Book Review

Unjust Enrichment: A Study of Private Law and Public Values by HANOCH DAGAN (Cambridge University Press, 1997) pp xiv, 166

In recent years the concept of unjust enrichment has excited much debate and controversy because it encapsulates a new and dynamic area of the law of restitution supplementing the limitations of contract and tort — and indeed sometimes overlapping and challenging contract and tort. If we are to create a responsive and yet relatively certain legal system of common law, then it will be necessary to settle the meaning of unjust enrichment — to the real extent it remains indeterminate. And, there are different means by which the concept of unjust enrichment may be defined and certainty created. One method is to define unjust enrichment by reference to legal doctrine and the kinds of triggering events which will prompt judicial intervention such as mistake or legal compulsion. Another possible method is to provide a scheme which, through a broad understanding of a social ethos, predicts how unjust enrichment analyses will succeed in different kinds of societies — a kind of comparative unjust enrichment method. It is the latter approach which the author of the book under review has adopted.

It ought to be appreciated that Dr Dagan has undertaken an ambitious project. He has attempted to show that the invisible but real ethos which permeates the social fabric will affect the way that a society defines unjust enrichment and remedies it. In order to do so, he argues that it is necessary to undertake an investigation of different legal systems. He selects for comparison and contrast the operation of unjust enrichment in the United States of America, Talmudic Civil law and International law.

In the light of this investigation into the contextual ethos of each legal system, Dr Dagan finds it necessary to limit his investigation. He confines the kind of unjust enrichment under investigation to a specific paradigm which he describes abstractly as:

> ...where A appropriates B's interest with respect to a resource without B's express or implied consent. B then files a complaint against A for his profit-making invasion. She asks for monetary recovery in restitution of A's resultant benefit, which she deems to be a wrongful gain. A does not raise any affirmative defense. (p 3).

The 'object of the controversy' in the paradigm will be resources which are 'any means or capability of raising wealth, meeting needs, or supplying wants' (p 4). Therefore, resources encapsulate interests which may exist outside traditional property concepts. The plaintiff will seek a pecuniary remedy *ex post* the invasion which is 'rooted in the archaic concept of *waiver of tort* which views restitution as a parasitic claim, an alternative to tort damages.' (p 5)

He adopts a positive theoretical approach highlighting a wide variety of moral, political and economic considerations which inform the underlying

social ethos. Such a positive theory may be developed with explanation and prediction in mind, referred to throughout the work as 'retrodiction.' (p 8) Thereafter, he identifies several rationales for recovery which apply to the paradigm ranging from compensation for harm, fair market value and return of profits. Such rationales for recovery are linked to an invisible hierarchy of distributive values, namely the communitarian value of sharing, the utilitarian value of well-being and the libertarian value of control respectively.

Dr Dagan argues that the distributive values inform each society's choice of rationales for recovery. Therefore, it appears that whilst such distributive values may inform different aspects of law, there will be a predominant ethos which in turn emphasises certain distributive values more than others. In the United States, the laissez-faire competitive ethos gives rise to many recovery rationales based on well-being and control such as recovery of proceeds and profits respectively. In contrast, the Judaic ethos is far more communitarian than the American ethos with the result that that pecuniary recovery for actual harm or loss is a very important recovery rationale. Disputes at an international level relating to the appropriate level of compensation for a state's expropriation or nationalisation of resources owned by a foreign entity represents a clash of different values.

This challenging work is a timely reminder that certain assumptions as to how people ought to behave will inevitably inform legal doctrine and pecuniary recovery. In this respect, the striking comparison between three legal systems is to be welcomed. So too, the careful and subtle analysis of the relationship of substantive doctrine, pecuniary remedy and values is often insightful. The succinct summaries of his findings are also helpful. After reading the book, one is aware that it may be necessary to keep such an analysis in mind when considering the shifts of judicial and legislative policy even in areas of law which do not fall within the paradigm so described. For example, does the shift from strict liability for breach of the profit rule governing fiduciary obligations (as stated and applied in *Regal (Hastings) Ltd* v *Gulliver* [1942] 1 All ER 378) to a recognition of the fiduciary's own contribution in formulating the remedy to account (*Warman International Ltd* v *Dwyer* (1995) 182 CLR 544) indicate fundamental changes in rationales and even the social ethos?

However, the book suffers from weaknesses some of which are inevitably associated with the ambitious task which the author set himself.

First, the paradigmatic definition of unjust enrichment stemming from waiver of tort, does not provide a complete picture of restitution. True, waiver of tort has featured as a form of wrong which constituted unjust enrichment (note for example *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1) but the more common explanation of unjust enrichment in restitution was that it stemmed from the law of quasi-contract. Whilst Dagan recognises the limitations of his paradigm, the choice has the effect of including other areas of law including tort law as part of the paradigmatic framework and excluding very significant portions of restitution law. In the light of the redefinition, Dagan tests his theory against wide and random areas of American and

Talmudic Civil law which even broadly speaking would not be characterised as part of the law of restitution. Therefore, Dagan does not posit and apply a new underlying theory for the legal concept of unjust enrichment, but rather an underlying theory for his limited definition of unjust enrichment.

Secondly, linked to the limited paradigmatic definition, Dagan argues that he is concerned with developing a positive distributive theory. In so doing, he rejects corrective justice as an appropriate account of unjust enrichment because it does not have explanatory or normative value. It does not explain why the enrichment is wrongful. This is a credible criticism. It highlights that distributive considerations may present real alternative approaches for working out when courts ought to intervene on the basis of unjust enrichment. However, it is submitted that such a swift dismissal of corrective justice fails to take into account the history of common law systems and may even skew an analysis of a social ethos. It also does not accord with the very paradigm which Dagan sets up. From a historical perspective, the identification and correction of wrongs or wrongdoing was an important aspect of the development of the common law system and continues to underpin fundamental principles and areas of law such as tort, equity and restitution. It is arguable that corrective justice has influenced and is influenced by social ethos — and that the legal systems under consideration are no exception.

Thirdly, whilst the application of the theory to American, Judaic and International law is interesting, it suffers from incompleteness and inadequacies of comparison. Sometimes highly complex areas of American law which are used as illustrations of Dagan's positive distributive theory are all too briefly described. The treatment of Talmudic Civil law is almost exclusively based on the factual scenario where a squatter takes possession of premises. The theory may have been better illustrated by a direct comparison of the way each legal system deal with certain substantive problems rather than providing a wide variety of instances in the case of the American legal system, but more limited examples in the case of Talmudic Civil law and International law.

Notwithstanding these criticisms, the book is still worth reading. For too long, legal theorists have concentrated on analysing contract and tort. This book does begin to unlock the theoretical underpinnings of unjust enrichment and in this regard the author is to be commended.

FIONA BURNS
Lecturer
Faculty of Law
The Australian National University