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Siyi Lin

The Law of Unjust Enrichment in China: Necessary or Not?

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Siyi Lin is currently a lawyer at Fangda Partners in China. She holds a PhD and an LLM from The Chinese University of Hong Kong and an LLB from China University of Political Science and Law. Her research focuses on civil law, trust law, and commercial law, particularly on the law of unjust enrichment. Her recent publications include "The Translation of Quistclose Trusts in China" (with Hui Jing) *Journal of Equity* 15 (2021), pp 153–180; "Looking Back and Thinking Forward: the Current Round of Civil Law Codification in China" *The International Lawyer* 52 (3) 2019, pp 439–467; "The History of a Mystery: the Evolution of the Law of Unjust Enrichment in Germany, England and China" (with Lutz-Christian Wolff and Steve Gallagher), International Comparative, Policy & Ethics Law Review 3 (2) 2020, p. 337–381; and "China's New Charity Law: A New Era of Charitable Trusts" *Trusts & Trustees* 24 (8) 2018, pp 768–777.

Abbreviations

CFI	Court of First Instance
CPC	Communist Party of China
CSI	Court of Second Instance
NPC	National People's Congress
NPCSC	Standing Committee of National People's Congress
PC	People's Congress
PCSC	Standing Committees of People's Congress
PRC	People's Republic of China
SPC	Supreme People's Court of the People's Republic of China
SPP	Supreme People's Procurator of the People's Republic of China

Chapter 1
Introduction

1.1 Background and Research Questions

The law of unjust enrichment, sometimes known as the law of restitution, is among the most debated private law subjects in many jurisdictions and is regarded as one of the most complicated of all areas of law.[1] Generally, the law of unjust enrichment provides rules, under which if one is enriched without a legal ground[2] or as a result of certain 'unjust factors',[3] the party suffering a loss therefrom is entitled to recover what has been lost.

In China,[4] the law of unjust enrichment has not received much attention from lawmakers, academia and legal practitioners. For the past several decades, the statutory framework concerning unjust enrichment was rather simple. Only one legal provision, i.e. Article 122 of the *General Provisions of the Civil Law of the People's Republic of China* ('General Provisions')[5] and previously Article 92 of the

[1] Percy Winfield once described unjust enrichment or restitution as 'no man's land... not in the sense that there are constant battles for it, but that nobody wants it'. Winfield (1931), p. 118; See also Burrows (2004), p. 14.

[2] Civilian and mixed systems, e.g. Germany, Scotland, South Africa and China, commonly have organized their laws of unjust enrichment based on the 'absence of basis' approach. Canada, as a common law jurisdiction, recently shifted to the 'absence of basis' approach as well. *Garland v Consumer's Gas Co.,* [2004] 1 SCR 629.

[3] Common law jurisdictions adopting the 'unjust factors' approach to unjust enrichment include England, the USA and Australia.

[4] In this book, 'China' and 'Mainland China' are used to refer only to the People's Republic of China, excluding Macau Special Administrative Region, Hong Kong Special Administrative Region and Taiwan Region.

[5] Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Provisions of the Civil Law of the People's Republic of China] (Promulgated by the National People's Congress ('NPC') on 15 March 2017, effective since 1 October 2017, expired on 1 January 2021). When promulgated in 2017, the *General Provisions* was designed to be incorporated into and become Book I of the *Chinese Civil Code* planned to be promulgated in 2020. Therefore, when

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General Principles of Civil Law of the People's Republic of China ('GPCL'),[6] sets out the general principle of unjust enrichment. Article 122 of the *General Provisions* stipulates, 'Where a person acquires unjust benefits without a legal basis, the person who so suffers a loss shall have the right to require him to return the unjust benefits'.[7]

In addition, one judicial interpretation issued by the Supreme People's Court of the PRC ('SPC') determines the extent of the return of enrichment acquired unjustly, i.e. Article 131 of the *Opinions of the SPC on Several Issues Concerning the Implementation of the General Principle of Civil Law of the People's Republic of China* ('Opinions on the GPCL').[8] It stipulates, 'The returned unjust benefits shall include the original object and the fruits arising therefrom; other benefits obtained by using the enrichment obtained unjustly shall be taken over by the state after deducting the expenses of labour services overheads'.

These two articles constituted the entire statutory law of unjust enrichment in China since 1980s. Rules at such an abstract level obviously could not provide a comprehensive regulation of unjust enrichment and fail to give proper guidance in judicial practice. The abstractness of the law of unjust enrichment has also attracted a barrage of criticisms from academia.[9]

The Chinese legislator seemed to be aware of problems existing in the law of unjust enrichment and intended to improve the current situation. When China finally passed its first-ever civil code since the establishment of the People's Republic of China ('PRC') on 28 May 2020, i.e., the *Chinese Civil Code of the PRC* ('Chinese

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the *Chinese Civil Code of the People's Republic of China* comes into effect on 1 January 2021, the *General Provisions* was incorporated as Book I of the civil code and repealed simultaneously. See Liu (2020b). Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the NPC on 28 May 2020, effective since 1 January 2021).

[6] Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by the NPC on 12 April 1986, effective since 1 January 1987, last amended on 27 August 2009, expired on 1 January 2021). For a discussion of the relationship between the *GPCL* and the *General Provisions*, see Sect. 3.3.2 in Chap. 3.

[7] Article 92 of *the GPCL* regulates the concept of unjust enrichment in a similar way to Article 122 of the *General Provisions*, which stipulates, 'Where a person acquires unjust benefits without a legal basis and causes another's loss, the person shall return the unjust benefits to the person who suffers a loss'. For a more detailed account of the provision concerning unjust enrichment in the *GPCL*, see Sect. 3.4.5.5 in Chap. 3.

[8] Zuigao Renmin Fayuan Guanyu Guanche Zhixing Zhonghua Renmin Gongheguo Minfa Tongze Ruogan Wenti De Yijian (Shixing) (最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见(试行)) [Opinions of the SPC on Several Issues Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China (For Trial Implementation)] (promulgated by the SPC on 26 January 1988, effective since the same date, expired on 1 January 2021).

[9] E.g., Huo (2006), pp. 83 and 87; Tang (2013), p. 128.

Civil Code'),[10] the *General Provisions* is incorporated as Book I of the *Chinese Civil Code*. Therefore, Article 122 of the *General Provisions* introduced previously turns into Article 122 of the *Chinese Civil Code*, providing the general principle of unjust enrichment. In addition, one chapter concerning specific issues of unjust enrichment was added in the *Chinese Civil Code*, i.e., Chapter 29 of Book III Contract of the *Chinese Civil Code*. However, a more in-depth analysis reveals that the new unjust enrichment chapter, which consists of only four articles, is neither formulated after long deliberation nor comprehensive to tackle various problems existing in this field of law. Even though more attention has been paid to unjust enrichment after the promulgation of *Chinese Civil Code*,[11] literature providing a detailed and comprehensive analysis of unjust enrichment is still limited.[12] Moreover, a rather fundamental question, why the law of unjust enrichment is needed in the Chinese legal system in the first place, remains unanswered.

In contrast, vast academic ink has been spilt over the law of unjust enrichment and there has been an explosion of writings in the last two decades on this topic in many other jurisdictions, especially in England.[13] Unjust enrichment has been recognized as one of the three principal strands of the law of obligations alongside contract and tort in England.[14]

Facing such an under-explored field of law in China, this book aims to first explore the goal(s) of the law of unjust enrichment in China to address the most fundamental issue of this area of law. The goals of an area of law are commonly understood as its objectives or purposes, which demonstrate why the area of law exists. The goals of an area of law influence decisively its explication and development. It is noteworthy that this book does not aim at any speculation regarding the thinking of the legislators as to the goal(s) of the law of unjust enrichment in China.

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[10] Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the NPC on 28 May 2020, effective since 1 January 2020).

[11] Much academic ink has been spilt over the new Chinese law of unjust enrichment after the promulgation of the *Chinese Civil Code*. A few examples are listed here: Liu (2020a), p. 26; Chen (2020), p. 5; Wang (2020), p. 51.

[12] Legal textbooks on Chinese civil law usually contain a chapter introducing 'unjust enrichment'. For example, Jiang (2011); Wei (2007), pp. 592–598. However, there are still only a handful of comprehensive analyses of Chinese law of unjust enrichment. For details, see infra Sect. 3.6.3.1 in Chap. 3.

[13] Goff and Jones published their pioneer work, *The Law of Restitution*, in 1966 when the subject was barely known in England and its 9th edition *Goff and Jones: The Law of Unjust Enrichment* has been published in 2016. Goff and Jones (1966). Later, many other textbooks (notably, Peter Birks, *Unjust Enrichment*, Graham Virgo, *The Principles of the Law of Restitution* and Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment*) and numerous collections of essays contributed to the development of the law of restitution and unjust enrichment. Birks (2005); Virgo (1999); Burrows (2012). The discussion of unjust enrichment also gave birth to a specialized academic journal, *Restitution Law Review*, which updates the latest information on the subject internationally.

[14] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227; Johnston and Zimmermann (2002), pp. 8–9.

Instead, it tries to identify the goal(s) through rational analysis of the statutes and judgments. The ultimate question is whether the existence of a general law of unjust enrichment is justifiable given the goal(s) it intends to achieve within the Chinese legal system.

Specific questions explored by this book are as follows:

- What are and what should be the goal(s) of the law of unjust enrichment in China as compared to the English law of unjust enrichment?
- Does the current law of unjust enrichment in China achieve its goal(s)?
- Are there any problems caused by the current Chinese unjust enrichment legal framework?
- Can other branches of law achieve the goal(s) of the law of unjust enrichment in China?
- Is there a need for the law of unjust enrichment or reforming this law in China?
- How should the Chinese law of unjust enrichment develop in the future?

1.2 Demarcation of the Research Area

Unjust enrichment can occur in an incredibly wide range of circumstances and the law of unjust enrichment does not deal with many of the enrichment scenarios, which are seen as 'unjust' at first glance. For instance, the law of unjust enrichment usually does not mandate the return of property acquired through bribery or tax evasion, which is governed by other laws. The term 'restitution' is often referred to as a form of compensation, which is not only used in the law of unjust enrichment but also in criminal law, administrative law, etc. For the sake of a focused discussion, it is therefore necessary to first set out the scope of unjust enrichment discussed in this book.

Firstly, this book only explores unjust enrichment in the private law context. Private law refers to laws regulating the relationships among persons including natural persons and legal persons, i.e. entities, which are equal in terms of their legal status.[15] Contrarily, public law, e.g. criminal law, is concerned with the interactions between individuals and the state, and the interrelationships between individuals that are of concern to society. Under Chinese law, the acquisition of benefits without a legal basis may be regulated by both private law and public law. For example, one stealing another's property is enriched unjustly without a legal basis. Article 122 of the *Chinese Civil Code* entitles the owner to seek return of the property. Meanwhile, criminal law compels the thief to return the property and

[15] *Chinese Civil Code*, art 2.

punishes him if the conduct constitutes a theft crime.[16] This book will not consider unjust enrichment, restitution and other liabilities in public law.

In private law, the law of unjust enrichment is closely related to other fields of law, including contract law, tort law and property law.[17] The law of unjust enrichment is concerned with restitution of benefits acquired without a legal basis or as a result of an unjust factor, namely a process of gain-based recovery.[18] A contract is an agreement among equal parties concluded through mutual consent.[19] Benefits may be conferred under a void, revoked or terminated contract, which does not constitute a legal basis for retaining benefits, and restitution of such benefits is included in our discussion. Where a person obtains benefits through a tortious act at the cost of an injured person, the law of unjust enrichment and tort law may both demand that the defendant should disgorge the benefits acquired through the tortious act.[20] Cases of this kind are included in this study. If one retains another's property without a legal basis, the Chinese property law already involves straightforward restitutionary remedies to protect the owner's proprietary interests.[21] The rules of property law also have an impact upon the law of unjust enrichment. For example, whether the researched jurisdiction adopts an abstract or causal approach regarding the transfer of ownership[22] has a direct impact on the design of the law of unjust enrichment. The relevant aspects of property law are also covered by this study.

Secondly, to explore the goal(s) of the law of unjust enrichment, this book inevitably has to deal with the concepts of justice and fairness to some extent. However, this book does not involve itself in the task of exploring the philosophical foundations or the normative basis of unjust enrichment liabilities.[23] Instead, this book is confined to a doctrinal analysis by reviewing the rules applicable in China as compared with the English law of unjust enrichment and also combining this exploration with judicial practices. It aims to deduce the goal(s) of the law of unjust enrichment from the doctrines rather than considering further whether the doctrines

[16] Zhonghua Renmin Gongheguo Xinfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the NPC on 1 July 1979, effective since 1 October 1997, last amended on 26 December 2020), arts 64 and 264.

[17] Dannemann (2009), p. 4.

[18] *Chinese Civil Code*, art 122; Birks (2005), p. 11.

[19] *Chinese Civil Code*, art 464.

[20] Zhang and Guo (2008), p. 12.

[21] *Chinese Civil Code*, art 235.

[22] The 'abstract or casual approach' is about whether a particular legal system separates the validity of the real act to transfer property ownership from the validity of the underlying obligatory contract and whether the validity of the obligatory contract and the validity of the real act affect each other. For a more detailed discussion, see infra, Sect. 3.3.4 in Chap. 3.

[23] Exploring the theoretical foundations of the law of unjust enrichment and inspecting what justice demands is a distinct and complicated area. A number of private law theorists have offered discussions of the philosophical foundations of unjust enrichment. e.g. Chambers et al. (2009); Webb (2016); Klimchuk (2004).

and their goal(s) accord with social justice. The scope of this book does not allow for a comprehensive discussion of jurisprudential aspects of related issues.

1.3 Research Contribution

Chinese law does not regulate unjust enrichment in a comprehensive and systematic manner as demonstrated by the fact that there are only a few provisions comprising the whole law of unjust enrichment in the civil code. As demonstrated in the following chapters in this book, such a limited framework is insufficient to provide a workable basis for dealing with various types of unjust enrichment.[24] In addition, comprehensive and deep academic research on the law of unjust enrichment is rare in China. The brevity of the legislation and the lack of proper research leave the Chinese law of unjust enrichment obfuscated and make the determination of the actual status of the law very daunting if not an impossible task. There are divergent views regarding the function, constituent elements and the practical application of the law of unjust enrichment, which has caused serious confusion in the judicial application of related rules and doctrines in China.[25] It is therefore time for a comprehensive study that analyses the status quo and offers systematic guidance for the way forward.

The existing academic research on unjust enrichment in China mainly focuses on the constituent elements of an unjust enrichment claim, the categorizations of unjust enrichment scenarios and the relationships between unjust enrichment claims and other claims.[26] However, academia overlooks the most fundamental question: What is the goal of the law of unjust enrichment? Why do we need a law of unjust enrichment in the first place?

The goals decide the values of the machinery and provide justifications for the need of a certain field of law. With regard to other branches of Chinese private law, the goals and functions are relatively definite. For instance, according to the prevailing opinion, the dominant goal of contract law is to provide an effective and fair regulatory framework for contractual exchange.[27] Tort law recognizes compensation for harms as a general duty[28] and nobody doubts that wrongdoers who infringe upon the interests of other people without their consent should

[24] Problems existing in the current Chinese law of unjust enrichment are discussed in Sect. 4.2 of Chap. 4.

[25] Cf. Liu (2013), p. 221. Although in comparison to previous regulations, the *Chinese Civil Code* expands provisions of unjust enrichment, some highly controversial issues in practice remain unsettled under the current Chinese law of unjust enrichment. For details, see infra, Sect. 4.2 in Chap. 4.

[26] For instance, Lou (2012), p. 110; Hong and Zhang (2003), p. 42; Liu (2020b).

[27] Wang (2011), pp. 107 and 109. The same view is proposed by scholars in other jurisdictions. Steyn (1997), pp. 433 and 434. See also Brownsword (2000), p. 23.

[28] Wang (2011), pp. 109–110.

compensate the victims. The primary goal of tort law is to provide a mechanism for those who suffer a loss due to another's fault to obtain compensation.[29]

Conversely, when discussing the goal(s) of the Chinese law of unjust enrichment, it is easy to lapse into circularity. The law of unjust enrichment aims to reverse benefits transferred without a legal basis because it is unjust to obtain benefits without a legal basis. In other words, unjust enrichment is unjust because no law justifies it.[30] The underlying rationale of unjust enrichment is undefined. There is no general duty of disgorgement of enrichments. Specifying the goals is a pre-requisite to understand the nature of a field as a whole and the goals decide what functions a system should have. The goals of the law of unjust enrichment determine the definition and constituent elements of unjust enrichment[31] and decide how the law of unjust enrichment should be designed. What unjust enrichment is and how to develop the rules of unjust enrichment will remain inaccessible until the goals of the mechanism are clear. It is for these reasons that this study aims to identify the existent goal(s), if any, and the desired goal(s) of the law of unjust enrichment in China.

After having identified the goal(s) of the Chinese law of unjust enrichment, this book explores whether other fields of Chinese law can fulfil these goal(s). This is done in order to assess if there are overlaps, if different areas of law supplement each other and if they can substitute or replace each other. Consequently, this book does not confine its analysis to the very limited statutory provisions of the current law of unjust enrichment but also explores whether the goal(s) of the law of unjust enrichment are or can be achieved via other legislative or judicial tools. By exploring the goals of the law of unjust enrichment in China this study will fill an important gap in the legal literature. More significantly, it will also form the basis for future research and future legislation concerning the law of unjust enrichment in China.

1.4 Research Methodologies

1.4.1 Overview

Three research methodologies are applied in this book, namely doctrinal research, comparative research and case studies. Doctrinal research and comparative research are intertwined and used to explore the Chinese and English laws of unjust enrichment. Case studies focus mostly on the application of the law of unjust enrichment in China with the goal of supplementing the results obtained through the other methods. The different methodologies are explained in more detail in the following.

[29] Scholars in other jurisdictions also propose the same view. See Robertson (2009), p. 3.

[30] The circularity problem happens not only in the Chinese law of unjust enrichment, but also in the law of unjust enrichment in common law jurisdictions. Nadler (2008), pp. 245 and 246.

[31] Kull (1995), pp. 1191 and 1193.

1.4.2 Doctrinal Research

First of all, this book engages in doctrinal research to analyze the legal principles underpinning the law of unjust enrichment. Doctrinal research is research in law, also described as research of 'black-letter law', providing a systematic interpretation and analysis of the principles and rules governing a particular legal area as well as their applications.[32] It also takes into account the relationships between rules and their status with a particular social context.[33] In addition to legislation and case law, i.e. the primary sources of law, doctrinal research is also concerned with secondary sources, e.g. books, journal articles and written commentaries on the legislation and case law,[34] which are examined to facilitate the understanding of legal rules.

In this study, the primary sources explored include the legislation and cases in the chosen jurisdictions, namely China and England, whilst laws in other jurisdictions, both civil law jurisdictions and common law jurisdictions are also considered occasionally where they are relevant. Examples are primary sources of Germany, Japan and Australia. Secondary sources considered for the doctrinal research conducted in the context of this book are books, articles and other commentaries reflecting the opinions—in the first place—of Chinese, but also of other overseas academics and practitioners regarding the law of unjust enrichment and related areas of law. The review of primary and secondary sources aims to understand the Chinese law of unjust enrichment, to explore its goal(s) on the basis of previous studies, and to assess whether its goal(s) can be achieved by other branches of law.

1.4.3 Comparative Research

Comparative legal research involves the exploration of both similarities and discrepancies between different legal systems.[35] Comparative law may serve a number of purposes, including the acquisition of better knowledge of legal rules and institutions and the imitation of foreign legal models for the reform of domestic law.[36] Through exploring and comparing the law of different jurisdictions, it is possible to assess a legal system or systems critically and present a new or at least different perspective in regards to the same discipline of law.[37] As Professor Alan Watson suggests, the vivid practice of borrowing legal rules and institutions from other systems has always been the main motor of legal progress.[38] Comparative legal research is

[32] Hutchinson and Duncan (2012), pp. 83 and 101.
[33] Dobinson and Johns (2007), p. 22.
[34] Ibid 19.
[35] Reitz (1998), pp. 617 and 620; Dannemann (2006), pp. 384–385.
[36] Sacco (1991), pp. 1–5; Schlesinger et al. (1988), p. 309.
[37] Watkins and Burton (2013), pp. 100–101.
[38] Watson (1993), p. 95.

helpful to a process of legal development when a law in a certain jurisdiction needs modification or amendment.[39]

This book compares the Chinese law of unjust enrichment with the English law of unjust enrichment for two reasons. First, the English law of unjust enrichment is taken as a benchmark to evaluate the conclusions of the research on the Chinese law of unjust enrichment. Second, the experience of the English law of unjust enrichment seems extremely valuable in order to bring benefits, offer future proposals, and provide warnings of possible difficulties to the Chinese law of unjust enrichment.

The selection of particular jurisdictions for comparative purposes must be methodologically sound.[40] Consequently, it must be explained why for this study English law has been chosen to be compared with Chinese law. Three main reasons have determined this selection.

First, although the English law of unjust enrichment is far from free of controversy, in recent decades, it has achieved a strikingly rapid development that may take other areas of law a century to reach.[41] The English law of unjust enrichment is much more specific and comprehensive compared with the Chinese law of unjust enrichment, thus Chinese law can benefit from this analysis. In other words, as compared with Chinese law the English law of unjust enrichment appears to have reached a higher level of development and can, therefore, 'teach you something'.[42]

Second, for every comparative study, it is necessary that the compared legal system has a certain amount of homogeneity, which makes the comparison possible.[43] In other words, comparative legal research should normally not be conducted in totally different legal, social, political and economic contexts.[44] While the Chinese and the English legal systems are obviously very different, both the Chinese and English laws of unjust enrichment are still in a process of development. From this viewpoint, the development experience of the English law of unjust enrichment can provide valuable insights for an assessment of China's situation.

Last, Chinese law is generally regarded as following the civil law legal tradition.[45] It therefore seems useful to compare the Chinese law of unjust enrichment with the system which is the most prominent representative of the common law legal tradition, i.e. English law. The Chinese law of unjust enrichment follows the

[39] Palmer (2005), pp. 261, 284.

[40] Cf. Oderkerk (2001), p. 293; also compare Wolff (2018), p. 151; Gallagher et al. (2020), pp. 337 and 339.

[41] Dannemann (2009), p. 2.

[42] Oderkerk (2001), p. 313.

[43] Sacco (1991), p. 6.

[44] Oderkerk (2001), p. 303.

[45] The statement that China is a civil law country is not free from controversy and some may assert that China's legal system is hybridized in nature or is a 'socialist system with Chinese characteristics' as proclaimed by itself. However, in terms of the fundamental distinguishing elements between civil law jurisdictions and common law jurisdictions, China is a civil law country. Chinese law and regulations are made by its legislative and administrative branches, which do not originate with judicial decisions made by courts over time. See Wan (2012), ch 9.

'absence of basis' approach to ascertain whether a defendant's retention of an enrichment is unjust.[46] This approach is adopted by most civilian and mixed legal systems. In contrast, English law adopts the 'unjust factors' approach, viewing unjust enrichment from a different perspective.[47] Selecting English law for comparative purposes, therefore, allows us to benchmark Chinese law against an (extreme) different position for testing purposes and may provide greater insights.

Having explained the reasons for selecting English law for the comparative purposes of this study, it must also be acknowledged that many other legal systems could have been chosen for the same purposes. However, this study does not focus on the comparative analysis of English law, but rather uses the comparison with English law to refine the analysis of Chinese law. While this and the limited scope of this study explain why (only) English law is selected for the said benchmarking purposes, the resulting limits of the comparative assessment are duly acknowledged.

This book engages in comparative research from three perspectives: history, doctrine, and function. It is not possible to learn from a foreign institution without understanding its history. In particular, the English law of unjust enrichment is the product of a complicated history that has an ongoing impact. This book will examine the history of unjust enrichment in China and England. This book will also map out the current doctrines of unjust enrichment in Chinese law and English law and discuss the similarities and differences of the laws. The functional approach is the most important one. Zweigert and Kötz assert that 'The basic methodological principle of all comparative law is that of functionality' because 'in law the only things which are comparable are those which fulfil the same function'.[48] As outlined above,[49] the focus of this book is to explore the goal(s) of the Chinese law of unjust enrichment and to see whether, given the goal(s), other branches of law within the system can achieve those goal(s). For this purpose, it analyzes the functions of the law of unjust enrichment in China and in England. In other words, the analysis of functionality stands at the core of this study.

1.4.4 Cases Studies

This book also employs case studies looking into the judicial practice in China to supplement the doctrinal and comparative analyses. The case studies are meant to offer an understanding of how the rules work in practice which the analysis of legal rules cannot provide.

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[46] *Chinese Civil Code*, art 122.

[47] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 234. See infra, Sect. 5.5 in Chap. 5.

[48] Zweigert and Kötz (1998), p. 34.

[49] Supra, Sect. 1.2 in this chapter.

The exploration into the decision-making of Chinese courts not only examines the judges' attitudes toward the goal(s) of the Chinese law of unjust enrichment but also reflects the problems, if any, existing in the application of the rules. The case studies can show in what kind of cases a claimant may raise a claim in unjust enrichment and whether a court may support his or her claim or not based on what kind of reasons.

Due to the limited scope of this research, only ten judgments delivered by courts in Beijing have been identified as case studies and analyzed. The study is conducted by employing an authoritative and also widely used database, Bei Da Fa Bao, also known as PKU Law.[50] The cases have been read and analyzed with the following research questions in mind:

(1) What are the grounds proposed by the claimant to argue that the defendant's receipt of enrichment lacked a legal basis, such as an invalid contract?
(2) Could a different cause of action have been used instead of 'unjust enrichment'?
(3) What are the circumstances under which the court supported the claim in unjust enrichment?
(4) How did the judges interpret the law of unjust enrichment in China?
(5) Are the judges' applications of the law of unjust enrichment consistent with the goals of the law of unjust enrichment identified in this study?

It is important to note that the case studies conducted for the purpose of this book do not aim at finding empirical truth. The case studies are rather meant to supplement the doctrinal and comparative analysis which stand at the centre of this book.

1.5 Book Structure

This book is structured as follows: This chapter first introduces the general concept of unjust enrichment, the regulations about unjust enrichment in China, the reasons why the goals of the law of unjust enrichment need to be explored and the methodologies used in this study.

Chapter 2 clarifies terminology. As the law of unjust enrichment is a controversial area of law, different terminologies have been used in this field representing different and identical or at least similar conceptual approaches. To allow for a focused discussion and to avoid confusion, these terminological differences and similarities first need to be identified so as to develop a terminological framework for this book.

Chapter 3 discusses the goal(s) of the law of unjust enrichment in China. First, a general introduction to the history and development of the Chinese legal system, private law, and the law of unjust enrichment is given. Then the current goal(s) of the law of unjust enrichment are explored through three perspectives, namely statutory rules, the opinions of commentators, and judgments made by courts. If there are

[50] Bei Da Fa Bao (北大法宝) (Pkulaw), online: Pkulaw < http://www.pkulaw.cn/>.

explicit goal(s) of the law of unjust enrichment, the question that whether the goal (s) are appropriate for China's situation or not are to be assessed.

Chapter 4 first discusses the problems caused by the deficient regulation of unjust enrichment in China. It then focuses on the question of whether the goal(s) of the Chinese law of unjust enrichment identified in Chap. 3 can be achieved by other branches of law through the analysis of hypothesized scenarios. This question is important because an affirmative answer to this question means that one may have to conclude that China does not really need a law of unjust enrichment.

Chapter 5 focuses on the English law of unjust enrichment. A brief introduction to the English legal system is given to set the scene with a focus on the history of the English law of unjust enrichment. This chapter then discusses the constituent elements of unjust enrichment and restitutionary remedies, the status of the law of unjust enrichment in private law, and the interrelationships of unjust enrichment with other branches of law in the English legal system. On the basis of a broad literature review, this chapter then explores the goals of the English law of unjust enrichment. It concludes by benchmarking the Chinese law of unjust enrichment against English law.

Chapter 6 imports ideas acquired by way of the assessment of English law to Chinese law and makes proposals for legislative action in China. Chapter 7 summarizes the findings and concludes with general final remarks.

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Chapter 2
Terminology

2.1 General

The law of unjust enrichment is surrounded by intense controversy. There is not even agreement in relation to the most basic terminology. In fact, a great variety of terms and concepts in this field are rife with academic debates. The terms 'restitution' and 'unjust enrichment' have been competing with each other to provide the generic name for this area of law for several decades.[1] The terminological confusion has bedevilled this area.[2] To facilitate the study of the law of unjust enrichment, it is necessary to develop a terminological framework with the ultimate goal to allow for a discussion of the same issues by using the same language. This chapter, therefore, seeks to define the legal terms in this area of law and thus to establish a terminological framework. The purpose is not only to ensure terminological consistency throughout this book and to help readers understand my starting premises, but also to facilitate any future discussion in this area.[3]

This chapter first deals with two core terms: 'restitution' and 'unjust enrichment'. The meaning of the two words, their nature and the relationships between restitution and unjust enrichment are established. In addition, related terms having vague meanings are also explored, e.g. benefit, enrichment and disgorgement.

[1] For example, Peter Birks based the law of restitution totally on the principle of unjust enrichment in his book *An Introduction to the Law of Restitution* published in 1985 but rejected to name the area the law of unjust enrichment for a fear of uncertainty of the word 'unjust'. However, later he made a few recantations to his own work and claimed that the law of unjust enrichment should be separated from the law of restitution and that it is never correct to say that restitution was squarely based on the law of unjust enrichment. Birks (1985a); Birks (1998); Birks (1999), p. 13; Birks (2005).

[2] Kull (1995), p. 1191.

[3] Many scholars have explained the reasons why using legal terms in a consistent manner is important. For instance, Fullagar (1957), p. 1. Gutteridge emphasized the importance of the consistency of legal terminology in the field of comparative law. Gutteridge (1938), p. 401.

S. Lin, *The Law of Unjust Enrichment in China: Necessary or Not?*, China-EU Law Series 8, https://doi.org/10.1007/978-3-031-06178-3_2

Although the focus of this book is on the law of unjust enrichment in China, the establishment of a terminological framework has to refer to English literature because this book is written in English. The work of scholars who worked on the English law of unjust enrichment is taken for references, including Peter Birks, Robert Goff, Gareth Jones, and Andrew Burrows last but not least because this book selects English law to be the comparative benchmark for the assessment of the current situation. They are prominent common law scholars who have made their name in the area of the law of unjust enrichment and restitution and have contributed greatly to shape the subject. Although their definitions differ on certain points and there may be divergent voices propounded by other scholars, they still represent the most widely accepted definitions in the common law world.

2.2 Unjust Enrichment and Restitution

2.2.1 Overview

Due to historical reasons, 'the law of restitution' is a better-known name than 'the law of unjust enrichment'. In 1936, the *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* ('US Restatement') was published by the American Law Institute as the first book on the modern law of restitution.[4] In 1966, the first edition of *Goff & Jones: The Law of Restitution* was published, which was the English response to the *US Restatement.*[5] Both the *US Restatement* and *Goff & Jones: The Law of Restitution* unequivocally stated that the law of restitution was established on the principle of unjust enrichment.[6] The two books were both significant achievements and their choice of naming this area as 'the law of restitution' was also emulated by many other scholars.[7] However, in more recent works, 'unjust enrichment' prevails in naming this field of law.[8] Peter Birks provided the

[4] American Law Institute (1936). Warren A Seavey and Austin W Scott served as reporters for this project.

[5] Goff and Jones (1966).

[6] Seavey and Scott (n 4), p. 1. The first article of the *US Restatement* provides immediately, 'A person who has been unjustly enriched at the expense of another is required to make restitution to another', which shows that the subject of this *US Restatement* is actually the law of unjust enrichment. *Goff & Jones* is also opened with the sentence that 'The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment'. Ibid 3.

[7] E.g. Birks (1985a); Hedley (2001); Virgo (1999); Burrows (2002).

[8] Peter Birks made a recantation, using the title 'the law of unjust enrichment' instead of 'the law of restitution' in his works. Birks (1985b). The third edition of the *US Restatement* was published in July 2010 and renamed as *Restatement (Third) of Restiution and Unjust Enrichment*. American Law Institute (2010). The newly published edition of *The Law of Restitution* by Goff and Jones is renamed as *Goff & Jones: The Law of Unjust Enrichment* in 2011. Mitchell et al. (2011) [*Goff & Jones on Unjust Enrichment 2011*]; Andrew Burrows who wrote a book *The Law of Restitution*,

reason for this trend by explaining that other groups of the law of obligation, i.e. contract law and tort law, are named after the causative events rather than the remedy, and so should the law of unjust enrichment.[9] In fact, the law of restitution and the law of unjust enrichment do not refer to the same areas of law as further explained in the later section.[10]

2.2.2 Unjust Enrichment

It is generally acknowledged that unjust enrichment refers to a causative event that comprises of facts and causes the existence of rights, which can be realized in court and is parallel to a contract and a tort.[11] This book focuses on the law of unjust enrichment in China and also discusses the English law of unjust enrichment for comparison. In the context of Chinese law, unjust enrichment refers to an event where a person is enriched without a legal basis resulting in another person's loss.[12] In the context of English law, unjust enrichment refers to a situation where a person is unjustly enriched at the expense of another with the presence of an unjust factor.[13]

It is noteworthy that in this book the term 'unjust enrichment' is referred to in the phrases of 'reversing unjust enrichment' or 'the return of unjust enrichment' occasionally. In such contexts, 'unjust enrichment' does not mean the event where a person is unjustly enriched but refers to the benefits acquired in unjust enrichment cases.

published *A Restatement of the English Law of Unjust Enrichment* in 2012 as well. Burrows (2002); Burrows (2012).

[9] Birks (2003), p. 1, 20. Birks proposes that it is inelegant to categorize the law by contract, tort and restitution because the law should be categorized by events rather than responses. In addition, the most distinguishing feature within the law of restitution is the principle of unjust enrichment. By admitting restitution can be trigger by events other than unjust enrichment, restitution fails to identify a discrete body of law. Birks (1985b), p. 1, 283.

[10] Infra, Sect. 2.2.4 in this chapter.

[11] Birks (1985b), p. 20; Mitchell (2011), p. 4.

[12] *Chinese Civil Code*, art 122.

[13] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn), 234 (Lord Hoffmann). The Chinese and English laws of unjust enrichment follow two divergent approaches, the 'absence of basis' approach and 'unjust factors' approach, which are discussed in Chaps. 3 and 5 in detail respectively.