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### “Colour of Office”: Restitutory Redress against Public Authority



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His other publications are: *The Jury* (1968, 1970); (with AL Diamond and others) *Sutton and Shannon on Contracts* (7th edition, 1970); (with G de N Clark) *Law and Society in England, 1750-1950* (1989).

At the time when Professor Cornish delivered the First Sultan Azlan Shah Law Lecture in 1986, he was Professor of English Law at the London School of Economics, University of London, and acted as an external examiner to the Faculty of Law, University of Malaya.

# 1 “Colour of Office”: Restitutionary Redress against Public Authority

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Your Royal Highnesses, Lord President, distinguished members of the judiciary, Deputy Vice-Chancellor, ladies and gentlemen, it is the greatest honour to be invited by the Faculty of Law of the University of Malaya to deliver the First Sultan Azlan Shah Lecture.

Before so impressive an audience it is also a daunting prospect. It is both fitting, and for me sustaining, therefore, to begin with an extract from one of your Highness’ own judgments.

*In Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* you had occasion to remark:

Every legal power must have legal limits, otherwise there is dictatorship ...  
In other words, every discretion cannot be free of legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.<sup>1</sup>

This uncompromising expression of a fundamental aspect of the Rule of Law has many ramifications. As we all must recognise, it poses difficult questions in trying to set bounds for the legitimate exercise of power by governments at every level and by other agencies with quasi-governmental power. I want in the hour ahead not to conduct any kind of survey of that whole range, but rather to concentrate sights on a single hillock in the terrain. It is one that has to do with the question of

*An amended version of the First Sultan Azlan Shah Law Lecture delivered on 23 April 1986, in the presence of His Royal Highness Sultan Azlan Shah.*

<sup>1</sup>  
[1979] 1 MLJ 135 at 148.

remedies, those hard measures of what we are really prepared to do in insisting that governments adhere to the authority that is given to them and act properly upon it.

### Recovery against public authorities

The particular question I want to address may seem a narrow one, so narrow indeed that it ought to have been settled long ago: If a government department, local authority or any other organ purporting to exercise public authority, demands a payment or other benefit without having the power under which it purports to act, should it be obliged in law to repay or reimburse? The demand is made under colour of the office but without entitlement to make it—*colore officii*, as the older cases have it. Hence my title.

I take the question as a starting point to do a number of things that I can hope to achieve in a small compass. As I say, my first object is to consider pecuniary redress for exceeding public authority. Secondly, the question will allow me to say something about that new disposition within the common law, the law of restitution—to some still a mystery, to some an antipathetic or an inappropriate generalisation, but to others again a classification worthy of rank beside tort, contract and property in the hierarchy of civil rights. As one aspect of this, I want to show how competing values may be differently balanced in parts of the British Commonwealth, thanks to the destabilising effect of codification. Thirdly, I want to illustrate how the mother source of the common law, the English courts, are, in their middle age, coming under a strange and occult influence—from that newly acquired god-parent, the European Economic Community; it seems to me a relationship which may have repercussions for common law offsprings throughout the Commonwealth.

Dicey's classic account of the Rule of Law claimed innate superiorities for the structure given to that formative ideal by its particular expression in the British Constitution.<sup>2</sup> For the British

<sup>2</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edition, 1965, Part 11, pages 195–202.

version, he proclaimed two special virtues. First, the detailed rules of property, contract, tort and criminal law were, by their careful working out over time, inherently worth more than grand declarations of fundamental rights. However, he had little to say, in relation to this, of the legislature’s power to alter legal expectations in a system where no written constitution erected against Parliamentary sovereignty any entrenched guarantees of individual rights. Secondly, Dicey disparaged the French dichotomy of private and public law which left the citizen able to pursue bureaucracy only through special administrative courts; for these were by definition within the administration rather than without, and so open to manipulation, suggestion, tacit understanding.<sup>3</sup>

But it was at this point that his argument became thin. For there stood, in his day, the uncomfortable fact that, as against the Crown, there was no right to proceed in tort. There was only the possibility of suing the individual civil servant responsible and the

willingness of the Crown to meet all reasonable claims as a matter of grace.

*No modern, democratic government is likely to reject out of hand all claims against it. What it wants is the power to deal at discretion.*

But was this not, in his beloved common law, a blemish of exactly the character which he so willingly found across the Channel? No modern, democratic government, after all, is likely to reject

out of hand all claims against it. It could not be high-handed on such a scale. What it wants is the power to deal at discretion: to be supplicated; to keep the issue private; to weigh all the circumstances as a jury unto itself; to cover up the blameworthy where exposure might bring political hurt; to allow the diffident and impecunious to exhaust themselves against a wall of inaction; and to do all or any of these things with a determination proportionate to the size of the error or the injury. So for a long period even in modern times the Crown resisted the imposition of liability in tort. And, to turn to restitution, there are occasions when it still preserves its discretion. Under the British Taxes Management Act 1970, for instance, the Board of Inland Revenue is to give such relief against overpaid tax

<sup>3</sup> Ibid, pages 193–95, 328–405.

“as is reasonable and just” having regard to all the circumstances of the case. While repayment has been permitted where the overcharge results from a mistake of law, as well as from some factual error, it does not extend to cases where the charge follows the Revenue’s “prevailing practice”, even if this is later held to be wrong in law.<sup>4</sup> So if A establishes that he is not liable to a tax, B, C and D, who have already paid the tax in exactly similar circumstances, will not be granted it back.

One must understand the starting point from which such a discretion operates. The old discretion maintained by the Crown in relation to tort claims (ie, until the enactment of the Crown Proceedings Act 1947 and its co-ordinates around the Commonwealth) was a power to dispense relief where no legal claim lay against the Crown, even though there would be an equivalent claim against a subject. But in the case of recovering payments not due to the Crown, the discretion of the type in the Taxes Management Act 1970 is not a consequence of rules about liability which distinguish Crown and subject. As we shall see, in places where the common law applies, neither category of payee is liable to repay unless some exception can be found to the basic rule that payments under a mistake of law are irrecoverable. In those jurisdictions where legislation has reversed this rule, the change touches both categories. Accordingly, our exploration of the rules affecting public recipients must take us first into the more general area of entitlement to recover.

### Entitlement to recover—generally no right to recover

The common law rule still predominates in the majority of Commonwealth jurisdictions. A person (Crown or subject) to whom money is paid under a mistake of law, if that mistake is “without more”, cannot be required to repay it. In the classic formulation of the principle, Lord Ellenborough explained it as turning upon the maxim, *ignorantia juris haud excusat*.<sup>5</sup> While that proposition may be a highly desirable foundation of criminal responsibility, it is not self-evident that it must apply equally to civil obligation in respect of

<sup>4</sup> Taxes Management Act 1970, section 33; see Goff and Jones, *The Law of Restitution*, 3rd edition, 1986, pages 134-35.

<sup>5</sup> *Bilbie v Lumley* (1802) 2 East 469.

money paid. But as Goff and Jones point out in their formative book on the *Law of Restitution*, there is one justification for the rule which must account for its long survival and repeated utterance.<sup>6</sup> Only if a decision to settle a claim by paying it is treated as final can the recipient conduct his affairs with reasonable certainty. In such cases, the question of repayment only arises once there has been a demand on the one side and a decision to give in to it on the other. The person

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paying might have stood firm and faced the consequences. If those consequences could at most be involvement in civil litigation, then a decision to submit rather than to fight ought to be treated as binding. There should be no re-opening of the issue by an action to recover what

was paid in submission, just as there can be no re-opening of an issue settled by a judgment other than through recognised channels of appeal.

What then of the exceptions to this basic position at common law? If the mistake is one that can be classified as being of fact rather than law, the payer may normally recover, just as he may if he can show fraud, oppression or some form of compulsion which is more than threatened litigation.<sup>7</sup> The person who demands money may, for instance, have a self-help remedy: as a pledgee he may refuse to return a security, or may take steps to realise its value; as a carrier or repairer he may refuse to give back the property; as a lessor he may be able to levy distress; as a chattel owner he may engage in reception. Where these remedies are threatened or used by a person not entitled to them, the “duress of goods” is taken to justify recovery of the amount paid.

Equally, there are cases where the demander—typically a public officeholder of some kind—keeps or threatens to keep a person from what he is entitled to unless he pays. A classic instance in England was *Morgan v Palmer*,<sup>8</sup> where a mayor had without authority demanded a fee for a public house licence; he was required to repay it as money had and received to the plaintiff’s use.

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3rd edition, 1986, Chapter 4, especially pages 17–20. As the authors agree, it is only a partial justification. There may be payments made under mistake of law which are not a response to any demand and the recipient’s claim to treat the payment as final is not so compelling.

The obvious case is a mistaken gift.

But it seems that this equally is irrecoverable; a well-known illustration was *Re Diplock* [1947] Ch 716 at 725–26; [1948] Ch 465 at 479–80—payments under a will to 139 charities in the belief that the legacy was valid, though in that case special actions, proprietary and personal, were found; see also [1951] AC 251.

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For these standard cases of restitutionary liability, see eg, Goff and Jones (above, note 4) Chapters 3, 9; PBH Birks, *An Introduction to the Law of Restitution*, 1985, Chapter 6.

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(1824) 2 B & C 729; similarly, *Dew v Parsons* (1819) 2 B & Ald 562.



While the case law which develops these distinctions is not entirely harmonious, the strategic line lies between payments which involve “mere” mistakes of law and those which involve some additional element of pressure. “Mistake of law” is here a broad front, stretching to cover not only the case where the payer pays without any appreciation that his liability to do so may be open to question, but also the case where he is aware of the legal doubt but chooses—even protesting—to capitulate.

As part of this approach, common law judges have shown little readiness to distinguish between public and private recipients of money paid by such “mistakes”. In *William Whitely v R*<sup>9</sup> a London department store paid the British Inland Revenue a tax upon “servants” in respect of certain of their employees; they claimed that the tax did not apply to these individuals, but they paid “under protest” rather than litigate. When eventually the point was settled in their favour they claimed back what they had paid. Walton J refused their claim, finding the money to have been paid “voluntarily”.

“Voluntariness” is a notion that is often used to preclude claims in restitution and its meaning varies a good deal. Here it was said to mean: without duress, compulsion or demand *colore officii*. But I am not sure that this takes the argument any further. Clearly the judge was influenced to find the payment voluntary because it was not really a case of mistake of law at all. The department store had faced the legal issue and even had counsel’s opinion that it was not liable to pay; yet it chose to do so.<sup>10</sup> The case has been accepted as good law in England, by a substantial majority of the Supreme Court in Canada in the recent decision, *Nepean Hydro v Ontario Hydro*<sup>11</sup> and (with a certain hesitation on the part of Sir Owen Dixon CJ) in Australia, in, eg, *Mason v New South Wales*.<sup>12</sup> Likewise in *Twyford v Manchester Corporation*,<sup>13</sup> a monumental mason paid an English local authority a licence fee for permission to cut a gravestone in one of its cemeteries. He too paid under protest, and as it turned out the licence could not properly be charged for, but he could not recover. In so deciding,

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(1909) 101 LT 741; and see *National Pati-Mutuel v R* (1930) 47 TLR 110.

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If the payment is made by the payer on condition that it is to be returned if the amount proved not to be due, then the payee will be obliged to do so: *Sebel v Commissioners of Customs and Excise* [1949] Ch 409.

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(1982) 132 DLR (3d) 193.

12  
(1959) 102 CLR 108.

13  
[1946] Ch 236; [1946] 1 All ER 621, Ch.



Romer J remarked on the absence of any evidence that the mason believed that he would be kept out of the cemetery for not paying. Had he found otherwise, the case would have resembled (though counsel did not raise them) earlier decisions such as *Steele v Williams*,<sup>14</sup> where a parish clerk had to pay back a charge for taking extracts from parish registers which he had no power to levy.

This was a case where a person was told that there was a charge for something to which in fact they were entitled free; accordingly it is to be distinguished from cases where there is a demand for a general rate or tax, for which there is no direct *quid pro quo*. Nonetheless, *Steele v Williams* goes a long way in favour of allowing recovery against a charging authority, for there the payment was made only after the parish records had been consulted. So the payer actually got what he wanted before he paid; yet he recovered his payment.

### Reversals by statute

There are jurisdictions where the basic common law position—no recovery of money paid under mistake of law—has been reversed by statute. Among them are the territories—including Malaysia—where the Indian Contract Act 1872 is in force.<sup>15</sup> That Act, by section 72,<sup>16</sup> provides:

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Initially this was read, in deference to common law principle, as excluding cases where the mistake was one of law.<sup>17</sup> But in 1948, the Privy Council, speaking through Lord Reid, disapproved of this approach and overruled the earlier case law.<sup>18</sup> The statute itself did not expressly contain such a limitation and the Judicial Committee seemed not to feel the strength of argument which had for so long led to maintenance of the common law position.<sup>19</sup> Two features may help to explain this: the case was concerned with a mistake arising over the

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(1853) 8 Exch 625; 22 LJ Ex 225.

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For the position in New Zealand, Western Australia, New York and other United States jurisdictions, see Goff and Jones (above, note 4) 118.

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*Editor's note*: Similar to section 73 of the Malaysian Contracts Act 1950.

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*Wolf v Dadiba Khimji* AIR 1920 Bom 192; *Appavoo Chettiar v SIR* AIR 1929 Mad 177; *Municipal Council, Tuticorin v Balli* AIR 1934 Mad 420; *Municipal Council, Rajahmundry v Subba Rao* AIR 1937 Mad 559; following the view of Pollock and Mulla, *Indian Contract & Specific Relief Acts*, 6th edition, 402; contra, *Jagdish Prosad v Produce Exchange Corp* AIR 1946 Cal 245.

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*Shiba Prasad Singh v Srish Chandra Nandi* AIR 1948 PC 297.

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Pollock and Mulla (above, note 17) founded their argument in part on the need for parity with section 21 which provides that a contract formed under mistake of law is not to be rescinded. The Judicial Committee, however, refused to treat the formation of contract and mere payments upon supposed liability as being on the same footing.

interpretation of a contract between private parties; and the payments had been made without any appreciation that the contract was open to a different interpretation.<sup>20</sup>

However, the cases in which Indian courts have subsequently considered its applicability have concerned the legality of a tax. In *Sales Tax Officer, Banaras v Kanhaiya Lal Makund Lal Sarat*<sup>21</sup> where a sales tax on forward transactions had been paid without appreciating that it was *ultra vires*, the Indian Supreme Court duly held the amount recoverable. It rejected an argument that taxing authorities should be exempted from the operation of section 72, as interpreted by the Privy Council, since there is nothing in the section to justify such a distinction.<sup>22</sup>

The first real test of the scope of the changed rule has come in *Tikochand Motichand v HB Munshi*.<sup>23</sup> The taxpayers had objected to imposition of a Bombay sales tax on a number of grounds and had fought and lost a case in the High Court. They did not appeal, but paid after issue of an attachment order. In these earlier proceedings, the judgment did not turn on any breach of constitutional right, but later another litigant succeeded in having the tax declared unconstitutional. The taxpayers sought to recover the tax paid but their proceedings were begun outside the period allowed by the Limitation Act 1963 for a recovery by writ, unless the exception delaying the commencement of the limitation period on the ground of mistake was applicable.<sup>24</sup> Accordingly they moved the Supreme Court, under Article 32 of the Indian Constitution, for relief against the infraction of their fundamental rights.<sup>25</sup> A majority of the Indian Supreme Court refused the relief sought, and in reaching this view, reliance was placed on the fact that the payment was not made under any mistake such as would have extended the limitation period under the Limitation Act itself. Referring specifically to section 72 of the Indian Contract Act 1872, Bachawat and Mitter JJ each characterised the payment as having been made with a clear appreciation that a constitutional challenge to the tax might have been pursued.<sup>26</sup> Accordingly it could not be said that there was any mistake of law. Because the first stage of the dispute was taken as far as a judgment

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For an English decision equally treating mistake of law in the formation of contract as not justifying the return of money paid under it, see *Orphanos v Queen Mary College* [1985] 2 All ER 233.

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AIR 1959 SC 135. NH Bhagwati J gave an interesting comparative treatment of the preceding law.

See also *Caltex (India) v Asst Commissioner of Sales Tax* AIR 1971 MP 162.

22

Nor did any estoppel arise.

23

AIR 1970 SC 898.

24

Limitation Act 1963, section 24.

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The fundamental right found to have been offended was the right to acquire, hold and dispose of property (later removed from the Constitution by the 1979 amendments). The prohibition on levying or collecting taxes without the authority of law (Article 265) is not in the Part concerning fundamental rights.

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Above note 23 at 907, 914; Hidayatullah CJ agreed and gave among other reasons for refusing relief "that law will presume that he knew the exact ground of unconstitutionality" (at 903).

against the taxpayer, the circumstances were special. But the decision may well herald a new, and not unreasonable, interpretation of section 72, drawing the strategic line between payments made with and without appreciation of the lack of legal basis for the demand.

If this approach is to become established, the gap between the Indian Contract Act 1872 and the prevailing view of the common law would be by no means as wide as it appeared to be after the Privy Council’s judgment in 1948: payments under protest would, in both regimes, be treated as irrecoverable in the absence of any additional element of pressure amounting to coercion. The difference would remain over payments in real ignorance of the legal position. Indeed there is one common law judgment at least which would reconcile the case law along the same axis, so far as it concerns payments to public authorities and officers. Windeyer J in *Mason v New South Wales*<sup>27</sup> analysed the cases of recoverable payments for a public service, such as *Morgan v Palmer*<sup>28</sup> and *Steele v Williams*,<sup>29</sup> as turning upon ignorance at the time of payment that the demand was without legal authority. Whereas, if the payer was not ignorant of the position, yet paid to put an end to the matter, he should not recover unless there was an added element of duress or compulsion.

### Challenging the rule

But if public authorities are to be treated as distinct in this measure, why should one not go further? Why should there not always be a right to recover what they had no power to demand? The question

*Why should there not always be a right to recover what public bodies had no power to demand?*

poses itself equally for both our sets of jurisdictions, common law and the Indian Contract Act 1872. In India itself, as we have seen, the issue has been posed by reference to fundamental

constitutional rights. In *Tikochand Motichand v HB Munshi*,<sup>30</sup> the two members of the Supreme Court who dissented, took the view that the money must be returned in the absence of an earlier judgment against the payer of the money on the very ground which was later held to be in his favour.<sup>31</sup>

27 (1959) 102 CLR 108 at 140–145.

28 (1824) 2 B & C 729.

29 (1853) 8 Exch 625; 22 LJ Ex 225.

30 AIR 1970 898.

31 They do not however adopt a common front: Sikri J treated the particular circumstances as showing a lack of understanding that the particular ground of challenge existed—there was thus a mistake of law in the narrow sense that is also the point of distinction in the majority judgments (ibid at 905–906);

Hegde J, however, would treat as a mistake of law any uncertainty about the legal position which has not been resolved by litigation (ibid at 919).

Written constitutions elsewhere may contain statements of the basic requirement of legal authority for the exaction of taxes and other public dues from which a similar result may be derived.<sup>32</sup> In the United Kingdom, Professor Birks has suggested that the principle can be found sufficiently stated in that strictly limited document, the Bill of Rights of 1689.<sup>33</sup> Even so, a rule requiring the return of moneys paid is likely to be a matter of inference from the fundamental proposition and it requires its own justification.

It is possible to rest the case mainly upon an element of duress: governmental bodies which demand charges and payments exert a pressure inherently more threatening than a private individual or enterprise.<sup>34</sup> This has of course a comforting sound, but it must surely be too wide a generalisation. Among those who may make such demands there are central and local governments, special government agencies, authorities acting as contracting parties, authorities fulfilling public obligations; while in the private sector there are institutions of enormously varied size and ability to sustain litigation against those who refuse their demands. Can it realistically be maintained that demands from public bodies in all shapes and forms amount inherently to “practical compulsion” or “economic duress”, while those from private bodies may or may not have this character, depending on whether more than just litigation that is at stake? So long as attention is concentrated on the state of mind of the person who pays, on the degree of pressure exerted over his will-power, it seems to me that there may be no sufficient case for treating public and private demanders differently.

If they are to be distinguished, it must be on grounds which touch the very purpose for which we conceive government to be conducted. Once we start to ask about that, we may suspect that the need to stand by compromises of claims, which we have identified as having an important economic and legal value in the private sphere, may not have the same importance in the public. The innermost struggle for the soul of democratic government lies in the conflict between sectional interest and the general good; in the tension

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The Federal Constitution of Malaysia requires the authority of federal law for the levying of a tax or rate: Article 96.

In Canada, the position has been strengthened by a decision that legislation to prevent the recovery of a tax extracted without authority is itself ultra vires: *Amax Potash v Saskatchewan* (1976) 71 DLR (3d) 1; see also JR McCamus, “Restitution of Monies Paid to Government under Mistake” (1982) 17 UBCLR 233 at 248–49.

33

Birks, *An Introduction to the Law of Restitution*, above, note 7 at 297. 1 W&M Sess 2, C.2, s. 1 Decl. 4 provides that “levying money for the use of the Crown, by pretence of prerogative, without grant of Parliament for longer time or in other manner than the same is or shall be granted, is illegal”.

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For a strong expression of this view, see RD Collins, “Restitution from Government Officials” (1984) 29 McGill LJ 407, esp. 429 ff.

between the pursuit of party objectives and the maintenance of government for the benefit of the whole society. In order to ensure that the victory does not go as of course to the first, there are only two real checks: the ballot box and the requirement of legality. The power of the electorate, for all that it remains weighty, is a blunt and an occasional instrument. The requirement that governmental action

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remains within the scope of legal authority is also only an occasional weapon, but it is by nature precise. The more the political condition of a country becomes polarised, the greater undoubtedly is the need to keep the weapon of legality well-sharpened. Among its various

cutting edges, the one concerned to require that taxes, rates and charges be extracted only under legal authority remains as important as it has been since the English struggles of the 17th century. For Professor Birks, it is a necessary corollary of that principle that improper extractions should be repaid by governmental bodies. To his aid he can call the counter-proposition. Lord Haldane once informed New Zealanders, in *Auckland Harbour Board v R*,<sup>35</sup> that it was a fundamental constitutional principle of Britain and therefore their own country that moneys paid without authority from the general exchequer were refundable as of course.<sup>36</sup>

I do not myself see that the requirement to repay should be axiomatic in either direction, in favour of government, or against it. The case must be argued. Once moneys have been paid on demand to a governmental body, that body certainly has some interest in treating the question of legality as settled. After all, the issue at stake may concern a tax of huge amount contributing a substantial proportion to an adopted budget. Nonetheless, I would submit that these bodies do not deserve the protection that is currently given to the private demander, because they do not regularly face encounters with insolvency, the stalking horse of the marketplace. Their decisions are governed not so much by commercial risk-taking as by political

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[1924] AC 318 at 326–327.

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See Birks, *An Introduction to the Law of Restitution*, above, note 7 at 298–299, referring to the subsequent Australian decision, *Commonwealth v Burns* [1971] VR 825 which held that not even an estoppel could affect the rule. See also the Malaysian Constitution, Article 104(3).

interest and electoral popularity. If they make unauthorised exactions and have to repay, they may suffer political embarrassment; but they enjoy, or can seek the support of others who enjoy, the power to raise revenue by other means, or even the power to make retrospective statutory exceptions (where that is constitutional). I would argue that the balance of these competing needs is indeed in favour of a rule of automatic recovery from public authority.

Indeed, I would go further than Professor Birks who, influenced by a remark of that great Australian judge, Sir Isaac Isaacs,<sup>37</sup> considers that the courts should have an ultimate power of absolution, where to order repayment would be too evidently disruptive. I find that notion unattractive. It would confer a discretion inherently difficult to exercise; and it seems to contain the imperative that, if governments are to exceed their taxing powers, this should be done on the grandest scale. To my mind, the only warrantable exceptions would cover first, the case of *res judicata*; and secondly, the payer whose payment is “voluntary” in an evident sense: the person whose intent is to bribe; or without going as far as that, the person who pays willingly because he hopes to secure advantages ahead of competitors—the man who thinks he can get all exclusive licence or other advantage and is willing to pay for it, whether lawful or not.<sup>38</sup>

*The refusal to place an overpaid public authority in a different position from an overpaid private individual is one instance of a wider reluctance to visit pecuniary consequences upon the misconduct of government.*

The refusal to place an overpaid public authority in a different position from an overpaid private individual is one instance of a wider reluctance to visit pecuniary consequences upon the misconduct of government. There is here a point of general contrast with the conception of public law responsibility which has grown in civil law countries, and one accordingly of inherent interest. Part of the common law reluctance has its roots in the system of government (particularly local government) before democratisation, when public responsibilities lay with the landed class as part of a paternal oversight and direction of community affairs. In public matters, as in private,

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*Sargood v Commonwealth* (1911) 11 CLR 258 at 303.

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In various jurisdictions judges have shown themselves unwilling to allow recovery in cases of this type: see eg, *Gordon Foster v Langley Corp* (1980) 102 DLR (3d) 730 and under the Indian Contract Act 1872, *Dhanyalakshmi Rice Mills v Commissioner of Civil Supplies* AIR 1976 SC 2243.



their stewardships were honorific and did not readily entail financial responsibility for errors that were honest, if misguided. Looking even deeper, one may perceive the reluctance to impose pecuniary liability in the very structures of the common law system, which developed the distinct prerogative writs as directive but not compensatory tools, and allowed other courts than those of common law (notably the Court of Chancery) to grant directive orders like injunctions and specific performance but in the main kept from them the power to award damages. In the common lawyer’s subconscious mind there seems to be a peculiar awfulness about the ordering of amends for what is past.

I have not, I think, asked for much in suggesting that modern government needs as one of its disciplines that unauthorised demands for money should lead to repayment. It is not of itself a large adjustment of the balance. I am nonetheless conscious that modern courts are reluctant to take precisely this step—witness, the decisions of the High Court of Australia, the Supreme Court of Canada and even the Supreme Court of India, to which I have referred. I am equally conscious that no government, left to itself, is likely to enact legislation exposing itself to greater liability to repay than the common law imposes; governments are more likely to prefer the sort of discretion that I illustrated by the British Taxes Management Act 1970.

### **Answers from civil law systems**

However, as I have also pointed out, there is, in civil law systems of public responsibility, a greater readiness to rely upon pecuniary redress and it may be through this influence that new perceptions will come to bear in those parts of the common law world that are directly touched by their membership of the European Common Market—the United Kingdom and Ireland.

Let me illustrate the effect by reverting to the problem that I have been discussing. The European Common Market is an economic confederation in which national political interests exert immensely strong multi-polar forces and the conventional law, primarily the





Treaty of Rome 1957, as interpreted by the Community's Court of Justice in Luxembourg, is often the one means of resolving tensions. In a sphere where the scope of executive power is not well defined and often under both strain and challenge, a world where national governments find it difficult to acknowledge the extent to which their country has surrendered sovereignty to a higher alliance, the problem of taxes and charges extracted without legal authority is encountered with relative frequency.

To take a recent illustration: in the *San Giorgio* case of 1983,<sup>39</sup> the Italian government had levied charges for health inspection of dairy products being imported into Italy from other parts of the Common Market. The charges were later held unconstitutional as being in contravention of specific EEC regulations requiring that there should be no such charge inhibiting movement of goods between EEC countries. The Italian government then resisted repayment under an Italian Decree Law which granted the right to cover overpaid dues only upon proof that the "charge has not been passed on in any way whatsoever to other persons". This was challenged by referring the issue under the Treaty of Rome to the Community Court. This Court refused the invitation simply to say that as the Italian rule applied to all overpayments, it should cover those which arose from infractions of Community law, there being no discrimination against other Member States of the Community or their citizens. Instead, the Court established as overriding Community law that unconstitutional payments must be recoverable, except where it could be shown positively that they were passed on to someone else, so that it would be an unjust enrichment to the claimant to give the amount back to him.<sup>40</sup> In particular, the court displayed a lively awareness of the difficulty in most modern business systems of proving the negative that the Italian law required: that there had been no passing on "in any way" of the improper charge. From its largely civilian background, the Court found it natural to assume that there should be repayment.

I want to extract from this example only some very general points about the legal influence of the decision. So far it is only a

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*Amministrazione delle Finanze dello Stato v San Giorgio* [1985] 2 CMLR 658.

Cf. *Blaizot v University of Liege*, *The Times*, 4 April 1988.

40

One common law judgment to address the same issue is that of Windeyer J in *Mason v New South Wales* (1959) 102 CLR 108. It had there been argued that the transport firm wrongly charged for a road permit had passed the charge on to their customers and so had not suffered "by subtraction".

The judge's answer was that it was not necessary to show a correlative impoverishment in an action for moneys which the government "was not entitled to collect and which *ex hypothesi* it got by extortion".

decision on Community law; it in no way obliged the Italian courts to abandon their “no passing on” law for entirely domestic exactions. Secondly, nonetheless, the fact that in Community law repayment is accepted as a concomitant of the obligation to act only within the scope of legal powers may in time influence judges in Community countries in applying purely domestic law, at least when they find no mandatory statute to the contrary. A good illustration could be the current common law rule preventing recovery of payments under a “mistake of law” unless there was an additional element of duress. Thirdly, there is the question of how the rest of the common law world should react if English courts consider that consonance with Community law requires a wider imposition of liability, particularly upon governments and other public authorities.

My hope, naturally, is that on this question, as perhaps on others, Commonwealth judges would be able to see wisdom in a British bowing to external influence and would accept for themselves the same shift in direction. They are, I suspect, the more likely to do so if they also feel a fundamental alteration of course within the common law itself and that brings me back to another of my basic themes. I have intended this talk to be a demonstration of thinking in the mode of restitution. To adopt that classification, is, above all, to commit oneself to the generalisation that unjust enrichments to a defendant at the expense of a plaintiff should be capable of repayment or reimbursement by civil action. This is presented as a fundamental proposition, which is then to be given shape and definition by more precise rules, such as those that I have taken as illustration. It is a proposition at the level of high abstraction that characterises *pacta sunt servanda* or *nullum damnum absque injuria*.

### A distinct law of restitution

The traditional objection to the notion of unjust enrichment, which for so long held it at bay in English judgments, was undoubtedly founded upon the severe, atomistic liberalism of so much 19th century thought: if courts were to undo unjust enrichments, the crucial necessity that each man should look after himself might be

fatally undermined. Because of this, Lord Denman CJ once insisted (in *Skeate v Beale*<sup>41</sup>) that a man who had entered into a revised contract, even under duress of goods, must be held to it. He soon questioned his own statement.<sup>42</sup> The remarkable thing was that *Skeate v Beale* remained a basic precedent in books on civil obligation until the mid-1970's.<sup>43</sup> There was here an inherent antagonism to readjusting bargains by means of claims in restitution which has been difficult to uproot.

A more radical criticism has been that of Professor Atiyah, who sees in the case for a distinct law of restitution, the erection of undesirable barriers to a fundamental re-orientation of the law of contract.<sup>44</sup> His conception of contract would displace from its central plinth that worship of promise and bargain which derives from the same liberal, non-interventionist premises as the hostility to unjust enrichment. He would place upon two higher columns the principles of unjust benefit and detrimental reliance. This he claims to be a faith better fitted to an economic and political world in which legislatures constantly set limits upon the freedom to contract on market-place terms and courts increasingly intervene to regulate and adapt civil obligation in the light both of preceding and superseding conditions surrounding a bargain.

This in turn is a challenging thesis which is already producing ripostes. Today I can only be concerned with that small part of the whole argument which seeks to define the appropriate status for a concept of unjust enrichment. I should note first of all how very different is Atiyah's approach from that conservative caution which would deny the very generalisation, unjust enrichment. Atiyah's case is that the concept must undoubtedly be accepted, but must be placed alongside others in service of a higher goal, a redefined idea of contract itself. That is of course an ambitious re-orientation of thought, and the first case for a distinct law of restitution of the kind advocated by Goff and Jones, Lord Denning, Professor Birks and other lesser mortals, is that it fits the stage that we have reached: it can be given an appropriate place within the pantheon of civil liability at

41  
(1841) 11 Ad & E 983.

42  
*Wakefield v Newbon*  
(1844) 6 QBD 276.

43  
Real challenge began  
only with *The Siboen*  
and *The Sibotre* [1976] 1  
Lloyd's Rep 293.

44  
Atiyah, *The Rise and Fall*  
of *Freedom of Contract*,  
1979, esp. Chapters 6, 15  
and 22.

common law without too serious a strain upon the tendency of that law to develop only by gradual adaptation.

The second point in its favour is this: All processes of legal classification are approximate. They have penumbral shades and they serve so long as shadow does not seem to be eclipsing the light itself. As my particular subject today suggests, a separate recognition of the unjust enrichment concept as the fulcrum of a law of restitution is needed not just within that world of essentially private transactions

which we label “Contract” but equally as part of the world of public responsibility and administrative law. Now, the distinction between the public and the private is a complex and sometimes awkward one and Dicey, let us recall, was vehemently opposed to one of its possible consequences, namely a splitting of jurisdictions. In the end, having belatedly discovered that, despite Dicey and Lord Hewart, the common law does indeed have an

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administrative law, it may be that we shall move on towards concepts of civil obligation that affect public and private institutions and individuals indifferently. It is indeed one direction in which Professor Atiyah seeks to point us.

But until we feel able to take that very large step indeed, I would suggest that the unjust enrichment concept deserves a place as a fundamental value in fields of public law as well as private obligation. Until preventing unjust enrichment by granting restitution can be seen as a good in itself, it is unlikely that there will be fundamental reconsideration of rules such as that allowing no recovery after submission to an honest but unjustified claim, whether by public authority or private person. It is just this sort of work that the general principle is fitted to do. That is the case for raising rather than lowering its status in our hierarchy of values.



Your Highness, many of your judicial pronouncements show a profound appreciation of the common law as an organism in which substantive rules, procedures and professional esprit all interact constantly and intimately. Your diagnosis of the particular difficulties which I have been addressing may differ diametrically from my own. What I do feel sure of, in inaugurating the lectures that bear your name, is that it has been right to voice a few ideas about how the glandular secretions of the common law might be activated to induce change; you appreciate, I know, that healthy growth is vital to the life of the corpus. I feel sure that it will be in the same endeavour that future lecturers, more illustrious in name and powerful in thought, will approach their task.

On this biological note I should like to close: once more thanking the Faculty for the great honour of being invited to give the new series, so aptly and royally named, its birth. 🍀

#### **Editor's note**

This lecture by Professor Cornish was described as “influential” by Lord Goff of Chieveley in the House of Lords decision in *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70; [1992] 3 WLR 366; [1992] 3 All ER 737, HL, at 754.