment in spite of it having been excluded as a valid form of payment by the creditor. The debtor would then still have to fulfil the obligation *and* make good any harm that the creditor might have suffered due to the fact that his claim was not satisfied timeously, or due to him not having been able to avail himself of the amount involved in the payment in a manner that he would have been able to do if it were not paid into the account excluded by him. However, should the creditor, in spite of him having excluded the account as a valid receptacle of the payment, nevertheless have acquired the ability to take the payment at his disposal, he will not be permitted to both keep the amount that had erroneously been deposited in the excluded account *and* also again claim payment to an account specified by him. Should he claim double payment he would be held not to be attempting to enrich himself in a frivolous way. In the present case, however, the amount that the State had paid could not be disposed of at all by *Meijer*. Therefore, no enrichment of *Meijer* had taken place, and thus the State was

27. [1995] 1 W.L.R. 212; [1995] 1 All E.R. 1005, also published in *A. Burrows, E. McKendrick,* Cases and Materials on the Law of Restitution, Oxford 1997, p. 274-280. Over Anticipated Contracts which do not Materialise: *Goff and Jones,* p. 668 ff.

28. HR, 28 februari 1997, NJ 1998, 218 (m.nt. *HJS*).

obliged forthwith to again pay the amount owed to *Meijer*[29].

One may ask oneself whether *Meijer's* claim should not be set off against a counter-claim by the State on the basis of an unowed payment. The answer to this question is "no". In the first place, the deposit in the giro account did not amount to a valid payment, since *Meijer* had sufficient reason to refuse this method of payment. Secondly, the exclusion of the account in question did not affect the basis of the payment itself and therefore it could not – however lacking its execution might have been – be said to have been without legal grounds.

An important problem in this regard is that of computing the amount of the enrichment. Does one take the moment at which the enrichment arises as the determining moment, or should only the enrichment which is extant at the time of the summons be taken into account. German and Dutch law (§818(2) BGB and article 6:212(3) Civil Code (new)) have both opted for the enrichment remaining: whatever the defendant had spent in good faith on the strength of his belief that he was entitled to do so, no longer forms part of his enrichment and therefore need not be restored. What is more, that was also the position in terms of the old law. The case *Vermobo - Rijswijk* can be taken to be the *locus classicus* in this regard. Vermobo had built a pigsty in accordance with an instruction by *Van Rijswijk jnr.*, but on land belonging to *Van Rijswijk snr.* When he was unsuccessful in obtaining payment from *Van Rijswijk jnr.*, he sued *Van Rijswijk snr.* The court held that the enrichment claim could not succeed if *Van Rijswijk snr.'s* averment (that he had taken over the pigsty from *Van Rijswijk jnr.* for which he had paid f68.000 in cash on 30 July 1986, as well as f25.000 by way of set-off in regard to another claim) were to be correct. In that case *Van Rijswijk snr.* would not be enriched. The fact that *Van Rijswijk jnr.* had neglected to pass on the amount thus paid to *Vermobo* could obviously not be laid at the door of *Van Rijswijk snr.* In approaching the matter in this way, the court neglected the fact that article 6:212 (2nd and 3rd provisions) Civil Code (new) (the provisions of which must be assumed to have reflected also the position in the pre-January 1992 law with regard to unjustified enrichment) deals solely with diminution of enrichment that took place in the period in which the enriched person reasonably cannot be expected (yet) to have regard to a duty to pay compensation, and this question was not examined by the court.

The Common law mostly reaches the same result, albeit along a different route.

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29. Similar was the reasoning in Standaard Groep Holland- ING HR 26 January 2001, NJ 2002, 118. A bank transferring money without order cannot claim the amount from the client unless the latter is enriched, e.g. since an obligation to pay to the recipient was extinguished. In that case the Bank may on the foot of art. 6:212 claim compensation for the harm it suffered by transferring the money up to the enrichment of the client. The burden of proof of both the enrichment and the impoverishment rests upon the bank.

In Common law systems enrichment is calculated at the moment of receipt, but the defence of "change of position" allows the final judgment to take account of expenses made in good faith. Other approaches, which only partly conform to this model, are also possible. Thus Scots law explicitly takes account only of expenses made in good faith, and as soon as the defendant can be shown to have been careless, he is held to have been in bad faith and is obliged to make restitution of the full amount[30].

A further, separate, question is whether the amount of the claim should be calculated in an abstract or concrete way. This problem arose in the case of the Parish of *Dordrecht* against *Stokvast*[31]. The Dordrecht parish had acted wrongfully vis-à-vis *Stokvast* by selling contaminated land for building purposes. The parish was obliged to pay compensation. Before the extent of the harm could be calculated, the land was decontaminated by the State. Did that diminish the harm suffered by *Stokvast*, or should this fact be left out of contemplation? Or should one, as *Bloembergen* (who noted the case) did, say that the decontamination operation by the State in effect already constituted (the beginning of) the compensation? In any event, the *Hoge Raad* held that the cost of the decontamination could not, in terms of article 75 (provision 3) of the *Wet Bodemsanering* ("Law on the decontamination of land"), be claimed from *Stokvast*, since he could in no way be held to have been enriched. Whether the State could claim the costs from the Parish of Dordrecht (as the party which actually benefited) could obviously not be an issue in the litigation in question, since the State was not a party to it.

5. Impoverishment

Balancing the enrichment of the defendant is the impoverishment of the claimant. This fact is obvious in instances of direct transfers of value between two parties. However, it remains an open question whether the one element is entirely the converse of the other. This question is particularly important in the penumbral area between tort and unjustified enrichment – for instance, where a benefit has unlawfully been drawn from encroachment on a patent. There are a number of instances which require a healthy imagination to be able to regard impoverishment as having occurred. The *Onyx Cave* case is, of course, well known. In this case the entrepreneurial discoverer of the cave developed it as a tourist attraction. When his neighbour discovered that part of the cave was under his property, he claimed (and was awarded) a part of the income derived from the exploitation of the cave[32]. The

30. Royal Bank of Scotland plc v. Watt 1991 SC 48; 1991 SLT 138.

31. HR 28 April 2000, NJ 2000, 690 (m.nt. *ARB*).

32. Edwards v. Lee's Administrator, 96 South Western Reporter (2d) 1028 (1936).

water-supply company that unknowingly uses pipes on another's land falls into the same category[33], as does the *Flugreise-Fall.* But when *Baartman* – in his free time, which, incidentally he was unable to use productively and indeed for his own enjoyment – worked on the house belonging to his wife (of which he had gratis use), it is possible that his wife could be enriched, but there is no question that *Baartman* was not impoverished, since it was not averred that he could have used the time which he sacrificed in this way to a profitable end. His claim was thus refused, unlike the other three instances just mentioned[34]. The question can be put even more sharply: does it make sense to require impoverishment on the part of the claimant as a necessary condition of an enrichment claim? In France the view has recently surfaced that the answer to this question should be "no". In Germany the words "*auf dessen Kosten* in §823 BGB are held to pertain not so much to the impoverishment of the claimant, but rather to the normative allocation of the performance to the creditor ("*Zuweisungsgehalt"*). In the case of the *Leistungskondiktion* the creditor derives his claim from the transfer; in the case of a *Nichtleistungskondiktion* the enrichment cannot be said to have arisen from his patrimony.

In regard to Dutch law, *J.G.A. Linssen* has recently pleaded, against the background of the uselessness of this requirement in instances of unlawful use of another's property, that it should be dropped as a prerequisite for liability[35]. The problem surfaced in a case at a time that Linssen was almost unable to deal with it in his dissertation. The case was *HBS Trading BV/Danestyle*[36]. In that case the issue was about the correlation between article 6:104 Civil Code (new) and article 27a, 1st provision, of the Copyright Act of 1989. The latter provision determined the following: "In addition to ('*naast*') damages, the author or his successor in title may claim that those who have encroached upon his copyright be ordered to surrender the profit which he made as a result of this encroachment and to this end to provide an account of such profits". The use of the word "*naast*" in this context is important since, for example, the old *Rijksoctrooiwet* (art 43, provision 3) used the term "instead of" ("*in plaats van*") damages. A fierce battle had been waged in the literature as to whether cumulation was possible in this instance, or whether the claimant had to choose. In spite of the fact that the word "*naast*" had been employed, the *Hoge Raad* nevertheless held that the unlimited cumulation *a quo* amounted to an incorrect interpretation of the law. Disgorging an unlawfully

33. Cass. Req., 11 December 1928. DH. 1929. 18, Gaz. Pal. 1929.1.464.

34. Baartman v. Huijbers, HR 11 April 1986, NJ 1986, 622.

35. *J.G.A. Linssen,* Voordeelsafgifte and Unjust Enrichment. Een rechtsvergelijkende beschouwing. Thesis KUB 2001 [Schoordijk Instituut. Centrum voor Aansprakelijkheidsrecht].

36. HBS Trading BV v. Danestyle, HR 14 April 2000, NJ 2000, 489 (with footnote *DWFV*).

acquired benefit *may* present an appropriate form of compensation.

The notion of impoverishment does, however, render sterling services in multi-party situations. If I has a claim against B and thinks that he owes E, I may ask B to pay E directly. Should it then appear that the supposed debt of I to E does not in fact exist, the concept of impoverishment (*auf dessen Kosten*) helps to identify I as the impoverished party (i.e. as the claimant) and I as the enriched party (i.e. the defendant). In the same way the requirement of impoverishment is useful in the context of the question whether a person against whom the *rei vindicatio* has successfully been brought may claim compensation for costs incurred in the cause of making improvements and effecting repairs in terms of art 630 Civil Code (old), if he did not incur the costs himself, but they were for the account of a third party. The *Hoge Raad* has determined that this article rests on the notion of unjustified enrichment which brings in its wake that only those who have suffered damage have a claim to compensation[37]. That corresponds to the damage being calculated in a concrete manner. The question arose in a case in which the lesser averred that she had suffered damage in the amount of the necessary repair costs that arose when the lessee had not returned the leased property in a proper state. The basis of her loss was said to be that she would suffer patrimonial loss in the amount of the diminution in value of the immoveable property, which diminution in value equals the objectively-determined costs of repair. The lessee would, according to the lesser, be unjustifiably enriched in that amount. Her claim was however refused at all levels. In a case such as this there is reason to award the lesser an abstractly-determined amount as damages, if it appears that the lesser would in fact not suffer any damage as a result of the fact that an intended remodelling of the house would render bringing it into its original state of repair would be senseless[38].

There is yet a further problem associated with the presumed impoverishment of the claimant. In England, but also in the European context, the question has been asked whether the fact that the claimant would become unjustifiably enriched as a result of his claim being allowed, should form a reason for the claim being refused? In England this problem arose in the context of taxes improperly collected. If the cost of the taxes so collected had been passed on to clients, as can easily be imagined would happen in the case of VAT, can the full claim still be awarded? In 1994 the Law Commission of England and Wales answered this question in the negative: "It should be a defence to any claim that the repayment of the amount in question would unjustly enrich the claimant[39]". In the U.S. and Canada[40], too, and

37. HR 7 October 1994, NJ 1995, 62.

38. HR 6 June 1997, NJ 1997, 612.

39. Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Law Com. No. 227, November 1994).

by the European Court of Justice[41], it has been accepted that *passing on* is a reason to refuse a reclamation[42]. Member states are, however, not obliged to implement a similar rule. According to both French and German law, the Receiver of Revenue must return each and every improperly collected tax, irrespective of whether the taxpayer has been impoverished by the payment. The European Court considers these national arrangements also to be acceptable. Its concern was directed not so much as unification but at the equal treatment of citizens of the member states of the EU. Australia does the same as France and the Netherlands. *Windeyer J*. asked the following question in *Mason v the State of New South Wales* (which concerned a claim for the return of a tax payment made by Mason, in circumstances where he had, however, passed on the amount of the tax to his clients): "If the defendant be properly enriched, on what principle can it claim to retain its ill-gotten gains merely because the plaintiffs have not … been correspondingly impoverished[43]"?

Moreover, the defence of "passing on" is in England allowed only in the case of claims against the *fiscus* and not claims against individuals.

6. A causal relationship between enrichment and impoverishment

In two-party situations the causal relationship between the enrichment of the claimant and the impoverishment of the defendant will normally not present any problems: the enrichment and the impoverishment have the same cause. In English one usually speaks of the "indivisibility of origin". At most the unjustified character of the enrichment or the exact amount of the claim could cause difficulties, as Lestrade found out. He had married an Oustry girl and lived (together with her) at the home of his parents-in-law. He made improvements and repairs to the house. When he was put out on the street, he instituted the *action de in rem verso* but the *Cour de Cassation* held that the amount of both the enrichment on the part of the parents-in-law and the impoverishment on the part of the son-in-law had first to be established, before it could be determined that the lowest of the two would represent the measure of enrichment[44]. Under the old Dutch law the question arose whether a fiduciary owner of property transferred for the purpose of security had to

40. Air Canada v. British Columbia (1989) 59 DLR (4th) 161, 193-194).

41. Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595, 3622-23.

42. See further: European Court of Justice 27 February 1980 Just v. Danmark, 68, 79, Jur., 1980 (501) 523; 27 March 1980, Italian Administration of State Fincances v. Denkavit Italiana, 61, 79, Jur. 1980, (1205) 1226; 12 June 1980, Express Dairy Foods v. Intervention Board for Agricultural Produce, 130, 79, Jur., 1980, (1887) 1900, 13 May 1981, International Chemical Corporation v. Italian Administration of State Finances, 66, 80, Jur. 1981, (1191) 1218-1219; 14 January 1997, Comateb e.o., C-192-218, 95, Jur., 1997, I, (165) 88- 2, also published in NJ 1997, 681.

43. (1959) 102 C.L.R. 108, 146. Mason v. The State of New South Wales.

44. Cass. civ., 19 January 1953, Oustry - Lestrade, D. 1953, 234.

(by analogy with the holder of a mortgage) transfer the difference between the yield of the sale in execution and the amount of debt (the *superfluum*) to the debtor. The question was answered in the negative by the Amsterdam High Court[45]. The question whether a pledgee may in advance compensate himself from payments made on so-called tacitly pledged claims in regard to which he has not yet informed the debtor. This point is of particular importance in regard to the position of banks. Would this not render the requirements laid down for a valid pledge illusory or, worse, could it not shatter the *paritas creditorum*, if the pledgee could compensate himself without limit from everything that is deposited in the account of the debtor? In the jurisprudence of the *Hoge Raad* it had long been accepted that banks may not claim set-off in respect of giro payments made into an account of a debtor of theirs, if these payments were received at a time when the bank was aware that insolvency was to be expected, even though it had not yet been declared. Recently, however, the *Hoge Raad* decreed that there is no good reason to consider this strict rule to also be applicable to the possibility of set-off by a bank of giro payments at those times in fulfilment of claims tacitly pledged to the bank by their holder and in regard to which the bank had not yet given notice. The *Hoge Raad* gave two reasons for its approach[46]. In the first place, when the act, which brought the new Civil Code into operation, was dealt with in parliament, the Dutch Society of Company Lawyers (*Nederlands Genootschap van Bedrijfsjuristen)* expressed the fear that the tacit pledge would afford creditors a lesser security than the then-current security property. In response to this concern, the government gave its assurance that the institution of a tacit pledge – which had been chosen in accordance with the prevailing view in the Second Chamber – "practically the same result as in the case of security property could be achieved", to which was added that the statutory arrangement was organized in such a way "that existing financing patterns could be continued without difficulty under the new law, despite the technically different set-up of the new ruling[47]". This means that a bank in fact, generally operating, has a general preference above other creditors, and in the result it cannot be said that the bank had once again, by way of set-off, placed itself in a more favourable position vis-à-vis other creditors. Secondly, the court said it must be mentioned that a bank could compensate itself by way of set-off in terms of the law applicable prior to 1 January 1992 in regard to payments received in fulfilment of claims made on claims ceded to it for the purpose of providing security[48]. It is in line with the whole notion of tacit pledge (which makes it possible to continue the

45. High Court of Amsterdam 18 June 1980, NJ 1981, 145.

46. HR 17 February 1995, NJ 1996, 471.

47. Parl. Gesch. Boek 3 (Inv. 3, 5 en 6), p. 1197.

48. HR 29 January 1993, NJ 1994, 171.

financing patterns that existed under the old law) also to accept the power of set-off by banks in regard to payments received by them and made for the purpose of fulfilling claims which have been tacitly hypothecated to it.

Finally, the causal chain is absent if the enrichment does not result from the impoverishment occurring elsewhere, but results rather due to a statutory ruling. The *Hoge Raad* ascribed the occurrence of enrichment to the system of the Bankruptcy Act in its decision in the case of *Royal Nederland Verzekering Maatschappij N.V. at Rotterdam* against *Mr van Kemenade q.q.*[49]. The facts were as follows: *Everstijn Beheer B.V.* was insured with Royal against business losses and damage to the inventory. In November 1981 a third of the business goods of *Everstijn* was damaged due to the act of a third party. Instead of paying the amount of the compensation due directly to *Everstijn* (f485 000) Royal chose to make the payment in terms of a money loan without interest, which would only have to be repaid if *Everstijn* were to be successful in reclaiming the loss from the third party who caused it in the first place. *Everstijn* further gave Royal an irrevocable power of attorney to do everything possible to make repayment possible. Subsequently, Royal sued the third party for damages in the name of *Everstijn*. While the case was proceeding, *Everstijn* became insolvent. *Van Kemenade* was appointed as curator. He continued the action against the third party, the result of which was that the third party paid an amount of f200 000 (in return for it being accepted in full and final settlement) to *Van Kemenade*. The question then arose whether this amount should fall into estate (as the curator claimed) or whether Royal was directly entitled to it? In the present context, only the more subsidiary basis of Royal's averments of claim are of importance; Royal held the view that the estate would be unjustifiably enriched at the expense of Royal (in addition to the money loan from Royal – which was to be seen as a fictional transaction) it also cashed in on the claim against the third party. The court, however, rejected this argument. The receipt of the amount of compensation that had been garnered was balanced by the obligation, albeit as a concurrent claim, to acknowledge the same amount as a debt to Royal. In this situation there is no question of enrichment being present. The *Hoge Raad* confirmed this decision. The obligation to transfer the amount recovered from the third party to Royal rested on a pre-insolvency agreement. From this agreement arose only a concurred claim as part of the insolvency proceedings. The enrichment of the estate for which Royal argued is justified by the system of the Insolvency Act, and more specifically, by the notion of *paritas creditorum*.

7. Unjustified

49. HR 30 June 1995, NJ 1995, 707.

Not every enrichment at the expense of another is subject to restitution. At the very least there has to be a good reason why it should be returned. The Common law methodically seeks positive reasons for restitution, while, on the other hand, the civil law jurisdictions tend to attach greater weight to the reasons for the transfer of value. It the reason is not sufficient to justify the transfer, the Civil law awards a claim to the impoverished party. If, on the other hand, the reason does in fact justify the transfer, the impoverished party remains without a claim. Since time immemorial acquisitive prescription or the presence of a contract has served as legitimation for transfers of value, as did certain statutory measures, such as certain rules in the area of property law, which derogate from the general rules regarding unjustified enrichment. If the owner of a principal object acquires ownership of another's property as a result of it acceding to the principal object, that fact may provide the basis for either a damages claim to the injured party or a claim based on unjustified enrichment[50]. The situation of a lessor is, however, different. If the (co-)owner of an immovable is enriched due to the lessee having made improvements to the leased property (for instance if he were to install lighting in a factory) he would not necessarily be under an obligation to compensate the harm, which equates to the value of the improvements effected by the lessee. In terms of the old law [art 1603 Civil Code (old)] the lessee had the right to remove the improvements upon vacating the premises (as long as he respected the restrictions placed on this right by the abovementioned article). However, he had no right to claim damages, except in specifically circumscribed circumstances[51]. These circumstances were present in a case in which a firm, *Goos BV*, had traded on premises leased from one *Reimes*, a statutory director and major shareholder. The close corporation had fitted the premises at its own cost to make them suitable for conducting its business operations. In light of its insolvency *Goos BV* cancelled the contract, but without exercising its right of removal. Had it done so, the improvements so removed would have formed part of the estate. Now, however, *Reimes* could simply continue with the business in the space which had been brought into a state of readiness for business by the close corporation. After all, it belonged to him. The *Hoge Raad*, however, declared *Reimes* to have been enriched at the expense of the insolvent estate and awarded the curator a claim. In terms of the new law the case would have been dealt with differently: the lessee would have a direct claim against the lessor (although he would not have one against a succeeding lessor)[52].

In the meantime, the relationship between the law of property and enrichment

50. Article 5:14 and 15 BW; PG Invoeringswet 5, p. 1021.

51. HR 17 September 1993, NJ 1993, 740.

52. In this sense the draft article 7: 216 par. 3 BW according to draft legislation number 26 089, see also The Official Commentary to the 7th Book, p. 729.

law is not without its problems, as a glance over the Eastern border of the Netherlands will demonstrate: The facts of the notorious *Grindelhochhaus*-case were as follows[53]. During the building of a block of flats the contractor encroached markedly on the land of the adjacent land-owner. After completion of the building the neighbour revindicated his land, including, obviously, the structure built thereon. The person who had commissioned the building thereupon sued the neighbour for restitution of the amount in which the value of his land had been increased by the building, which a the time – that is to say the 1960's – amounted to something of fortune, namely DM 800.000. *Quaeritur quid iuris?*, as the ancients were wont to ask. If the claim were to be allowed without further ado, the truth of Pacchioni's adage would once again be proved: "The simplest way too ruin a man is to enrich him[54]". And indeed, § 996 BGB affords the bona fide possessor a claim for the necessary and useful expenses which he had made in regard to property that was subsequently successfully revindicated from him. The Bundesgerichthof did not deem the building costs to be useful expenses, but as an increase in the intrinsic value of the property[55] – and consequently the owner would in principle not be liable to pay compensation. Since the German legal system holds the law of enrichment to be subsidiary to the law of property, the person who commissioned the building would also not be accorded an enrichment claim – not even a *Nichtleistungskondiktion* in terms of § 951 BGB[56]. Such an all-or-nothing approach is not satisfactory. It might even be asked whether the reasoning of the Bundesgerichthof is compelling in this instance. After all, historically compensation for necessary or useful costs has been dealt with in the context of the unauthorized administration of the affairs of another. For centuries the *actio negotiorum gestorum contraria* has done duty as an enrichment action and a satisfactory solution to the problems presented by the *Grindelhochhaus* seems to lie in in ordering compensation for the actual patrimonial benefit reaped by the land-owner himself. Not an abstract, but a concrete determination must provide the solution in this instance[57]. This method of computation provides, furthermore, adequate

53. BGHZ (1964) 41, 157; see also *D. Verse*, Verwendungen im Eigentümer-Besitzer-Verhältnis, Tübingen 1999, pp. 3 ff., c.r. *E.J.H. Schrage,* in Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review LXIX (2001), p. 185-188; c.f. *D. Verse*, Improvement and Enrichment, in: 6 (1998) Restitution Law Review, pp. 85-103.

54. *G. Pacchioni*, Trattato della gestione d'affari altrui secondo il diritto Romano e civile, Lanciano 1893, p. 679. Prof. Schermaier (Münster) was so kind to bring this reference to my attention.

55. Critical about this narrow interpretation of the notion impensae: *W. Pinger*, Funktion und dogmatische Einordnung des Eigentümer-Besitzer-Verhältnisses, München 1973, pp. 101 f.

56. This Nicht-Leistungskondiktion follows from § 951 BGB in relation to the legal concept of accession (§§ 946, 94: superficies solo cedit).

57. See also *D. Verse*, o.c. (footnote 52) pp. 157 f.

protection against imposed enrichment when this is subjectively of no value to the recipient (as is generally the case).

A similar problem about the border between property and enrichment law arose in a case in which a lessee was given an option to purchase. With the impending purchase in mind, the lessee made a considerable investment in the property, which he most certainly would not have done if he had been aware of the formal deficiencies from which the option suffered and which, to his utter bewilderment, led to it being void. The lessor subsequently sold the property to a third party, thereby making a large profit[58]. Obviously, the lessee wanted a share of the profit, but – as the saying in the Netherlands goes – he was fishing behind the net. The *Bundesgerichthof's* point of departure in dealing with this case was § 1001 BGB, a provision which denies the possessor any claim for necessary or useful expenses *before* his possession is terminated. The court applied it to this case, in which delivery was effected *longa manu* by the lessor. About 20 years ago *Dieter König* – who, incidentally, died at much too young an age – made a number of suggestions to bring these property-law rules into line with the assumptions of the law of enrichment[59]. However, in the recent reform of the German law of obligations, the law of enrichment received very little or no attention.

One all-encompassing formula to determine whether enrichment is unjustified cannot be constructed. In this regard it should be mentioned that Dutch law also knows enrichment claims within the sphere of public law. Until recently, the position was different in the Common law. The influence of European law in regard to this issue will be dealt with below, but it should be mentioned that the State is entitled to recover the costs of decontaminating land (as regulated by article 75 of the Law on the Decontamination of Land) by way of an enrichment claim against the owner of the decontaminated land. The latter's liability stretches only to the amount in which he was actually enriched by the decontamination operations. The mere fact that the decontamination is carried out in fulfilment of a statutory duty does not suffice to make the enrichment could not be unjustified. So the *Hoge Raad* ruled in a recent judgment, in which it was also held, on the strength of article 119a of the Transitional Law regarding the New Civil Code, that although the period of prescription of a claim in unjustified enrichment, like that of a claim based on tort, amounts to five years, prescription would not stop running before 1 January 1997[60].

The first notion is in harmony with a long line of decisions dealing with the question whether a government body (e.g. the fire brigade which puts out a fire; the

58. BGH 29 September 1995 (V ZR 130, 94), in: JZ 1996, 366.

59. *D. König*, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Vol. II, Köln 1981, p. 1524.

60. HR 15 March 2002, RvdW Number COO, 133HR, JM 2002/117.

water board which removes a wrecked ship) which incurs costs in the exercise of a public-law function entrusted to it, may recover these costs by way of an action in private law[61]. The principle is simple enough: The first question is whether the public-law statute itself provides the answer. If the answer is "yes", *cadit quaestio*. If the answer is "no", the determining factor is whether recovery of the costs by way of an action in private law would unacceptably intrude into the territory of the public-law measure[62]. It is also important to note that in instances where recovery along public-law lines has been excluded, this is an important indication that recovery on the basis of private law is likewise excluded. With respect to the Law on Wrecks[63] the *Hoge Raad* recently held that this statute does not make exhaustive provision for the measures that the State could employ in fulfilling its public-law task to clear away vessels that have sunk in public waters or run aground and do not fall within the purview of the Shipping Transport Act ("*Scheepvaartverkeerswet*")[64]. The question whether the State may recover its costs by way of a private law action must therefore not be answered with reference to the Shipping Transport Act. Rather, the question is whether the Law on Wrecks excludes private-law recovery. According to the last part of article 10 of this act the controller of public water is authorized to recover the costs incurred by him from those who are liable for the costs in terms of the law. The obligation to pay compensation may be designated as being a claim in tort[65]. However, in so far as the owner reaps significant savings as a result of the intervention of the State, one should also contemplate an action based on unjustified enrichment. This is so even though the *Hoge Raad* in this case did not want to go as far as it did in another case[66], in which it also held that a claim in tort would not amount to an unacceptable intrusion into the sphere of the Law on Wrecks and that this would be so whether or not the wrongdoer can be blamed for the sinking of the vessel[67]. If a vessel sinks to the bottom of a navigable waterway, in circumstances in which the owner cannot be blamed for the sinking, the owner's liability for the costs of removing it would be contingent upon the controller averring and proving that the dangers attendant upon not removing it were so great that it in reasonableness compelled removal.

In respect of the Fire Brigade Act 1985 the *Hoge Raad* held the opposite. When the fire brigade had put out a fire on board a ship, the parish sought to recover the

61. HR 11 December 1992, NJ 1994, 639, 14 October 1994, NJ 1995, 720.
62. HR 26 January 1990, NJ 1991, 393 (Windmill).
63. Law on Wrecks, in Dutch: Wrakkenwet (Wet van 29 juli 1934, Stb. 401).
64. HR 15 January 1999, NJ 1999, 306 (m.nt. *ARB*).
65. Compare HR 14 December 1979, NJ 1982, 96 par. 3 (m.nt. *JCS*).
66. HR 14 October 1994, NJ 1995, 720 (m.nt. *MS*).
67. Compare HR 26 January 1990, NJ 1991, 393.

costs on the basis of *negotiorum gestio*. However, the *Hoge Raad* ruled that in this instance such a claim does amount to an inadmissible intrusion into the sphere of a public-law measure[68].

8. Subsidiarity

"When a contract exists, we should not alight upon an action based on unjustified enrichment". These words form the title of a well-known essay by *H.C.F. Schoordijk*[69]. The Hoge Raad had come to the same conclusion in terms of the old law in its decision in the *Smit-Amsterdamse Huizenhandel* case[70]. In contractual relations the question whether or not a ground for a particular transfer of value exists, is determined by the contract itself. When the legislature develops a separate regime in articles 6:272-279 Civil Code (new) to deal with instances of identifiable enrichment that exists after the dissolution of synallagmatic contracts, this measure must take preference above the general rule dealing with unjustified enrichment. The same is true with regard to the obligation to dissolve which arises in the wake of the fulfilment of a resolute condition (article 6:24 Civil Code (new)). When parties expressly prefer to marry out of community of property, the general position may very well be that a rule (which is generally applicable to the parties on the strength of the ante-nuptial contract) may be held not to be applicable in so far as it offends against norms of reasonableness and equity in the particular circumstances. But the mere fact that the labour of the wife had increased the patrimony of the husband will in itself not be enough to prevent this exclusion of community of property from being applied[71].

The parties to a contract of sale are free to agree to a price which is either higher or lower than the market price. If they have consciously done, recourse cannot afterwards be had to a claim based on unjustified enrichment. The enrichment action cannot serve the object: *à déguiser une demande en supplément de prix prohibée par l'art. 1793 en cas de marché à forfait*[72]. When damages have been contractually limited, this represents the maximum amount to which the claimant is entitled; he should not be able to claim a higher amount of damages by way of an enrichment action than he would be entitled to if he were to proceed in contract.

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68. HR 11 December 1992, NJ 1994, 639 (m.nt. *MS*).

69. *H.C.F. Schoordijk,* Aan een actie uit ongerechtvaardigde verrijking dienen wij in geval van een contract niet toe te komen. WPNR 5356.

70. HR 30 April 1948, NJ 1949, 253.

71. HR 25 November 1988, NJ 1989, 529 (m.nt. *EAAL*).

72. C.d.C. 2 March 1915, D.20.1.102, cf. HR 24 February 1938, 952: the enrichment of the bailiff is not unjustified since the improvement to the house falls within the scope of the contractual relation between the parties.

Only in very exceptional circumstances does a contractual relationship come within the purview of article 6:212, as held by the *Hoge Raad* in the *Reimes-Constandse q.q.* case[73]. Normally an agreement of lease is governed by the contract and the special statutory rules created specifically in regard to this relationship. Therefore, a curator who, in spite of him being factually and juridical able to do so, neglects to exercise his *ius tollendi*, cannot then, in order to benefit the estate, institute an action based on unjustified enrichment in order to claim the value of improvements (the construction of sporting cabins), made by the lessee for his own account[74]. A similar decision was recently reached by the Common Court of the Dutch Antilles and Aruba. On the basis of article 1584 of the Civil Code of the Dutch Antilles the court held that in principle the owner of an immovable, who has been enriched as a result of improvements made by a lessee, is not obligated to compensate the damage suffered by the lessee up to the amount of his own enrichment. The reason for this is that article 1584 Civil Code only affords the lessee, within stipulated limits, the power to remove the improvements when he vacates the property – that is to say at the end of the lease. A former lessee is therefore not entitled to compensation of this harm (but, to reiterate: except in special circumstances)[75].

Both the Common law and civil-law jurisdictions have to struggle with the problem of exactly where to draw the border between the law of contract, the law of property, the law of tort and the law of unjustified enrichment. Certain legal systems, most notably the Italian, prefer to regard the enrichment action as subsidiary to the law of contract and the law of tort. French law, albeit not so explicitly, adopts the same view, but has in latter years begun to reverse its stance. Thus an enrichment action was awarded to a first husband of a woman against her second husband for the alimony that the former had paid over a number of years in respect of a child that had been born while the first marriage subsisted, but was later unequivocally proven to be the child of the latter[76]. The *Cour de Cassation* currently distinguishes between instances where the alternative action is excluded by operation of law (e.g. prescription, attachment or an earlier judgment of a court) and those where it is excluded as a result of a factual circumstance (e.g. the insolvency of the defendant). Only when the other action cannot be instituted as a result of the operation of law the assumption is made that the enrichment action,

73. HR 17 September 1993, NJ 1993, 740. Supra, at footnote 50.

74. HR 6 October 2000, NJ 2001, 167.

75. Gem. Hof Nederlandse Antillen en Aruba 24 October 2000, NJ 2001, 38.

76. Civ. 1.2.1984, D. 1984.388; *Mestre,* Rev.trim.dr.civ. 1984,712, see *B. Nicholas,* Modern developments in the French law of unjustified enrichment, in *Paul W.L. Russell* (ed.), Unjustified Enrichment. A comparative study of the law of restitution [Juridische Reeks Vrije Universiteit 14], Amsterdam 1996, p. 77-95, at p. 88.

too, is excluded[77].

As far as Dutch Law is concerned, we find a few comments devoted to the subject of subsidiarity in the *Meijers* Explanatory Note on the Draft of the New Civil Code[78]. *Meijers* wanted to exclude enrichment liability in instances where another statutory measure, specifically applicable to the situation at hand, could be read as intended to be exclusively applicable to the situation.

He gave the example of the void ability of juristic acts: if the right to claim avoidance has prescribed, the person who has been prejudiced by the juristic act, cannot claim any compensation of the harm that he has suffered through the medium of the unjustified enrichment of the other party.

It is true that the *Setz-Bruning* case has recently been interpreted as if the *Hoge Raad* had explicitly wanted to abolish the subsidiarity of the enrichment action, but [a proper reading of] the case does not admit of this conclusion. On appeal it was no longer contested that the second purchaser had been unjustified enriched after he had been able (following on the untimely dissolution of the hire-purchase contract between the seller and the first hire purchaser) to buy the thing far below its actual value. Once it is accepted that unjustified enrichment had occurred, the mere fact that the first buyer might possibly have a claim for compensation based on malperformance against the seller cannot act as a bar to the obligation of the second buyer to compensate the damage that the first buyer might have suffered in consequence of the second buyer being enriched at his expense[79]. It is true that the second buyer argued that there was an insufficient link between the enrichment and the impoverishment, but the objection to that judgement of the court did not carry the day.

The question regarding the subsidiarity of the enrichment action cannot in my view, be separated from the other examples of concurrence in private law generally. The consequence of this approach is that the enrichment claim must yield to a measure, which has as its aim exhaustively to govern the legal relationship between the parties. *Ermer Management* experienced the correctness of this statement[80]. The ABN AMRO Bank had fulfilled the same order twice by transferring $ 75.000 on two occasions to a supplier which went under the name Black Hole. When the bank did not succeed in reversing the second transfer, they made contact with *Ermer*, who then gave her permission for the second transfer, but – as she saw it – under a resolutive condition. The court considered acquiescence in regard to the second

77. Civ. 29.4.1971, Gaz.Pal. 1971.2.554; Nicholas see footnotes 43-44.

78. Parl. Gesch. Boek 6, p. 830.

79. HR 27 June 1997, NJ 1997, 719 (m.nt. *JH*).

80. Ermer Management - ABN AMRO, HR 30 June 2000, NJ 2000, 536; also published in NTBR 2000, p. 418 (m. nt. *G.E. van Maanen*).

transfer to have been proved but not the resolutive condition. The view of the court *Vaquo* was that the enrichment of the bank insofar as an enrichment of the bank must be presumed – was legitimated by the permission for the second transfer, which provided a reasonable ground for the enrichment. The *Hoge Raad* agreed with this view. In case of a contract, liability based on unjustified enrichment does not feature according to *Schoordijk.* But one must not see subsidiarity in absolute terms.

9. A ses propres risques et périls

The two final requirements are dealt with *seriatim* in French Law, but on closer examination they seem to overlap. In the Netherlands examples of the application of this principle are rare. One thinks, for example, of the case of *Royal Nederland Verzekeringsmaatschappij N.V. v Mr. Van Kemenade q.q.*[81], mentioned above. Because *Royal* had itself chosen to adopt the very unusual construction of a money loan for payment, rather than a direct payment, it took the risk of inability of the other party to pay on itself, and thus it could not have recourse to a claim based on unjustified enrichment of the estate. The *Baartman - Huijbers* Case is equally in point[82]. In that case it was accepted that the deployment labour does nor imply impoverishment if it is not accompanied by a possible surrender of financial gain. In an almost identical French case it was assumed that the man would know that the fruits of his labours would accrue to the woman. If he nevertheless persists in his labours with his eyes wide open and in the full knowledge of the proprietary consequences of his actions, he cannot *ex post* console himself about the dashing of his hopes for a longer period of cohabitation by instituting an enrichment action[83].

The so-called *windfall* cases provide an earlier example. These cases concern persons who take advantage of the efforts of others without making any contribution, nor in labour nor in money. A classic example (which played a role in the discussions leading up to the American Law Institute's *Restatement of Restitution* in 1937 stems from French law[84]: A person builds a dyke, which also benefits his neighbors who, however, refuse to contribute to its costs. The builder is not entitled to an enrichment action, because he acted *à ses risques et périls et dans son propre intérêt.* The same goes for the owner of a water mill who effects

81. HR 30 June 1995, NJ 1995, 707.

82. HR 11 April 1986, NJ 1986, 622. See above at footnote 48.

83. Civ. 7.7.1987, on which extensively *Mestre,* Rev. trim. Dr. civ. 1988, p. 132; In the same sense Pau 19.4.1983, Juris Data n. 42112, [on which G. Bonet in his survey of recent decisions] in Jurisclasseur Civil, App. Art. 1370-1371. (See further notably) *H. Périnet-Marquet,* Le sort de l'action de in rem verso en cas de faute de l'apprauvi, JCP 1982.I.3075; *A.-M. Romani,* La faute de l'apprauvi dans l'enrichissement sans cause dans la répéition de l'indyu, Dalloz 1983, Chr. 127; *P. Conte,* Faute de l'apprauvi et cause de l'apprauvrissement, Rev. Trim. Dr. Civ. 1987, p. 223.

84. Cass. Req. 6 Nov. 1938, S. 1839.1.160.

expensive alterations to the flow of the stream. Another miller lives at the lower end of the stream and the improved flow also benefits him, but he was not prepared to contribute and he was not held liable to contribute either[85]. Someone received for use from a usufructuary. The usufruct could terminate at any moment, e.g. at the death of the usufructuary. By nevertheless sowing under these circumstances, the farmer took on the risk that this exertions could benefit, not himself, but the owner of the land. He was not entitled to an enrichment action, the *Cour de Cassation* held[86].

Similarly illustrative is a recent French case, in which the *Cour de Cassation*, unlike both lower courts, refused the claim. The case is of such interest that the editors of the *European Review of Private Law* devoted the entire 4th issue of Volume 8 (2000) of this journal to the case[87]. The case was a simple one. The owner of an antenna invited a quote for its repair. When he returned he found it repaired and he was presented with a stiff account. Appealing the fact that he had not ordered the repair of the antenna he refused to pay and demanded his antenna back. The repairer argued that his client would be unjustifiably enriched if he were to be able to take the repaired antenna home without further ado. The *Cour de Cassation* refused the claim with an appeal to the *faute de l'appauvri.*

An analogous case occurred in South Africa where the Roman-Dutch enrichment law still applies and where the existing actions are often interpreted extensively only with great difficulty. But a clear move towards a general action was made by *Schutz JA* in *Short distance Carriers CC v McCarthy Retail Ltd.* The former, the owner of a heavily-damaged truck, had the vehicle brought to a garage. The garage thought that it had already received the order to repair the truck from the insurers and proceeded with the repair work. However, they were misinformed because when the repaired truck was delivered to the owner, the insurance company refused to pay. Who gets the wooden spoon here[88]? To make a long case short: the court held that the court had taken care of the interests of the owner of the truck and to that end had incurred necessary expenses. The costs should be compensated. If the garage had to ear the risk of the litigation against the insurance company, the owner of the truck would be unjustifiably enriched.

10. Preliminary Conclusion

85. Req. 22.6.1927, S. 1927.I.338.

86. Soc. 18.3.1954, JCP 1954.II.8168.

87. G. de Geest et al. Cass. Fr. 15.12.1998, Enrichissement Sans Cause Abstract [2000] European Review of Private Law/Revue européenne de droit privé/Europäische Zeitschrift für Privatrecht 8 (4), p. 613-688.

88. McCarthy Retail Ltd v Short Distance Carriers cc 2001 (3) SA 482.

With this we have come full circle. The main complaint with regard to the old law was seen as having been that the enrichment law of the Civil Code of 1838 did not cater for a number of instances in regard to which many thought it proper that the enriched party should compensate the impoverished party. That the old actions should not be extended in an unbridled way had been established by the *Hoge Raad* in *Quint-te Poel*. That opened the door to a general action, for which especially *Bregstein* argued so persuasively. But, as always, a general action must be kept within manageable bounds. To that end there are a number of possible technical approaches. Italian law, which preceded Dutch law in the codification of the general enrichment action, chose a strict subsidiarity rule and that has led to the general action being unduly restricted in that country. French law opted for the technique of refining the law by refusing a claim to anyone who caused the transfer *à ses risques et perils dans son propret intérêt.* The result is a paradox. In one system that knows a general action, the overenthusiastic repairman finds his bill unpaid, while a system with a limited number of actions (South Africa) his equally workaholic colleague is given, albeit in the guise of an action based on *negotiorum gestio*, an enrichment action. And with that yet another question rears its head: Will Luxembourg, will the European Court cause the two systems to converge?

11. European Influences on the law of unjustified enrichment

With a view to a merger with *Kaiser Aluminium Europe Inc.*, *Bug-Alutechnik* received an important subsidy from the German *Land* Baden-Württemberg. The European Commission declared this grant of subsidy to be contrary to article 93 §2 of the EC treaty and incompatible with the common market. The Commission ordered Baden-Württemberg to reclaim the subsidy, but it refused with an appeal to §48 of the Law on Administrative action (*Verwaltungsverfahrensgesetz)* A government body is obliged to respect legitimate expectations and is therefore not able – or hardly able – to correct its own decisions. The German court found that the balance of interests was in favour of Bug-Alutechnik, since which expectations could be said to be more legitimate than those created by the government?

The European court needed only a few words. Protection of legitimate interests in a very important jurisprudential principle, but in the present case the expectations of Bug-Alutechnik were not legitimate, since each serious businessman knows that there is no longer room for such anti-competitive subsidies. In spite of its protests, the German government was forced to reclaim the subsidy. The European court set out its judgment in *Land-Rheinland-Pfalz v Alcan Deutschland GmbH*[89]. Because of the direct effect priority and effectiveness of European law, national governments

89. Land Rheinland-Pfalz v Alcan Deutschland GmbH (Case D-24/95) [1997] 1 ECR 1591.

are duty-bound to reclaim forthwith all government aid that has been declared unlawful by the Commission. Rules of national laws make recovery difficult or (effectively) impossible have no binding force. An appeal to prescription of the claim, *change of position* or the protection of expectations raised by the government, are of no avail to the national authorities.

An obligatory recovery in favour of national authorities in regard to state aid has been held to have been unlawful. That takes some getting used to. But the same problem arises in the case of improperly-collected taxes. European law prohibits taxes that discriminate against the services and goods of other member states. The necessity to return improperly-collected taxes flows directly from the same doctrine regarding the direct effect priority and effectiveness of European law. The AG Tesauro understood this problem well when he argued in the case of *Société Comateb* v *Directeur Général des Douanes et Droits Indirects*[90]. The protection of individuals who complain about unlawfully exacted taxes requires direct operation. "It is quite clear that that protection would be effective if a judgement declaring a charge to be unlawful because it was levied in breach of a Community rule having direct effect were not accompanied by the possibility for an individual to obtain re-imbursement". But it is not entirely self-evident that a national legal order would necessarily allow the recovery of taxes. In Dutch law, too, principles such as the formal validity of a decision and good governance play a role in payments in accordance with the decisions on which they rest – even if the decision turns out later to have been taken on an incorrect assumption. In England the situation shouts to the heavens. Although the Law Commission had already, in 1994, proposed to make it possible to recover unlawfully exacted taxes, an act along these lines has still not been promulgated. Judges, now and again, do what they can to find possibilities for restitution, because the legislature is slow off the mark. In *Woolwich Equitable Building Society* v *Inland Revenu*[91] Lord Goff delivered a quite cynical speech, in which he touched on the (un)willingness of the legislature to regulate recovery of unlawfully exacted taxes.

However compelling the principles of justice may be, it would never be sufficient to persuade to propose its legislative recognition; caution, otherwise known as the Treasury, would never allow this to happen.

A good example of a case in which the interests of competition saw to it that individuals gained a right to restitution is the case of *Just vDanish Ministry for fiscal Affairs*[92], that was heard in the European Court in 1979.

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90. Société Comateb v Directeur Général des Douanes et Droits Indirects (Cases C-192-1'8/95) [1997] 1ECR 165, para. 11-12.

91. [1991] 3 WLR 790, with comments of E. *McKendrick* [1991] 107 Law Quarterly Review, p. 526.

92. Europese Hof van Justitie 17 February 1980, Just v Danish Ministry for Fiscal Affairs, 68, 79,

Denmark taxed aquavit distilled inside the country at a rate which was lower than for aquavit the tax-authorities forced Just (under pain of having its license withdrawn) to pay the higher tariff. Of course Just was entirely correct when he argued that the then valid article 95 of the EC Treaty is breached when a product from another member state is taxed at a higher rate than a comparable national product, but the Danish tax authorities would have nothing of this, until Just put his complaint before the European court. That Denmark had to pay back was certain. Two decisions *Rewe-Zentral Finanz Gand Rewe-Zentral AG* v *Lanswirtschaftskammer für das Saarland* and *Comet* v *Productschap voor Siergewassen* laid foundations for this[93]. In *Amministrazione delle Finanze dello Stato* v *SpA San Giorgio* the court had decided that the right to repayment "is a consequence of, and an adjunct to" the right of the citizen to remain free from taxes which offend against community law[94]. But Denmark proved to be a slippery customer. Just had not been impoverished, Denmark argued, because he had passed on the taxes to his customers. Should this kind of defence be accepted? The answer is to be found in *FMC plc* v *Intervention Board for Agricultural Produce*[95]. The problem there was somewhat different. Until the decision of the House of Lords in *Kleinwort Benson* v *Lincoln City Councel* the rule that a payment made in error of law could not be reclaimed prevailed in English law[96]. Everyone is presumed to know the law, and for that reason *error juris* was incompatible with recovery[97]. The rule of the common law did not, however, find favour in the eyes of the European court, "a rule of national law by virtue of which a sum paid to a public authority under a mistake of law may be recovered only if it was paid under protest manifestly fails to satisfy [the requirements of Community law], ….is liable to prejudice, effective protection of the rights conferred on the traders in question by community law". The House of Lords was thus forced to retreat from its former position.

What about the defense that Just had not been impoverished (the defense of passing on)? Does this rule reduce the main rule that unlawfully exacted taxes

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Jur., 1980 (501) at p. 523, § 26: confirmed in the decision of 14 January 1997, Comateb a.o., C-192-218, 95, Jur., 1997, I, (165) 188-192, § 19-34.

93. Rewe-Zentral Finanz G and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (Case number 33, 76) [1976] ECR 1089 and Comet BV v Productschap voor Siergewassen (Case number 45, 76) [1976] ECR 2043.

94. Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case number 199, 82) [1983 ECR 3595. *Alison Jones*, Restitution and European Community Law, Oxford 2000, p. 56-57.

95. FMC okc, v Intervention Board for Agricultural Produce (Case number 212, 94) [1996] 1 ECR 389, para. 70-71.

96. Kleinwort Benson v Lincoln City Council [1998] 3 WLR 1095.

97. *Virgo*, o.c., p. 136 ff.

should be recoverable to a fiction? The European court found itself in the company of its American and Canadian brethren when it answered this question in the negative[98]. Unjustified enrichment not only provides the basis for recovery, but also provides possible defenses. This approach is not entirely free from problems. In the Netherlands we think differently about the recovery of unlawfully exacted taxes.

12. Conclusion

Alongside with contract and tort unjust enrichment has become an independent source of obligations. Its growing importance, both in the Common law and in the Civil law cannot be overestimated. European law contributed many new important features, but the European Court eventually leaves the purport and the exact content of the remedy for unjust enrichment to the national jurisdictions, provided that the citizens of all member states are treated equally. We have seen, that it is left to the national jurisdiction to decide whether the defense of passing on can be raised. The new Civil Code in the Netherlands represents an important landmark in development of the remedy for unjustified enrichment within the Civil law. That development is still going on. There is no rest for the law, also not for the law of unjustified enrichment.

98. It is for the Member States to ensure the repayments of charges levied contrary to Article 95 in accordance with the provisions of their internal law, subject to consitions which must not be less favourable than those relating to similar actions of a domestic nature and which in any case must not make it impossible in practice to exercise the rights conferred by the Community legal system: Community law does not prevent the fact that the burden of the charges which have been unlawfully levied may have been passed on to other traders or to consumers from being taken into consideration; lastly it is compatible with the principles of Community law to take into consideration, if appropriate, in accordance with the national law of the Member state concerned, the damage suffered by the person liable to pay the charges, by reason of the restrictive effect for the latter on the volume of imports from other Member States.