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**ULTRA VIRES AS AN UNJUST FACTOR IN
THE LAW OF UNJUST ENRICHMENT**

BY

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Introduction : Approaching the Generic Conception

It is now beyond doubt² in Australia that the unjust enrichment of the defendant at the expense of the plaintiff can be remedied by restitution.³ The key to the orderly development of a generic conception like unjust enrichment as a rule of law is an understanding of the level of abstraction at which the generic concept operates. 'Unjust enrichment' on its own represents little more than a cry for justice and makes a mockery of the normativity of law, especially where no attempt is made to define the theoretical basis of the claim for justice. That is why jurists generating the tradition of unjust enrichment are quick to root the concept back to the cases. They have a difficult job in that many cases which fit the unjust enrichment

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² The acceptance of restitution as a remedial response to unjust enrichment is now firmly established by *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768 at 777-778 which reinforces the earlier acceptance of this legal concept by Deane J. (with whom Mason and Wilson JJ agreed) in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

³ 'At the expense of' can mean, by subtraction from the plaintiff i.e. A's loss is B's gain, or, it can mean by doing wrong to the plaintiff i.e. restitution for wrongs. This article is concerned with 'at the expense of' in its subtractive sense or as it sometimes termed, its use in autonomous unjust enrichment: see Birks, P., 'The Independence of Restitutionary Causes of Action' (1990) 16 *UQLJ* 1.

at the expense of the plaintiff formula are couched in terms which are confusing and at times ridiculous.

Restitution is the remedial response to the unjust enrichment of the defendant at the expense of the plaintiff. The causative event is the loss to the plaintiff resulting in an equivalent gain⁴ to the defendant in the context of unjust circumstances. A primary element is that the loss and/or gain be unjust. It is not possible to generalise as to whether the unjust element is plaintiff or defendant sided, but as the High Court has recently shown the unjust factors of vitiated intent and qualified intent have a definite plaintiff sided orientation.⁵ On the other hand the contentious unjust factor of free acceptance and the new ultra vires unjust factor could be said to be defendant sided.

To make sense of the generic conception of unjust enrichment academics have constructed a framework whereby 'unjust' is given definition through unjust factors.⁶ The unjust factor is a more definite concept which has been given judicial approval in the loss/gain scenario, although more than likely not in the terms of unjust enrichment. The High Court has recently refused to accept unjust enrichment as 'a definitive legal principle according to its own terms'.⁷ There is no doubt that the

⁴ The equilibrium between loss and gain represents a contentious issue yet to be fully resolved. The problem arises out of the difficulty in quantifying the gain. In the context of services see: Beatson, J., *The Use and Abuse of Unjust Enrichment*, Oxford, Oxford University Press, 1991, Chapter 2; cf. Birks *infra* n 8 at 109 ff where the notion of subjective devaluation of the services is introduced.

⁵ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768 at 777-778. The High Court took the view that upon the plaintiff proving vitiated intent, for example in the form of a transfer made pursuant to a mistake, a prima facie right to restitution of the defendant's gain arose, although the Court were quick to point out that the defendant could invoke defences based on the unjust consequences of having to return the gain. It is this combination of actions and defences that makes one wary of calling restitution for mistake a plaintiff sided affair. The Court's use of the word 'unjust' in relation to the defence of change of position confuses the issue as to whether the defence is unjust or enrichment related.

⁶ It could possibly be said that this is the easy way out, presuming injustice by relying on the old cases. However it may have been more sensible for this idea of 'unjust' to develop pursuant to a mature theory of (primarily corrective) justice. The arbitrary nature of such an approach deters many jurists from supporting it, but justice should be our prime concern. If the unjust factors approach is to be adopted it is vital that someone eventually measures the virtue of the unjust factors against a mature theory of corrective justice.

⁷ *David Securities supra* n 5 at 777.

generic conception is open ended, but we should not be too quick to interpret the High Court as dismissing unjust enrichment as defined by the unjust factors as legal principle. It cannot be doubted that the High Court has endorsed the legal principle that unjust enrichment as defined by unjust factors can be remedied by restitution. To deny unjust enrichment in its definitive form the status of legal principle fragments the unity amongst cases allowing recovery in loss/gain situations.⁸

The important point is that for unjust enrichment to have utility in a legal sense it must be defined by the unjust factors which in turn must be cogent legal concepts. Professor Peter Birks has advocated the view that the taking of a subtractive enrichment by ultra vires demand is unjust.⁹ He has formulated the idea that ultra vires exaction is an unjust factor.¹⁰ Support for recovery of a payment made pursuant to an ultra vires demand has recently been given by the House of Lords in *Woolwich Building Society v IRC* [1992] 3 WLR 366, although the exact theoretical approach enunciated by Birks is not clearly endorsed by the Lords.

The purpose of this article is to critically examine the introduction of this new unjust factor and its possible application in the context of Australian Constitutional law. Part I defines the unjust factor as enunciated by Birks and the House of Lords respectively. Part II examines the applicability of such an unjust factor at a constitutional level in the context of decided cases. Part III is an attempt at rationalising the approach the cases take towards unconstitutional statutes and part IV analyses the public/private dichotomy generated by the nature of the unjust factor.

The article seeks to assert the thesis that ultra vires (i.e. acting beyond legally defined authority) without more is not sufficient to justify an immediate right to restitution of an ultra vires exaction. In short, the article will work towards

⁸ Much of the thinking in these introductory paragraphs is more ably presented by Professor Birks, see: Birks, P., *An Introduction to the Law of Restitution*, Oxford, Oxford University Press, 1989, at 16 ff.;

⁹ Birks, P., 'Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights' in Finn, P. *Essays in Restitution*, Sydney, Law Book Co., 1990.

¹⁰ Traditionally the recovery of an ultra vires exaction has been effected through the private law unjust factor of compulsion and in particular the sub category of duress. Mistake and compulsion in the form of transactional inequality are private law unjust factors which could possibly be invoked: see Burrows, A., 'Public Authorities, Ultra Vires and Restitution' in Burrows, A., (ed.) *Essays on the Law of Restitution*, Oxford, Oxford University Press, 1991 at 39; cf. Birks *supra* n 9 at 174-177.

the thesis that ultra vires (meaning beyond legally defined authority) while having a role to play is not the sole criterion of any unjust factor. The argument that will be developed will be that a moral theory of authority is the touchstone of the unjust factor and that we should more properly term this unjust factor 'lack of authority'.

The article deals in depth with arguments put forward by English judges and jurists who at this stage are constantly experimenting with law through the lens of unjust enrichment. The point to be made though is that the English developments will at some time in the future need to be examined in an Australian context by Australian judges as the current law on recovery of unconstitutional exactions contains some apparent defects of which Sir Owen Dixon made us all aware in 1959. It is ironical that while this article deals heavily with English materials the genesis of the modern approach in England comes from judgments of three famous common law judges (Holmes, Dixon and Atkin) born outside England, two in fact born in Australia.¹¹

Part I : Defining Ultra Vires as an Unjust Factor

To understand the definition of this new unjust factor it is necessary to refer firstly to the incisive writings of Professor Peter Birks. Birks is at the forefront of the development of unjust enrichment in England and is one of a number of academics centred mainly in Oxford and Cambridge who are keen to push the better understanding of unjust enrichment to the margins. Australian academics in their writings have been cool towards the wholesale adoption of Birksian rhetoric.¹² There are without doubt major questions about many of the current approaches coming through the lens of unjust enrichment however there are areas where the analysis of legal problems in terms of unjust enrichment as defined by the unjust factors simply cannot be ignored. As the late Samuel Stoljar pointed out in the sixties recovery of mistaken payments is based on the loss to the plaintiff and gain to the defendant.¹³ Ultra vires exactions by analogy are an appropriate topic for unjust enrichment however this article will closely scrutinise the existence of any universal injustice in ultra vires situations. Let us return to Birksian rhetoric.

¹¹ Sir Owen Dixon was one of Australia's most respected judges while Lord Atkin was born in sunny Queensland (Sandgate, Brisbane).

¹² See generally Paul Finn's *Essays on Restitution supra n 9*; Getzler, J., 'Unconscionability' (1990) 16 *Monash LR* 283; Stoljar, S., 'Unjust Sacrifice' (1987) 50 *MLR* 603.

¹³ Stoljar, S., *Law of Quasi Contract*, Sydney, Law Book Co., 1964. It must be noted that Stoljar's definition of unjust is based on loss of "property", a definition that the modern English writers reject; cf. McKendrick, E., 'Restitution, Misdirected Funds and Change of Position' (1992) 55 *MLR* 377.

Restitution from the Executive

Professor Birks' argument is that there is an (English) constitutional principle against executive taxation, which is enshrined in the Article 4 of the *Bill of Rights 1689 (UK)*, and which generates the ultra vires unjust factor simply on the basis of want of *authority* to make the demand.¹⁴ The touchstone for the Birksian construct then is that the loss to the plaintiff and subsequent (equivalent) gain to the defendant is recoverable because the public body acted beyond their legally defined authority.¹⁵ Immediately on reading this theory one is forced to ask whether a lack of legally defined authority is sufficient justification for an immediate right to recovery. Birks takes the high ground of the *Bill of Rights* but that document says nothing about the recovery of ultra vires exactions, perhaps because in 1689 it was presumed that the legal and moral authority of the executive coincided. In fact the *Bill of Rights* is a document which in preventing executive taxation has as its purpose the betterment of social cooperation and thus in those situations where an immediate right to recovery frustrates the ordered nature and well being of society one is drawn to the conclusion that the *Bill of Rights* is being erroneously invoked.

Birks constructs his theory in eloquent style and pays respect to the decided cases. He traverses the cases for and against the right to restitution concluding in convincing style that the right must be recognised. Much of the controversy caused by such a conclusion has been ameliorated by the decision in *Woolwich (supra)* which by majority of judges supports the Birks style analysis of the case law; therefore it is not the aim of this article to examine the case history in any great detail.

Some basic points about the scope of the unjust factor need to be made at this stage. Birks in constructing his unjust factor talks solely about an ultra vires executive or administrative act i.e. ultra vires as it exists in our pedagogical category of Administrative Law. It is important to realise that ultra vires in a constitutional sense is not in any mature way embodied in this unjust factor.¹⁶

At this point of its development the unjust factor is concerned only with an ultra vires levying of money, and is yet to encompass the provision of services at the behest of a an ultra vires command or ultra vires commander¹⁷, or the forfeiture of

¹⁴ Birks first launches this rhetoric in brilliant and concise fashion in his *Introduction .. : see supra n 8* at 294-299.

¹⁵ A moot point would be whether an ultra vires executive exaction could be recovered in Australia under the *Administrative Decisions Judicial Review Act (1977) ss. 5 & 16*; see *Pearce v Button* 65 ALR 83 at 90.

¹⁶ Cf. Birks *supra n 8* at 298.

¹⁷ For example the performance of community service on crown

goods through an ultra vires demand¹⁸.

The Diceyan construct¹⁹ that Parliament is sovereign and can make or repeal any law it likes stands at the foundation of Birks theory.²⁰ From Birks writings it is clear that a taxing statute of the British Parliament could never found this new unjust factor (other than through ultra vires in the form of misapplication of a valid statute) for the simple reason that it could never be ultra vires. The point to be made is that ultra vires as an unjust factor does not gain significance until we enter a second dimension i.e. the dimension of the executive. Lawyers from states where authority is defined by a written constitution will argue that ultra vires as an unjust factor must extend to the first dimension i.e. the constitutional dimension, if it is to have credibility. For instance if the Commonwealth Government of Australia enacts a statute levying money (other than a tax) which is beyond its legally defined authority will it be possible to argue on the basis of ultra vires as an unjust factor that monies paid across pursuant to the statute are recoverable as of right?²¹ As the Birks theory stands it is simply incomplete and fails to accomplish the universality it seeks in that it ignores the ramifications such a theory would have for communities with written constitutions.

Woolwich and the Unjust Factor

The most urgent criticism of the Birks formulation is that there is no explanation in the theory as to why the money without more should be recoverable.²² The decision in *Woolwich (supra)*

land e.g. a school, pursuant to an ultra vires order.

¹⁸ For example by a custom's official.

¹⁹ Dicey, A., *Introduction to the Study of the Law of the Constitution*, 8th ed. 1924, MacMillan & Co., London, at 37ff.; For further discussion and analysis in historical context of the Diceyan tradition see: Craig, P. 'Dicey: Unitary, Self Correcting Democracy and Public Law', (1990) 106 *LQR* 105.

²⁰ Adoption of this theory in regard to the Constitutions of the Australian States appears in the Privy Council decision of *McCawley v The King* [1920] AC 691, subject of course to the limitations that double entrenchment and reconstitution can create.

²¹ Cf. *Mason v New South Wales* (1959) 102 CLR 108.

²² Much of the problem arises because Birks bases recovery on lack of legal authority, but such lack of authority does not really hurt the individual until the right to private property is infringed upon. Birks is not suggesting like Nozick that taxation is unjustified but he is suggesting that a right to private property can only be taken away through lawful means. The difficulty with such an approach is that if property is the product of social cooperation it is illogical to defeat social

provides a more concerted effort to explain the immediate right to recover the payment unlawfully requested.

The factual situation in *Woolwich* (*supra*) concerned taxation of the interest and dividends earned by members of English building societies. It had since 1894 been the tradition for English building societies to pay directly to the Inland Revenue Commissioners (IRC) the income tax due on interest earned by their members. In 1986 the scheme was formalised through statute (s. 343(1A) *Income and Corporation Taxes Act 1970*) and regulations (*Income Tax (Building Societies) Regulations 1986*).

The regulations *Woolwich Building Society* (*Woolwich*) argued resulted in the double taxation of interest for the period of six months immediately preceding 6th April 1986.

Woolwich sought to have the regulations declared void so far as they were retrospective in operation however in order to maintain their business reputation they decided to pay across the tax for the period prior to 6th April 1986. In total *Woolwich* paid over 57 million pounds in tax for this period.

A point to make here is that *Woolwich* at no time were mistaken as to the law, in fact they actually claimed the IRC had no legislative mandate. The importance of this is that the rule that payments made under mistake of law are not recoverable could have no scope for application.²³

The building society were not content to stand by and watch this ultra vires levying of taxation and commenced proceedings to have the regulation declared void. Nolan J. declared the regulation void and consequently the IRC repaid to *Woolwich* the sum of 57 million pounds with interest from the date of the order but refused to pay interest from any earlier date. *Woolwich* were not satisfied with such a result and issued a writ of summons claiming 7 million pounds for interest accruing on the 57 million pounds from the time of the original payment. To be successful the building society had to prove that it had a cause of action to recover each payment as a debt on the date when it was made. Section 35A of the Supreme Court Act (UK) 1981 empowers a court to award interest on the judgment debt from the date the cause of action arose.

The primary submission made by *Woolwich* to the House of Lords was that a subject who makes a payment in response to an unlawful demand for tax acquires an immediate right to recover the amount so paid; and thus a power to award interest exists

cooperation in the name of property: see *Sampford and Wood*, *infra* n 68. Birks in simply referring to lack of legal power ignores the real basis of his theory viz. a right to private property. Ultra vires on its own fails to explain why recovery should occur.

Much of the law of unjust enrichment is premised on a right to private property, which Birks manages to evade by talking at a level which presumes the right to private property to exist.

²³ This rule has recently been discarded in Australia: see *David Securities Pty Ltd supra* n 2 at 776.

from the time of payment. The Woolwich approach was to put forward a Birks inspired argument that linked ultra vires administrative action with an immediate right to recovery. They did put forward an alternative submission based on duress, but this argument only finds room for application in the dissenting judgments of Lord Keith of Kinkel and Lord Jauncey of Tullichettle.²⁴

The Court of Appeal (Glidewell and Butler-Sloss L.JJ., Ralph Gibson L.J. dissenting) had held that Woolwich did have a right to recover the ultra vires exaction and allowed the claim for interest from the date of the payment.²⁵ The matter came to the House of Lords through the appeal of the IRC against the judgment in favour of Woolwich.

Ultra Vires as an Unjust Factor Judicially Recognised?

The five Lords were split 3:2 over the desired outcome. Two of the Lords were not willing to accept Woolwich's primary submission and import ultra vires into the realm of unjust enrichment.²⁶ The other three Lords were willing to embrace the primary submission made by Woolwich however they did not unequivocally adopt ultra vires as an the unjust factor.²⁷

Lord Goff a recognised master of the principles of unjust enrichment provides a stimulating analysis of the issues. His Lordship's judgment is seminal not only in the field of unjust enrichment but also that of constitutional law.

Lord Goff (to steal a phrase) after having laboured in the

²⁴ For an analysis of the operation of duress and transactional inequality in the Woolwich scenario see: Birks *supra n 9* a 174-176.

²⁵ [1991] 3 WLR 790. Glidewell L.J. held that the general right to recovery would not prevail case where the payment had been made to close a transaction or where the payment was made pursuant to an ultra vires application of a valid statute. Butler-Sloss L.J. Held the right of recovery would not apply where the payment was made to close a transaction or pursuant to a mistake of law. Ralph Gibson L.J. endorsed the theory behind the general right to recover but held that such a change in the law was better introduced through the legislative arm of government. He suggested that the general right if approved could not operate with the limitations placed upon it by the other two judges.

²⁶ Lords Keith and Jauncey. However it must be noted that their dissents were not based on a rejection of the principle but rather a repulsion for judicial legislation: at 381 and 410; although this attitude was fostered to some extent by the political nature of the problem: at 381 and 413-414.

²⁷ Lords Goff, Browne-Wilkinson and Slynn.

vineyard of unjust enrichment for so long was not about to relinquish a chance to further the better understanding of the law and harvest some of the fruits for which he has worked so hard. The problem presented itself in this way. The cases were lined up on both sides of the fence; some as Birks had painstakingly shown for and some against the general right of recovery of money paid pursuant to an ultra vires demand. Two senior judges were dissenting on the ground that they did not wish to construct the law of today, being keen for the political arm of government to resolve this dilemma. Lord Goff had before him an uncertain law, the separation of powers and a convincing academic construct waiting to be implemented, how was he to respond?

His Lordship's judgment begins by suggesting the decision on appeal will be of vital importance for the development of the law of restitution and by acknowledging the vital importance of academic writings to the resolution of the issue. His Lordship then approaches the law resigning himself to the conclusion that the English law at least at Court of Appeal level required some form of compulsion to found recovery. Lord Goff turning to obiter dicta of two great Australian born judges, Lord Atkin and Sir Owen Dixon, poetically suggests:

... and the central question in the present case is whether your Lordship's House, deriving their inspiration from the example of those two great judges, should rekindle that fading flame and reformulate the law in accordance with that principle [the principle of justice].²⁸

Lord Goff says that in his view Sir Owen Dixon had supported a general right to recover in his obiter in *Mason supra n 12* at 117 and that Lord Atkin had done likewise in *A-G v Wilts United Dairies Limited* 37 TLR 884 at 887. Dixon certainly was not content to simply adopt the English approach based on compulsion however he did not go as far as endorsing the Birks style construct. His concern was no doubt related to the effect the compulsion approach would have in legitimising unconstitutional Commonwealth of Australia statutes. For Birks and Lord Goff to lift this Dixon rhetoric out of context is a little disquieting as it fails to properly analyse the nature of Dixon's fears. Although Lord Goff acknowledges the support of the general right of recovery by these two judges he fails to adequately examine their theoretical approaches in any detail and reverts to the realm of justice to explain the right.

Lord Goff builds on his notion of justice concluding that:

.. the revenue's position appears to me as a matter of common justice to be unsustainable; Common justice seems to require that tax to be repaid, unless special circumstances require otherwise the

²⁸ [1992] 3 WLR 366 at 387.

taxpayer should be entitled to repayment as of right.²⁹

'Common justice' is the principle behind the decision Lord Goff makes. What is this principle? Where does it come from? Is it a new unjust factor?

Justice as an Unjust Factor

Justice is a term most jurists use with caution as its meaning has had technical significance since the time of Aristotle. On current thinking justice as a moral concept refers to either distributive justice³⁰ or corrective (or commutative) justice.³¹ Justice in its distributive and corrective sense is said to be a moral criterion for the measure of law's virtue.³² In the context of corrective justice it is common for judges to utilise the term 'justice' as if it were law; the judge saying recovery in this situation is just.³³ There is no theoretical problem with judges invoking (corrective) justice as a principle of law however such judicial reasoning must demonstrate reliance on a theory of corrective justice and not just a fancy catchcry. For example a principle of law could be that an immediate right to recover an ultra vires exactions arises where corrective justice requires. If such were the case then a mature theory of justice would be the cornerstone of the law.

Lord Goff purports to adopt some vague notion of corrective justice not as the measure of his law's virtue but as a substantive part of it. To make sense of such an action one needs a clearly articulated theory of corrective justice or else the law fails to maintain any normativity.

Rooting Unjust to the Cases

²⁹ Ibid., at 391.

³⁰ Distributive justice (or as Rawls terms it, social justice) relates to the way in which 'the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation': Rawls *infra* at 7. The most well known (but rapidly aging) theories of distributive justice from modern times are: Rawls, J. *A Theory of Justice*, Oxford, Oxford University Press, 1972; and Nozick, R., *Anarchy State and Utopia*, New York, Basic Books Inc., 1974.

³¹ Corrective/commutative justice relates to the injustice caused by dealings between people. For an interesting analysis of the this category of justice and justice in general see: Finnis, J., *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980, at 164 ff.

³² On this idea generally see : Hart, H. *The Concept of Law*, Oxford, Oxford University Press, 1961, Chapter VIII.

³³ Harris, J., *Legal Philosophies*, Butterworths, London, 1980, 261-2.

When one reads Professor Birks' seminal textbook it becomes obvious that the modern approach to constructing the notion of restitution for unjust enrichment at the expense of the plaintiff is rooted very much in the cases. Birks has gone to great lengths to explain certain causative events and remedies which are recognised by courts of law, in terms of unjust enrichment at the expense of the plaintiff. The result is that Birks is able to explain in a unified way a disparate group of decisions. Unjust enrichment becomes the principle which unifies and describes these cases. It is evident that many of cases fit the Birks formula, and that a better understanding of those cases is gained by recognising the principle of unjust enrichment.

If unjust enrichment is to gain recognition as a fully fledged legal principle it must have definition. Birks original thesis was that unjust enrichment at the expense of the plaintiff was given legal definition by the unjust factors already recognised by the courts e.g. mistake, and failure of consideration. When Birks attempted to usher in the new unjust factor of ultra vires he attempted to root its origins back to existing case law. He was aided in his introduction of the new unjust factor by the recognition of ultra vires in other areas of the law. What Birks has continually striven for is definition of the word unjust through the law as it stands. To say that the categories of unjust enrichment are never closed is a truism necessitated by the nature and function of the law, however the expansion of unjust enrichment must come through a reasoned and cogent construct (unjust factor).

The Birks approach then removes any need to construct a theory of corrective justice as it relies simply on law it stands regardless of virtue. To Birks an immediate right to recovery exists because the law says ultra vires acts are void. For Birks then the corrective justice of the situation is irrelevant; the law is the law and that is that. In contrast Lord Goff wants his law to be based on and accord with justice but fails to adequately articulate a theory of justice. Professor Sampford in commenting upon this article has made clear his preference for judges being more aware of the content of any theory of justice they espouse. But Professor Sampford is equally critical of predetermined unjust factors in the name of justice if they do not accord with current theories of justice. Unjust enrichment as evidenced by its name relates to justice yet Birks defines that justice in terms of predetermined legal categories. Such an approach is acceptable so long as the predetermined categories do accord with current theories of justice.

Lord Goff fails to uphold the aims of this area of the law by simply referring to justice and failing to give definition to the generic concept.

In the end it is hard not to agree with Alf Ross when he says:

To invoke justice is the same thing as banging on the table: an emotional expression which turns one's

demand into an absolute postulate. That is no proper way to mutual understanding. It is impossible to have a rational discussion with a man who mobilises 'justice', because he says nothing that can be argued for or against. His words are persuasion, not argument.³⁴

The words of Ross are not used in order to level emotive criticism at moral theories of justice but rather to highlight that the vague use of justice as justification in legal reasoning is simply not good enough.

What is the Unjust Factor?

This brings us back to the judgment and the question as to the form of the unjust factor. The Birks theory as outlined above is that the payment is recoverable because it was taken pursuant to an ultra vires demand. Lord Goff talks at one point of 'want of consideration' as the motivation for allowing recovery.³⁵ 'Want of consideration' as used by Lord Goff (cf. Lord Browne Wilkinson's use) embodies the notion that as there was no consideration given for the payment it should be returned; however if this were the general rule a gift would always be recoverable in unjust enrichment. This is perhaps why Lord Goff goes on to introduce the overriding concept of justice.

No matter how hard one searches through Lord Goff's judgment there is nowhere to be found an unjust factor other than justice.³⁶ With respect, such an unjust factor can have no role in the law of unjust enrichment; it is not a cogent construct. There is no doubt that an interpretive community would constrain the term in its application³⁷ however it is a construct that totally defeats any respect for the development of this subject. Birks idea of demand without power at least gives some concrete definition of the unjust factor. Why has Lord Goff resorted to justice as his criterion? The answer to this will be further developed in this essay and it is sufficient to say at this stage that he introduces justice as a flexible term which can be applied as seen fit by the judge to the circumstances of the case. What do the other Lords say?

³⁴ Ross, A., *On Law And Justice*, London, Stevens & Sons, 1958, at 274.

³⁵ [1992] 3 WLR 366 at 385. We are not talking here about the unjust factor of failure of consideration which anticipates a consideration in existence.

³⁶ It may be argued that ultra vires is expressly recognised by Lord Goff as the unjust factor. This it is suggested is not correct. Lord Goff clearly requires something beyond mere ultra vires. Before he will allow recovery he wants the criterion of justice satisfied. This is one step beyond mere ultra vires rhetoric and suggests the possibility that in some cases the justice criterion may prevent recovery.

³⁷ As suggested by Fish: see: Fish, S., 'Dennis Martinez and the Uses of Theory' (1987) 96 *Yale Law Journal* 1773.

Lord Browne Wilkinson bases his decision on the cumulative effect of 'want of consideration', implied compulsion and transactional inequality. His Lordship does though endorse the 'want of consideration' ground and supports its separate application. Lord Browne Wilkinson sees the basis of the 'want of consideration' unjust factor as analogous to failure of consideration i.e. Woolwich paid across the money because the public authority said the demand was lawful, the demand not being legal the reason for payment has failed. Lord Browne Wilkinson builds his reasoning on the dicta of Lord Mansfield from *Campbell v Hall* (1774) 1 Cowp. 204 where he says:

The action is brought upon this ground: namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same.³⁸

The difficulty with this approach is that the concept of 'want of consideration' only has scope for application where the consideration fails; for if it simply means recovery because there is no contractual consideration the whole law as to alienation of gifts is turned upside down. But has the consideration failed in *Woolwich (supra)*? The answer must be in the negative as Woolwich at all times considered the demand to be unlawful. To suggest they paid across because they thought the demand was valid is to misconstrue the facts. To say that they paid across the money because the public body said the demand was valid is no help as that consideration never failed.³⁹ If a total failure of consideration unjust factor were to operate in this type of case it would have to be in the context of the social coordination paid for not being supplied. The point to make is that this Lord did not embrace ultra vires as the unjust factor.

³⁸ (1774) 1 Cowp. 204 at 205.

³⁹ Debate rages as to the relation between the unjust factors of mistake and failure of consideration: Matthews, P., 'Money Paid Under Mistake Of Fact' [1980] *NLJ* 587; *David Securities P/L supra n 2* at 778. It is conceivable that this debate has something to do with the approach of the Lords in this case. The analytical dichotomy rests on the fact that mistake operates ab initio and whereas failure of consideration is an unjust factor arising after the payment over. The two operate in different temporal frameworks. Birks approach to misprediction and mistake highlights this point: see Birks *supra n 8* at 147-148 and 277-279.

It is suggested that failure of consideration (a emanation of transfer pursuant to qualified intent) operates where circumstances which are capable of being fulfilled at a time after the enrichment fail to eventuate. Mistake (an emanation of transfer pursuant to vitiated intent) on the other hand operates where the plaintiff is mistaken as to something existing at the time of the enrichment.

Lord Slynn the other judge in the majority allowed the general right of recovery on the basis that there being a 'common element of pressure'⁴⁰ the right could be said to be based on the analogy with compulsion. His Lordship found it 'unacceptable in principle that the common law should have no remedy for the taxpayer'.⁴¹ This with respect is a poor attempt at rationalising the unjust factor. His Lordship is suggesting that pressure combined with the perceived inadequacy of the law generates the unjust factor, yet gives no definite structure to such a concept.

Lords Goff and Slynn were in agreement that the mistake of law rule should not be seen as limiting the general right of recovery.⁴² The place of the defence of 'voluntary close of a transaction' was not finally determined.⁴³ The case is a tremendous example of a judiciary willing to get in to the maze and attempt to redirect the flow of the common law. The Lords will no doubt be subject to much criticism for seeking to usurp the function of the political arm of government. In a matter so closely intertwined with politics the criticism may ring true in this case although one cannot help but feel that Lord Goff displays the dynamism a common law judge requires.

Sadly though the resulting judgments are not clear enough in defining the basis of the ultra vires unjust factor or in unequivocally accepting the unjust factor. Furthermore 'justice' and 'lack of an adequate remedy' are simply not the stuff unjust factors are made of.

Part II : Ultra Vires As A Universal Unjust Factor At A Constitutional Level

The Woolwich (*supra*) decision is a long way from judicial recognition of ultra vires as an unjust factor. Out of a majority of three it is only Lord Goff that comes anywhere near supporting the immediate right to recovery on the basis of ultra vires. Lords Browne Wilkinson and Slynn appear to rely more on traditional private law concepts like failure of consideration and compulsion respectively.

The foregoing analysis of *Woolwich (supra)* was directed at the better definition of the unjust factor as enunciated by Birks; it has not helped in this regard. The approaches taken by the three Lords representing the majority are not sustainable and should find little support in Australia. That leaves us with the Birks construct.

⁴⁰ [1992] 3 WLR 366 at 421.

⁴¹ *Ibid.*, at 421.

⁴² *Ibid.*, at 395-396, 421.

⁴³ *Ibid.*, at 396, 421.

The current of case and academic authority throughout countries with written constitutions suggests that it has never been the case nor will ever be the case that courts simply declare unconstitutional statutes void ab initio. If this is so then the major premise of the Birks theory i.e. ultra vires action is void ab initio, is contradicted and his theory encounters theoretical flaws. It must be remembered that the crux of Birks theory is the lack of legal authority.

The Cases

Canada

The most interesting case in this jurisdiction is that of *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 where a majority of the Supreme Court of Canada refused to order the return of ultra vires (in the constitutional sense) exactions. The judgment of Justice La Forest in this case is seminal. Justice La Forest reasons that it is not unjust to retain an unconstitutional exaction, especially where a statute is unconstitutional due to a technicality.⁴⁴

The British Columbian statute levying a gasoline tax was unconstitutional and had been used to levy money through 1974-1976. In 1976 the tax was constitutionally imposed. Justice La Forest held it to be beyond sense to order the refund of the money. It is notable that he preferred to base his decision on this reasoning rather than on the effectiveness of a retrospective legislation levying the exaction constitutionally and anew. The approach of Justice La Forest in effect gives life to the unconstitutional statute up to the point of curial review.

Ireland

The case of *Murphy v Attorney General* [1980] I.R. 241 provides an interesting insight from this country. A legislative enactment levying tax was struck down because it was contrary to a provision of the Irish Constitution protecting marriage. O'Higgins C.J. dissenting was of the view that an unconstitutional statute was only void from the date of curial review. He reasoned that to treat the statute void ab initio and give the tax back would foster anarchy and disorder.⁴⁵ The majority paid homage to the void ab initio rule but held the statute void only for those parties who had commenced litigation at the time the statute was struck down.⁴⁶ This approach had been adopted in the European Court of Justice in *Defrenne v Sabena* [1976] 2 CMLR 98 at 128.

USA

⁴⁴ (1989) 59 DLR (4th) 161 at 191.

⁴⁵ [1980] I.R. 241 at 301-302.

⁴⁶ *Ibid.*, at 324; cf. Griffin J. at 331.

After early support for the void ab initio approach by Field J. in *Norton v Shelby County* (1886) 118 US 425 at 442 the American approach has been to treat the doctrine with caution. As Pannam shows in his three articles the void ab initio doctrine is not applied universally in the USA. Supreme Court justices have made it clear that the void ab initio doctrine is not universal. Hughes CJ in *Chicot County Drainage District v Baxter State Bank* (1940) 308 US 371 at 374 speaking for the Supreme Court said:

The actual existence of a statute prior to such a determination is an operative fact and may have consequences which cannot be justly ignored.

Justice Stone in *Frost v Corporation Commission* (1928) 278 US 515 at 552 said:

They [unconstitutional statutes] are not void for all purposes and as to all persons.

Justice Jackson in *NLRB v Rockaway News Supply Co.* (1953) 345 US 71 at 77 said:

Even where a statute is unconstitutional and hence declared void from the beginning this Court has held that its existence before it has been so declared is not to be ignored.

These judicial pronouncements make it clear that in the USA void ab initio is not the universal rule it purports to be, although no detailed rationale for the approach is given.

Australia

In Australia the High Court has supported the void ab initio doctrine in the realm of torts committed pursuant to an unconstitutional statute.⁴⁷ Section 92 has generated much of the litigation involving the effect of an unconstitutional statute.

Mason (supra) of course represents a rejection of the void ab initio doctrine in the context of an unconstitutional exaction.

This is the case where Sir Owen Dixon raised doubts about the prevailing approach to invalid exactions. Lord Goff and Birks are quick to utilise Dixon's doubts. But the truth is Sir Owen Dixon would have had great problems if he had attempted to universally apply the void ab initio doctrine.⁴⁸ For to do so would mean that any law unconstitutional because it was made by an unconstitutionally elected parliament would be void ab initio. If five people in the position Phil Cleary was found to be in had sat in a parliament where the government which passed all the laws over a three year period had a majority of one then the void ab initio doctrine would say all those laws are invalid. What would happen? Could the Parliament retrospectively validate everything?

To some extent it could however in some areas the retrospective legislation would not achieve much. For example to

⁴⁷ For a list of these cases see Pannam 5 *MULR* 125-135.

⁴⁸ Cf. Dixon, O., 'De Facto Officers' (1938) 1 *Res Judicatae* 285.

retrospectively create a criminal offence would not mean all the previously convicted persons could be spared a trial. Each and every person convicted in the three year period would have to be retried to do otherwise would be to usurp the judicial power of the commonwealth. In *Polyukhovich v The Commonwealth* (1991) 65 ALJR 521 Justices Deane and Gaudron held that an ex post facto creation of a criminal offence was tantamount to the legislature usurping the function of the judiciary. This view which was a minority view does not need to be relied upon as the majority judgment would still mean all would have to be retried.

The High Court in *A-G of Australia (ex rel McKinley) v The Commonwealth* (1975) 135 CLR 1 gave the opinion that a House of Representatives elected in contravention of s. 24 Constitution would pass valid laws⁴⁹. Such an approach is the tantamount to saying that an unconstitutional enactment is not void ab initio in all circumstances.

In summary the cases from all these four jurisdictions portray apprehension at unequivocally adopting the void ab initio approach. The cases are not very clear however on the underlying rationales of their approaches.

Academic Writings

Dr. Cliff Pannam's three articles are the best introduction to this facet of constitutional law.⁵⁰ One article shows how unconstitutional taxing statutes have been given effect in Australia and the USA, another how the de facto officers doctrine makes acts of unconstitutional office and officers effective and the third shows how torts committed under unconstitutional statutes cannot be justified under the invalid statute. These incisive articles highlight the varied approaches to an unconstitutional statute. His overall conclusion is that the dictates of justice should determine the effect of the statute. For example he would allow the unconstitutional statute partial effect in tort cases but disallow it effect in taxing cases. Why? Because that is what justice requires.

Oliver Field the author of the main USA text⁵¹ wants to keep the void ab initio doctrine but jettison it where justice and fairness require. He does not accept a universal application of

⁴⁹ See especially Gibbs J. (as he then was) at 53; see also Katz, L., 'Ex Parte Daniell and the Operation of Inoperative Laws' 7 *Federal LR* 66 at 73.

⁵⁰ Pannam., C., 'Unconstitutional Statutes and De Facto Officers' (1966-7) 2 *Federal Law Review* 37; Pannam, C., 'The Recovery of Unconstitutional Taxes' (1964) 47 *Texas Law Review* 777; Pannam, C., 'Tortious Liability for Acts Performed under an Unconstitutional Statute' (1965-7) 5 *MULR* 113, especially at 135 ff.

⁵¹ *The Effect of an Unconstitutional Statute* (1935); see in particular at 2-9.

the rule and the chapters of his book represent the exceptions to the rule.

It might be argued that covering clause V operates in the context of unconstitutional statutes. Does it mean unconstitutional statutes are effective? The current of academic opinion in Australia is against such an approach.⁵²

Part III : Rationalising the Case Law

From the foregoing discussion it is clear that countries operating under a written federal constitution have found great difficulty in treating all unconstitutional statutes void from the start. The obvious reasons for this are:

- a) if the general void ab initio rule applied, it would in all likelihood eventually threaten the existence of social cooperation e.g. where a legislature passed hundreds of unconstitutional statutes;
- b) once a statute has been used as a basis for the furthering of social cooperation it is illogical to deny its existence as it has existed in fact;
- c) the government may have had some claim to an extra legal justification for action;
- d) the void ab initio doctrine could unfairly disadvantage future generations, forcing them to pay for the benefits supplied in the past.
- e) the uncertainty and vagaries of judicial review of legislative action makes it difficult to pinpoint a universal time as to when the legislation is invalidated from.

These reasons are not meant to be exhaustive or theoretically mature but merely indications of the common sense of refusing to follow a universal rule.

The Birks approach although it purports to be applicable to unconstitutional statutes fails to adequately analyse the case law. How for example does Birks analyse the situation where a 1975 statute is declared valid by the High Court in 1980 but in 1990 it is declared invalid by the same court? Will Birks allow recovery from 1975, 1980 or 1990?

The response from Lord Goff might be that the judges of the past have not been equipped with the proper legal tools

⁵² Lane, P., *Australian Federal System*, 2nd ed., Sydney, Law Book Co., 1979, at 1136; Thomson, J., *Judicial Review in Australia* (1988) unpublished thesis at 136-137; Quick, J, and Garran, R., *The Annotated Constitution of the Australian Commonwealth*, 1901, at 346; Wynes, A., *Legislative Executive and Judicial Powers in Australia* 5th ed., 1976, at 95.

and thus have fallen into error. This rhetoric only tackles part of the problem. Judges in the past have been shy in the context of a written constitution to pull down from the beginning an unconstitutional statute because of the great social consequences this could have. Of course when we are only talking about unconstitutional levies it is easier to see a thin argument for recovery but when it is realised that unconstitutionality is a broad concept relating to laws in general, the arguments for a universal right to recovery appear nonsensical.

The cases and academic commentators support the argument that unconstitutional statutes are effective to the point of curial review in some circumstances. What is lacking however is a mature rationale for such an approach. The remainder of this part shall be devoted to formulating a theory explaining the efficacy of unconstitutional statutes. The theory is a tentative start towards the development of a mature theory which judges could utilise. There is much difficulty in proposing a theory that one might expect the judiciary to use especially where that theory by the nature of the issue must involve assessment of political action. Enough pessimism, the time has come for a concerted attempt at rationalising the case law that exists. If a coherent theory can be established this defeats any claim by Birks for the universal application of the ultra vires unjust factor.

The Suggested Approach in Outline

In moral theory the question is often asked as to justification for people surrendering the exercise of judgment to someone else or some institution. Moral theory as enunciated by Professor Joseph Raz and Professor John Finnis suggests that surrender of judgment is morally justified in order to solve coordination problems. From this basic premise both philosophers build elaborate theories on the authority of the state and ultimately the authority of law. When one surrenders judgment to another the power holder is said to exercise authority.

Leslie Green has categorised the approaches to the justification of the authority of States in terms of coordination, contract, consent and community.⁵³ Justification for authority on the basis of coordination is supported by jurists such as Professors Raz⁵⁴ and Finnis.⁵⁵ The gist of the theory is that the authority

⁵³ Green, L., *The Authority of the State* Oxford, Oxford University Press, 1988, 92-94.

⁵⁴ For a stimulating critique of Razian theory of authority as practical reason see: Hurd, H., 'Challenging Authority' (1991) 100 *Yale LJ* 1611.

⁵⁵ Finnis *supra* n 31 at 231-233; Raz *infra* n 60 at 56; and Raz, J., *Practical Reasons and Norms* at 63 ff; Green *supra* n 53 at 100 ff; Marmor, A., *Interpretation and Legal Theory* Oxford, Oxford University Press, 1992, at 113 ff; cf. Lukes, S. 'Perspectives on Authority' in Pennock, J, and Chapman, J., eds. *Authority Revisited Nomos XXIX* New York, New York University

of the state is justified because it does a better job of coordinating individual action than would a bunch of individuals. The social contract theory has links to writers like Hobbes and roots the justification for authority to the concept of agreement of rational people 'in order to solve problems of collective action associated with the production of beneficial public goods'.⁵⁶ The consent theory of authority justifies authority as the product of the citizen's consent. Communitarian approaches see authority arising from the need for community for human flourishing; they start with the view that community is prior and necessary to the individual.⁵⁷ Green comes down in favour of a consent based approach to justifying authority.⁵⁸ Regardless of whatever justification for authority is adopted all approaches have in common a belief in the value of social cooperation.⁵⁹

The 'authority as coordination' approach is the one that shall be adopted through this essay primarily because it holds current and popular support in the eyes of many jurists. If we take the popular coordinative approach as the preferred explanation then we must determine the nature of a coordination problem. A coordination problem can best be described by way of example. Assume that 10 million Australians are desirous of having a system of traffic lights installed throughout Australia to promote road safety. A coordination problem will immediately arise as the 10 million individual actors will have neither the resources nor the power to effectively introduce the road safety initiative. This is where the state and the law enter the picture offering a framework for the facilitation of coordinative action.

The legal limit of the authority (coordinative powers) bestowed on a state is found in the constitution.⁶⁰ In the Australian

Press, 1987, at 59. **N.B.** Raz and Finnis use the coordinative approach in entirely different ways.

⁵⁶ Green *supra* n 51 at 122.

⁵⁷ Green's criticism of communitarian approaches is that they fail to explain why authority is necessary: at 199.

⁵⁸ Green *supra* n 51 Chapters 6 & 7; Green's approach is a novel one in that the encumbrance of authority is based on consent, while content is seen to emanate from a communitarian base: at 201-219.

⁵⁹ The point to be made is that whichever theory of justification of authority one pursues there will always be scope for moral authority to exceed legally defined authority. For example with the contract and consent theories we must determine what authority is agreed to or consented to; yet there is the distinct possibility that the moral authority will be wider than the legal authority. A coordinative approach also presents scope for moral authority to exceed legal authority, as would a communitarian approach.

⁶⁰ cf. Stokes, M 'Is the Constitution a Social Contract?'

context the Commonwealth government has authority (coordinative power) as described by the (written) *Constitution*. It is conceivable that the Commonwealth government could effectively solve many coordination problems that it is not legally entitled to solve. For example it could effectively solve the coordination problem of the incorporation of companies yet it is not legally allowed to do so. Raz would limit authority to the situation where the state can better achieve right reason i.e. not just be able to coordinate but be able to further the reasons that should apply to the individual better than the individual. For example a statute creating and punishing the crime of murder solves the coordination problems of a reason that should apply to the individual viz the protection of life, whether the individual actually wants that or not.⁶¹ This is an important part of the moral theory of authority and one that should be given close attention.

Hence it is suggested that in situations where courts give interim effect to unconstitutional statutes they are recognising this legitimate authority. They are recognising the value in social cooperation, however the courts fail to construct any universal theory as to why the attempted coordination should be allowed effect.

The conclusion to be drawn from the cases is that a government can be morally justified in exercising authority yet such exercise of power may be unlawful.⁶² However if we simply followed the ability to coordinate criterion in the face of illegality then the rule of law would be rendered senseless. Respect for the philosophical foundations of the rule of law must underpin the solution.

It must be remembered that moral theory will also require respect for the individual in the face of coordination. Moral fundamental rights⁶³ or autonomy⁶⁴ will limit the exercise of the

(1990) 12 Adelaide LR 246.

⁶¹ Raz, J., *Morality of Freedom*, Oxford, Oxford University Press, 1986, at 53. Raz writes: 'the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely to better comply with reasons which apply to him ... if he accepts the directives of the alleged authority as authoritatively binding.. '

⁶² cf. Detmold, M., *The Australian Commonwealth*, Sydney, Law Book Co., 1985, 22-26, chapters 4 and 13. A general theme running through Detmold's work is that the substance of constitutional law is not simply contained in the 128 sections of the *Constitution*. His arguments on the 'federal community', the legitimacy of the union (in the context of aborigines), and reason and the will, raise ideas that fit easily with some of the points made here.

⁶³ A rights based moral theory gives primacy to rights; in Professor Dworkin's terms rights are trumps. Dworkin's primary right is the right to equal concern and respect, which he sees as generating a series of derivative rights; including the right

coordinative power and thus 'illegal' action will not have wholesale legitimation. As well the federal compact must also be respected in the face of claims to more able coordination. As the federal system is premised on the states having a role in government it must be presumed that coordination on state issues can only be carried out by state governments. Therefore the suggested solution does not have operation where a state claims to have the right to coordinate. It is tantamount to the individual saying she/he has a moral right to government by state government on state issues.⁶⁵

Distributive justice is not an issue as the question being raised is that of the need for social cooperation which is largely anterior to any question of how to distribute the benefits of the social cooperation.⁶⁶ Corrective justice is at the centre of the whole issue but if it can be shown that social coordination is needed the claim for corrective justice is very much weakened.

If there is moral justification for authority to be exercised in the name of coordination and if the community relies on such coordination there is much to be said for recognising the efficacy of such action. The fact that the social coordination has been relied on by the community (including the current litigant) makes it unconscionable for anyone to claim it has been of no effect.⁶⁷ It would be possible in an attenuated sense

to justice as fairness: see Dworkin, R. *Taking Rights Seriously*, London, Duckworth, 1977, Chapters 7 and 12.

⁶⁴ Another way to look at morality is through the medium of autonomy. Professor Raz while not denying a role for rights sees the touchstone of a morality of freedom as the liberal concept of autonomy: see Raz, J., *Morality of Freedom*, Oxford, Oxford University Press, 1986, at 193 ff.; also 'Symposium: The Works of Joseph Raz' (1989) 62 *Southern Californian LR* 731-1153.

⁶⁵ It is presumed here that moral authority and legal authority regarding federal government coincide and are truly represented by the *Constitution*. This is perhaps a controversial assumption and one which severely restricts the scope of the approach suggested here. To suggest that the Commonwealth could exercise state powers and have this legitimated is in essence proposing a clandestine theory of constitutional amendment. However due to the fact that the exact boundaries of the federal compact depend to a large extent on prevailing political morality an argument for the wider effect of unconstitutional statutes would be understandable. At this stage the suggested approach presented here is primarily aimed at legitimating the exercise of power which is for all intents and purposes Commonwealth power as for example in the unconstitutional legislature cases; cf. Detmold, *supra* n 62 at 25-26.

⁶⁶ Green, L., *The Authority of the State*, Oxford, Oxford University Press, 1988 at 5-6; cf. Finnis *supra* n 31 at 232; and Rawls *supra* n 30 at 467 ff.

⁶⁷ It is intended that the criterion of reliance is an extra

to say the government has a claim for counter restitution; the unjust factor being total failure of consideration. As well if the future of social cooperation is endangered by the strict void ab initio approach there is much to be said for adding this to the moral justification for authority and claiming that the statute should be given interim effect. The gist of such an argument is that it would be hypocritical to endanger the individual in the name of protection of the individual.

The Birks approach appears to take much inspiration from the Nozickian theory of distributive justice⁶⁸ which single mindedly protects the right to private property.⁶⁹ Birks does not go as far as Nozick but in saying that the taking of property by ultra vires demand requires immediate recovery he ignores any other claims. If the property has been taken and applied towards fostering social coordination then the immediate right to recover seems pure Nozick behind the guise of ultra vires.

The point to be made is that if the community takes the benefit of social coordination, if a murderer or corporate delinquent is imprisoned, then it is ridiculous to pull down what has gone before in the name of private property.⁷⁰

The Suggested Approach Developed

The law must respond to these demands by establishing an

and not an alternative requirement. Reliance is a useless criterion if the exercise of power is immoral.

⁶⁸ Nozick *supra* n 30.

⁶⁹ On the right to private property in the context of distributive justice see: Waldron, J., *The Right to Private Property* Oxford, Oxford University Press, 1988. It should be noted the right to private property Waldron supports has a distributive element: at 5, and is a general as opposed to a specific right: at 284-287 and more in depth in Chapter 4; cf. Nozick *supra* n 30. Waldron concludes that a general right to private property substantiates special rights to private property: at 338-342. An excellent discussion of rights is found in Chapter 3.

⁷⁰ It is possible that the creation of political authority makes the holding of property a reality and that the right to property is an emanation of the law. If this is the case then the key to resolving whether a right to private property exists in this situation is the justification for the taking. If the taking is justified in the name of social cooperation which in itself makes the right to private property possible it must follow that there is no right to private property in this instance and the constitutional (common) law should reflect this: see Sampford, C., and Wood, D., 'Tax, Justice and the Priority of Property' in Sadurski, W. (ed.), *Ethical Dimensions of Legal Theory*, (1991) 23 *Poznan Studies in the Philosophy of the Sciences and the Humanities* 181-208.

adequate common (constitutional) law principle.⁷¹ The principle must reflect the need to give efficacy to unconstitutional statutes where the dictates of morality justify authority and the argument from social cooperation is strong.

The suggested approach is arrived at through the following reasoning. Firstly the location of moral authority allows us to justify a claim for giving effect to the statute. On its own this claim is weak. Hence the next step is to highlight the benefits taken by citizens on reliance of the social cooperation generated by the statute and the potential damage to social cooperation that a general void ab initio rule would engender. It is clear to most constitutional scholars that a strict and general application of the void ab initio rule would eventually create social disorder.⁷²

If we could toss aside the morally justified actions of the government without defeating the purpose of social cooperation the solution would be simple. However the unison of the moral authority and the need to pay for the benefits of and continue some form of social cooperation demand that the common law rule determining the effect of unconstitutional statutes must give effect to some statutes. Such an argument it should be noted does not just rely on paying for and preserving the role of social cooperation but also demands the existence of justified authority. This is an important point because Birks has suggested the fiscal disruption obstacle to ultra vires as an unjust factor is built on false reasoning. For Birks the gist of recovery is the unlawful exaction and the effect this may have on social cooperation is ignored as the citizen is seen to have a right (legal or moral) to legitimate government. But what Birks fails to appreciate is that a government acting unlawfully may still have justified authority which then turns the focus onto the potential damage for social cooperation.

It is paradoxical that no sooner has Birks denounced the fiscal disruption approach than he is looking for a way to minimise the potential damage. The approach suggested here does the job much more rationally. The first inquiry is to find authority and then to assess the potential damage. If the first inquiry fails then the second should not be undertaken. This is more reasonable than the Birks approach which in searching for a way to minimise fiscal disruption does not discriminate between justified and unjustified government action.

Introducing this morally inspired common law rule has certain practical difficulties. For a start how are the judges expected to determine whether a moral justification exists? The answer is not simple but judges under the rubric of justice having

⁷¹ In line with Detmold's argument one might rephrase the issue by saying the judge in application of reason (common law) to the *constitutional* 'will' meets the demands: Detmold *supra* n 62 Chapters 11 and 13.

⁷² See for example O'Higgins C.J. in *Murphy v A-G* [1980] I.R. 241 at 301-302.

being doing just that for over a hundred years. The basic approach must be to determine whether moral authority exists by firstly adopting a moral approach to authority (i.e. either consent, contract, communitarian or coordination). Assuming one were to adopt a coordinative approach the next step would be to determine the substance of the approach. If we took the Razian coordinative approach then the next step would be to assess the operation of the authority in better achieving right reason. Assuming the government performs the moral function Raz postulates and does not impinge autonomy, or rights, then the common law test for the effect of a unconstitutional statute must reflect the moral authority. It is important that the utilisation of and potential for damage to social cooperation must be the limiting factors. If social cooperation has not been fostered or used as a result of the invalid act or will in no way be damaged then the statute may be regarded as void ab initio. However even if the unconstitutional statute is given effect it must not be given effect beyond the point of curial review or a reasonable time thereafter. Such an approach must be taken because once the government and citizens are aware of the invalidity it is imperative that they legalise the new arrangement or forget it. The reason for this limitation is firstly respect for the role of legal rules in government and secondly the fact that damage to social cooperation can now be avoided.

To universalise the approach it would be necessary to state the relevant constitutional common law principle in these terms:

An unconstitutional statute is of no effect unless it can be proved that:

- a) the public authority had a morally justified claim to exercise authority over the people;
- b) people (including the plaintiff) relied on the benefits of social coordination fostered by the unconstitutional statute;
- c) and that damage to the future operation of social cooperation is inevitable if the statute is not given effect;

whereupon the statute must be given effect to the point of curial review or a reasonable time thereafter.⁷³

What does all this mean for Birks rhetoric? If it is correct that an unconstitutional statute is not always void ab initio then the Birks theory fails to have universal application and is not the complete postulate he suggest it is. In other words acting beyond legally defined power in the context of a written constitution does not necessarily mean that retention of an

⁷³ Perhaps a question of substantive justice should also enter the equation once the first three conditions are met, however such an approach demands a reasoned and mature theory of justice.

ultra vires exaction is unjust. The acting beyond power does not automatically equal unjust; something Birks seems to assume.

This is not to say that we could not use Birks approach in cases where moral and legal authority is missing.

The point is that we must realise which Birks does not purport to do that going outside legally defined authority does not necessarily create a nullity and consequently an unjust factor.

The Argument for Retrospective Legislation

Professor Sampford suggests that the solution of the problem could lie in the effective use of retrospective legislation. In the case of unconstitutional levies it is clear that retrospective legislation could have some role however difficulties arise when one looks at unconstitutional statutes in general. For instance the retrospective validation of criminal convictions under an unconstitutional statute in light of restrictions on the exercise of the judicial power of the Commonwealth would be very difficult. Furthermore retrospective legislation in theory does not thwart an immediate right to recovery and the potential damage to social cooperation.

Retrospective legislation which legitimates a prior exaction is no doubt based on principles similar to those advocated here viz. that the government when it previously acted had legitimate authority. Professor Sampford sees one basis of retrospective legislation as the principle of reliance/expectation. That is the citizen should pay the exaction when levied by retrospective legislation because that citizen has relied on or expected the protection and benefits of the coordinative functions of government; that citizen has expected the government to build roads, restrain criminals or regulate companies as a protective measure and therefore must pay the retrospective levy.

The problem is that the argument from retrospectivity only operates successfully if the court prevents for a reasonable time (in order for the government to pass the legislation) the right to recovery. If this is allowed then the Birks immediate right to recovery is thwarted albeit temporarily and possibly permanently.

The retrospective argument is attractive to exponents of the rule of law yet it does have problems of compatibility with any alleged common law principle legitimating unconstitutional statutes. The argument from social cooperation is that if the social cooperation was justified to start with the utilisation of that social cooperation along with the potential damage to further social cooperation that recovery would impose demand that the money not be returned. It can be said that this is antithetical to the rule of law however it is possible that the vagaries of constitutional interpretation and amendment especially after the societal framework has been utilised make it nonsensical to invoke the rule of law. The retrospective approach ignores these theoretical bases and for this reason should be treated as an aid to resolving the problem through positive law but not as a theoretical solution.

The foregoing represents an attempt to rationalise the law as

it stands. It may be decided in future decisions that the rule of law trumps the value of beneficial and legitimate social cooperation, yet until that occurs it is incumbent upon the judiciary to provide a current rationale for their decisions as the catchphrase void ab initio is neither accurate nor illuminating.

Part IV : The Public/Private Divide

The ultra vires unjust factor operates on the basis that the executive or (in Australia) the legislature has acted beyond the legally defined authority. The unjust factor then is directly related to the actions of public bodies. This applicability of the unjust factor raises the issue of the public/private debate.⁷⁴

Birks has ushered in his new concept on a Diceyan tailwind saying that as Dicey prescribed the ultra vires unjust factor makes public authorities accountable before the private law. It treats the government like an individual; this is the rule of law.

The problem is that ultra vires as an unjust factor is a public law concept in that it can have no operation to private institutions; in Birks construct it only operates at the executive level of government. It is misleading to say we have developed a private law unjust factor. The private law principle of unjust enrichment then must have a public law counterpart. But is this public/private divide necessary; could the norm not have had application equally to public and private. A concept like unconscionability may have done the job however the English jurists are keen to avoid it, because it lacks definition of the causative event.

Ultra vires could be the principle to cover both private and public situations. Why is it not possible to view the actions of major corporations in our society through the medium of authority⁷⁵ and consequently the doctrine of ultra vires. If they exceed their legal authority⁷⁶ then any gain they have subtracted from the plaintiff is unjust. Ultra vires then becomes an unjust factor that does not divide the public and private.⁷⁷

⁷⁴ The USA writings on this issue are plentiful. The best place to start is the Public/Private Symposium Papers in (1982) 130 *University of Pennsylvania LR*

⁷⁵ Consider Roger Cotterrell *The Sociology of Law* 2nd ed. London Butterworths 1992 at 128.

⁷⁶ This legal authority does not refer to the old ultra vires doctrine of company law. What is being suggested is that major corporations exercise authority as regards certain things within the community but once this authority is exceeded then the actions of the corporation are null and void. The legal definition of this authority awaits development.

⁷⁷ An interesting analysis is presented by Charles Sampford

Such an idealistic approach awaits development.

Conclusion : Restraining Leviathan?

This article started out examining the principles of unjust enrichment and has ended in the midst of political theory.

Returning to unjust enrichment, one can say that Birks ultra vires as an unjust factor construct is a very certain principle of course subject though to the vagaries of the interpretive aspect of law. Throughout Birks work on unjust enrichment one sees an intention to seek the most certain principles one can find. This to some extent stems from the ridiculing unjust enrichment has taken over its lack of definition.

The view advocated in this article no doubt would be criticised in Birksian terms for being too discretionary.⁷⁸ But the view here advocated need not be seen as open ended. What the judge must do is construct a moral theory of authority and apply it in the case where the legally defined authority has been overridden. That moral theory will no doubt be constrained in some of the ways Dworkin sees his theory of law being constrained.

There will no doubt be persons feeling that the rule of law is betrayed by all of this. This is a worrying aspect of the theory however the protection of rights and/or autonomy and the reliance on and damage to social cooperation requirements allay much of this type of fear.

The future of the ultra vires unjust factor hinges on its sensible application. Earlier in this essay it was suggested the unjust factor should be renamed 'lack of authority'. Such a name change would make it obvious that the unjust factor is not aimed at defeating social cooperation that exists and is legitimate. Whatever the unjust factor is termed the caution that is sounded from this inquiry is that an immediate right to recovery depends on a complex threshold question.

The road ahead for this unjust factor is uncertain, however it is suggested that given a sensible interpretation the citizen can in appropriate circumstances restrain leviathan in private or public form through the law of restitution. However it is only once those circumstances are fully established that the unjust factor becomes universal and this is what much of the

in 'Law, Institutions and The Public/Private Divide' forthcoming (1991) *Federal LR* especially Part 5; see also Airo-Farulla, G., '"Public" and "Private" in Australian Administrative Law' (1992) 3 *Public Law* 186; cf. Cane, P., 'Public Law and Private Law : A Study of the Analysis and Use of a Legal Concept' in Eekelaar, J., and Bell, J. eds., *Oxford Essays in Jurisprudence* Third Series Oxford, Oxford University Press, 1987.

⁷⁸ For an excellent analysis of this issue see: Galligan, D., *Discretionary Powers*, Oxford, Oxford University Press, 1990, Chapter 2.

current thinking on the topic fails to acknowledge. In order for sense to be made of the unjust factor it must also be recognised that the right to private property is an integral part of the theory. If Sampford and Wood (supra) are correct the right to private property and ultra vires in the truest sense i.e. where there is no moral authority or reliance are simply different sides of the same coin.

For Australians the correct approach to ultra vires at a constitutional level is foundational to our continued existence as a society and for this reason ultra vires as an unjust factor must be approached with critical thought rather than open arms.