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The Law of Restitution: for the Attention of the Legal Scholarship in Nigeria.

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Abstract

The law of restitution is an aspect of law that works at reversing a benefit wrongly gained by a recipient. Such wrongly derived benefits may arise out of unearned monies paid for goods sold or services rendered; or in situations where gains are derived under mistake, misrepresentation, undue influence, or other factors capable of vitiating contracts. The law of restitution has a close bearing with the law of contract. While the law of contract centres on compensatory remedies in favour of a claimant, where the courts endeavour to put a defendant in the position he/she would have been prior to a contractual agreement, the law of restitution, on the other hand, provides a remedy to assist an innocent party, to recover from a defendant, a gain that was wrongly obtained, by the latter, from the claimant. Basically, it relates to a study that discourages an unjust enrichment gained at the expense of a claimant.

The law of restitution is not common to our legal system but has for many years been laden with controversies. The extent of such controversies go as far as various authors on the subject not being in accord on basic principles. This paper exposes readers to the subject of restitution in general, and discusses the controversies surrounding necessary factors to be present before a claim for restitution may arise between parties. The paper does this by analysing the views of renowned authors as well as court decisions, aligning with the position of the multi-causalists.

Keywords: Restitution, Restitutionary Response, Unjust Enrichment, Proprietary Rights.

1.0 Introduction.

When the subject of law of restitution was making waves in certain commonwealth jurisdictions, the subject matter was unfamiliar within the Nigerian legal spheres.[1] Even now that the subject has undergone significant transformation, it nonetheless remains unrecognised within the Nigerian legal system in spite of prevailing circumstances warranting its relevance. However, the word restitution is not totally alien to many. Restitution comes across to different persons as meaning different things. Restitution to some is synonymous with the teachings in the Bible. It emanates from the need to be just, to make things right and repairing a wrong done.[2] According to the King James version of the Bible, for example, it states:

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[1] Peter W Davies, 'Restitution: Concept and Terms: Introduction and Historical Background' [1968] (19) (4) *Hastings Law Journal*, 1167.

[2] I O Adesanya, 'Misinterpretation of Biblical Concept of Restitution as Violence Against the African Woman' [2010] (2) *Journal of Arts and Contemporary Society*, 91.

> *In every case in which an ox, donkey, sheep, clothing or anything else is lost, and the owner believes he has found it in the possession of someone else who denies it, both parties to the dispute shall come before God for a decision and the one God declares guilty shall pay double the other.*[3]

To some others, restitution brings memories of the period immediately after the colonial rule in Africa where demands for reparation were made by the colonized for past injuries suffered in the hands of the colonialists.[4] Within the Nigerian legal context, it is tucked somewhere under the law of contract having to do with implied contract or quasi-contract structure. To the ordinary person, it may mean the taking over of ill-gotten wealth and ensuring that such is returned to the original owner. As a normative body of laws, how then can the law of restitution be defined?

Virgo in his book[5] states that the law of restitution is about the award of a generic group of remedies having the common function of depriving the defendant of a gain rather than compensating a claimant for loss suffered. Burrows[6] is of the view that restitution is the law concerned with reversing a defendant's unjust enrichment derived at the claimant's expense. He states that the underpinning principle is the reversal of unjust enrichment. Goff and Jones[7]state that it is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment. Lastly, the position of the Restatement of the Law of Restitution[8] provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other.

Despite the manner or context in which the law of restitution has been defined above, one thing is certain; all the definitions point to the fact that a defendant is not allowed to retain a gain or a benefit which he has not rightly derived at the claimant's expense.

With the background as stated, the aim of this paper is to introduce readers to this subject and expose them to controversies associated with it. The paper examines the various contributions made by renowned authors and case law involvement which have for years attempted to redress prevalent controversies associated with the subject; the main question being whether or not unjust enrichment is the only cause of action that gives rise to a restitutionary response. The above is done with the hope of drawing the interest of readers to the subject towards legal scholarship within the Nigerian legal system.

1.1 Restititionary Response.

Whether unjust enrichment is the only cause of action that gives rise to a restitutionary response remains a controversial issue in the subject of the law of restitution. A good number of commentators discuss this issue, even where sometimes, this is not the thrust of their works. Despite this, there is still no clear view in sight.

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[3] Exodus 22:9 TLB. See also Leviticus 6:2-5 TLB as well as Number 5:5-7 NIV.
[4] Festus Emiri, *Law of Restitution in Nigeria*, (Malthouse Press 2013) 1.
[5] *The Principles of the Law of Restitution* (2nd edn, OUP 2006)
[6] *The Law of Restitution* (2nd edn, OUP, 2002) 1.
[7] *The Law of Restitution*. (6th edn, Sweet and Maxwell 2002) 3.
[8] D W Logan, "*Restatement on Restitution": American Law Institute* [1937] (2) (2) 153.

However, it is not in doubt that a restitutionary response is the reaction resulting from the deprivation of a gain found in the hands of the defendant that was derived at the claimant's expense. The gain derived by the defendant is an enrichment which is unjust, and it is the unjustness of such a gain that the law of restitution frowns against. The defendant is then required to dispense of such gain as he is not rightly entitled to it. Thus, where it is established that the defendant has wrongly derived a gain from the claimant, and it is proven that the defendant has been enriched as a result of that gain, he has a right to seek restitutionary reliefs by bringing a restitutionary action against the defendant[9].

Orthodox learning[10] about the law of restitution suggests that there is only one principle on which it is dependent and that is the principle of unjust enrichment.[11] This proposition is backed by judicial authority as far back as in the case of *Moses v Macferlan*[12] followed by the case of *Fibrosa Spolka Akicynja v Fairburn Lawson Combe Barbour ltd*[13]and even in much later decided cases of *Lipkin Gorman v Karpnale*[14] and *Woolwich Equitable Building Society v IRC*[15]. These proponents are referred to as quadrationists. Conversely, there are other authors who hold the view that unjust enrichment is not the only cause but one of the causes giving rise to a restitutionary response. These proponents are referred to as the 'non-quadrationists' or 'multi-causalists'. This discussion shall commence with the arguments of the quadrationists.

2.0 Quadrationists.

2.1 Andrew Burrows.

Andrew Burrows is a renowned scholar of the quadrationist school of thought, who holds the view that the law of restitution equals the principles of reversing the defendant's unjust enrichment. In his book,[16] he illustrates the view of the law of restitution and the principle of the reversal of unjust enrichment as being two sides of the same coin. Burrows describes the law of restitution as having a central divide between unjust enrichment by subtraction and unjust enrichment by wrongdoing and that this division is marked by two meanings of 'at the expense of' the claimant, that is, 'by subtraction from' and by 'wrongdoing to'. He says that the divide is one between where unjust enrichment is the cause of action or event to which restitution responds and where a wrong is the cause of action or event to which restitution responds.[17] Further defending his position, Burrows points out in his article,[18] under what he labels as 'the conventional picture',[19] that it can be seen that the principle against unjust enrichment underpins both the cause of action in unjust enrichment and the response of restitutionary wrongs. He denies the law of restitution as one that has ever been

[9] This does not prevent the claimant from bringing an action in other related claims.
[10] Virgo (n 5).
[11] Burrows (n 6) and Goff and Jones (n 7).
[12] [1776] 2 Burr, 1005, 1012.
[13] [1943] AC 32, 61.
[14] [1991] 2 Ac 458. Per Lord Bridge at p 558; Lord Templeman at p 559 and Lord Goff at p 578.
[15] [1993] AC 70, 197 per Lord Brown-Wilkinson.
[16] *Ibid* (n 6).
[17] He attributed this to Birk's former work in his book: *Introduction to the Law of Restitution* (OUP 1985) 26, 44-65.
[18] 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle' [2000] (8) RLR 257, 258.
[19] *Ibid* p 258.

seen as concerned with the enforcement of promises but rather as a response imposed by law irrespective of the consent or promise of the defendant.

He agrees with restitutionary proprietary claims falling within the law of restitution,[20]but denies that vindication claims are seen as part of the law of restitution. This was however a departure from the first edition of his book[21] where he argued that a vindication claim could be viewed as one resting on unjust enrichment with the unjust factor being a 'retention of the claimant's property without his consent'. His later stand was that a claim is not based on the defendant's unjust enrichment, where the claimant is asserting that the property in the defendant's hand was and is still the claimant's property. In the real sense, the defendant was never enriched and the return of the property simply dwells on the existing ownership of the claimant.[22] On this same issue, he takes the stand of Goff and Jones, and Birks' which happens to be the latter's former position in respect of their belief that there exists a relationship between the law of restitution and property law, that is, the law of restitution as it relates to the principles against unjust enrichment as concerned only with propriety rights created in response to unjust enrichment. Burrows adds here that the claim in *Macmillan Inc v Bishop Inv. Trust Plc. (N0. 3)*[23] would have been a straightforward one only if the above reasoning, that is, treating it as a purely propriety claim had been applied to it.

On the issue of restitution for wrongs, he agrees with some other commentators[24] that the cause of action in restitution for a wrong is the wrong itself and not the wrongful enrichment.[25] He admits in his article that there are no wrongs that are actionable only on proof of enrichment. However, in disagreeing with the non-quadrationist approach, he puts forward an analysis on the work of Virgo and the later work of Birks and upon this analysis, he raises his objections to the non-quadrationists' thesis. He labels this 'The New Approach'.[26]

In stating this analysis, he presents the view of the rival commentators (non-quadrationists), stating their position thus - that the law of restitution is one concerned with the response of restitution to different causes of action which consists of not only unjust enrichment and wrongs, but also consent; promises[27] and vindication of proprietary rights.[28] That, the law of unjust enrichment is the law concerning the cause of action of unjust enrichment and that according to Birks therefore, the real subject is the law of unjust enrichment; on the other hand, Virgo reaches the opposite conclusion that the actual subject matter is the law concerning the response to restitution. As a result of this divergence, he raises the following objections.

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[20] As it was under the conventional picture, that is, the position taken by Goff and Jones and Birks, before his change of mind.
[21] A Burrows, *The Law of Restitution* (1993) Ch. 18.
[22] *Ibid*.
[23] [1996] WLR 387; Burrows, *Quadrating Restitution* (n 18) 259.
[24] Birks (n 17) and Virgo (n 7).
[25] Burrows (n 18).
[26] Peter Birks, *Misnomer, in W R Cornish and others* (eds), *Restitution: Past, Present and Future*(Hart Publishing 1998).
[27] See Virgo, (n 7).
[28] See *My Kinda Town Ltd v Soll* [1982] FSR 147, 156.

Firstly, that this new approach leads to the abandonment of the usual language commonly used in the subject as well as its adoption by the courts. He refers to a number of cases illustrating his argument.[29]

Secondly, Burrows counters Birks' argument where he (Birks) advocates that the primary purpose of classification into categories is to help ensure that like cases be treated alike. He claims that the following proposition would lead to the argument that there is a closer affinity between restitution for wrongs and compensation for wrongs, and that in particular, a number of central questions exist common to both restitution for wrongs and unjust enrichment by subtraction but are not relevant to compensation for wrongs.[30]

On the third exception, he raises the point to the effect that it may not be right to deal with the measure of restitution between two parts of the divide, that is, unjust enrichment by subtraction and unjust enrichment by wrongdoing, as being closer than conventionally thought. Burrows did not think it right to say that there is always a correlation of loss and gain in unjust enrichment by subtraction like is the case with unjust enrichment by wrongdoing.

Finally, he objects that this new approach abandons the conventional approach which categorizes restitution law as being principle-based. He states that this new approach has now categorized it either as event-based or based on a cause of action. Similarly, he expresses displeasure with the fact that the new approach equally excluded promissory restitution and pure proprietary claims as these were corroborated by principle other than that against unjust enrichment.

In support of his principle-based analogy, Burrows finds support in the work of Seavey and Scott[31] and Goff and Jones[32] and states that the new approach by Birks and Virgo represent a significant departure from the restitution movement,[33] representing a break in the history of the subject to date and are no longer in conformity with what the Anglo-American world originally intended the subject to be.

2.2 Goff and Jones.

Goff and Jones, the founding fathers of the first textbook on the law of restitution, also belong to the quadrationist school. The fact that they belong to the quadrationist school can be inferred from the opening paragraph of their book where they refer to the law of restitution as the law referring to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment. Incidentally, Lord Goff was a former British Judge and law lord and has no doubt, made immense contributions to the subject (though not having particularly contributed to the controversial issues at hand). It is therefore no wonder that the book which he wrote with Gareth Jones is a widely recognized authority on the subject. In their book,[34] Goff and Jones state the need for a system of law to adopt the law of restitution as it is a means whereby benefits are made to be

[29] See *Dart Industries Incorporated v Décor Corp Pty Ltd* [1993] 179 CLR 101, 111.The American case of *Edwards v Lee's Administration* [1936] 96 SW 2 1028, 1031 and the Canadian case of *Lac Minerals v International Corona Resource Ltd* [1989] 61 DLR (14) 145amongst others.
[30] 'Quadrating Restitution and Unjust Enrichment' (n 18) 263-266.
[31] 'Restitution', [1938] 54 (LQR) 29, 31-32.
[32] *The Law of Restitution* (n 7) 16.
[33] A Burrows, *The Law of Restitution*, (2nd edn OUP, 2002) 13
[34] *The Law of Restitution* (6th edn Sweet and Maxwell 2002) 13

restored by a person who has been unjustly enriched. They give examples of the many instances where a defendant should restore a benefit he has unjustly received from a claimant. They then proceed in defining unjust enrichment as 'the name which is given to the principle of justice that the law recognizes and gives effect to in a wide variety of claims of this kind'.[35] They accept the notion of the principles of unjust enrichment as being too vague to be of any practical value and also being incapable of any precise definition. They state that it would be an effortless pursuit in trying to find a precise 'common formula' at this level but prevail on persons to focus their minds toward perceiving the law from a philosophical angle in a bid to arrive at justice describing the foregoing as being 'both an aspiration and a standard for judgment'. In other words, we should not be mainly concerned with what the subject is called but focus more on the substance of the subject. They cite the case of *Moses v Macferlan*[36] as the first case to infer the existence of the subject. They also discuss the difficulties faced before the law was finally accepted. In respect of this, they cite the cases of *Woolwich Equitable*[37] (where Lord Goff himself rightly predicted the continual growth of the subject), *Lipkin Gorman case*[38] and the more recent case of *West Deuche Landesbank Girozentrale v Islington LBC*[39], etc.

Furthermore, Goff and Jones admits that as in other branches of law, recourse must be given to decided cases in the law of restitution in order to mould general principles into stabilized rules of law. They do not deny the fact that the principle of unjust enrichment is capable of elaboration and refinement[40] if it must attain the height of its counterpart subjects.

The duo appear not to want to categorically dabble into the controversy surrounding the quadration issue but rather to develop the subject.

3.0 The Non-Quadrationist/Multi-causalist Approach.

3.1 Peter Birks.

Peter Birks was another renowned scholar and a former teacher to a leading author on the law of restitution, Andrew Burrows.[41] Peter Birks was one of forerunners in the development of the subject. The omission of the mention of Birks' contribution to the law of restitution would render this paper incomplete. This is because of his shift, almost a decade after he wrote the revised edition of his book,[42] from the quadrationist view to the non-quadrationist view. This is found in his work which he titled 'Misnomer'.[43] In that article, he categorically withdrew his former position by stating that the quadration of unjust enrichment and restitution is not naturally perfect and that such statement was a recantation of his own teaching. He argues that the perfect quadration principle is narrow and artificial and tries to show that a number of intellectual traps are hidden in such artificiality.

[35] *Ibid* 14.
[36] (n 12).
[37] (n 15).
[38] (n 14).
[39] [1996] AC 669.
[40] See Goff and Jones (n 7) 17.
[41] Burrows *The Law of Restitution* (n 23).
[42] *The Introduction to the Law of Restitution,* (n 17) 26, 44-5.
[43] See *Misnomer, in W R Cornish and others* (eds), *Restitution: Past, Present and Future* (n 26).

In justifying his reasons for adopting the non-quadrationist approach, he objects that the response-oriented name is 'misleading' and 'taxonomically inelegant'. He refers to Lord Wright's speech in *Akcynjna case*[44] on unjust enrichment and argues that in shifting the focus from one of responses to one of causative events makes it obvious that the distinguishing feature of restitution from all other principles of law, is the fact that the cause of action is an unjust enrichment at the claimant's expense; and has not necessarily got to do with restitutionary responses. In other words, that unjust enrichment often focuses on the event which triggers restitution and not on the measure or mode of restitution which is triggered.

On the second point, he refers to the Restatement on the Law of Restitution[45] and pointed out its aim which was to document the cause of action. He argues that by virtue of the provision in Art. 1 of the Restatement, that if the emphasis is laid on the event, and not on the response and, that if the series of the subject was that of which contract and wrongs formed the most familiar components, why then was the restatement not tagged the 'Restatement of Unjust Enrichment' as opposed to 'Restatement of Restitution'.[46]

Lastly, he asserts that it is incorrect to give the subject (restitution) a name which is a response to it rather than from the event itself.

Carrying further his justification, he posits that there is a stranger reason for adopting the nomenclature in which the event explicitly prevails over the response. He explains that a perfect quadration of both is by an artificial imposition on the restricted meaning of 'restitution' and then asserts that restitution means only that 'yielding up' as is precipitated by unjust enrichment.

Though it is common to find such artificially in law, he points out the dangers in so doing; and if it must be done, there must be compelling reasons to justify the attempt, but that apparently, none exists. This leads to his proposition that unjust enrichment triggers restitution, but restitution is triggered by other events other than the analytically distinct event of unjust enrichment; meaning that it will never be certain that a restitutionary claim does not indeed arise from unjust enrichment unless we decline from infringing on the line between the natural and artificial meanings and resolve never to use 'restitution' except in its artificially restricted sense.[47]

He advances his argument by moving on to the classification of rights by reference to their causative events. He states that all rights, whether personal or in rem arise from events and that the causative events can be divided into four, namely: consent, wrongs, unjust enrichment and (miscellaneous) other events, which are the factual basis of liability. He states that it is possible for a claimant to have two causes of action yielding from a single event, for example, where undue influence is perpetrated upon a claimant by the defendant extorting money from the claimant. The claimant has a choice either to bring the cause of action in unjust enrichment to recover the claim made by the claimant or a cause of action in Tort, as having suffered a wrong but cannot bring both whether simultaneously or concurrently. He cannot benefit both ways. The discussion of Birks 'causative events' shall now be discussed.

[44] (n 13).
[45] (n 8).
[46] Though there is evidence to show that the reporters were not comfortable with naming it the latter.
[47] See *Misnomer* (n 26).

3.1.1 Consent.

According to Birks, a contractual right can both be contractual and restitutionary in its purpose and effect. So also, can a gift possess restitutionary flavour. Money may sometimes be given back when there is no obligation that it should be returned[48] and that based on the fact that an uncompelled repayment is restitutionary (which does not arise from unjust enrichment).Therefore, there is an inference that restitution can be based on consent. He posits that there exist contracts to make restitution, for example, contracts made on the condition that money would be handed over in the event that a doubt is resolved against a recipient. Such contracts may be express or implied. This has to do with the primary obligations under the contract and not those arising from the wrong of the breach of contract.

He says that rescission which happens to be a remedy under a contract awarded where a party can recover his money if dissatisfied with the goods or services rendered to him, is a basis for a restitutionary award; that 'rescission' is a specialized synonym for restitution.

Finally, on consent, he says that the category of consent falls within the concept of resulting trust which operates in such a way that where certain benefits are intended for the use of the recipient, but for one reason for the other, the purpose is not achieved, such benefits should automatically revert to the donor. It is this reversion that Birks refers to as being restitutionary.

The point Birks tries to make on consent is that it arises out of contractual obligations which may ultimately give rise to restitution, may be, due to failure of the object of the contract.

3.1.2 Wrongs.

Birks raises two issues on wrongs as a causative event.

* The relationship between restitution and compensation; and
* That restitution ought never to be made as a gain-based award for wrongs.

He identifies a problem associated with the use of both words (restitution and compensation) as the duplication of one to mean the other, when in reality, they have entirely different meanings which is that while the former is used in describing gain-based awards, the latter describes loss-based awards.[49]

He expresses fear that there is real danger involved where the words are used interchangeably which could lead to the incorrect assumption that every set of facts which give rise to restitution will justify an award of compensation.

On the second issue, he talks on restitution and disgorgement and discusses the use of restitution to denote gain-based awards for wrongs as opposed to unjust enrichment. He disagrees with Dr. Smith's analysis[50] that no clarity will be achieved till gain-based awards for wrongs are put in the language of disgorgement, since in his view, restitution is only appropriate when something has to be given back while in cases of gain-based award for wrongs, there is only a giving up, as profits

[48] *Woolwich Equitable* case (n 15).
[49] He uses *Swindle v Harrison* [1997] 4 ALL ER 705 (per Evans LJ at p. 714) to explain the confusion.
[50] 'The Province of the Law of Restitution' [1992] (71) CBR, 672.

would have come from third parties. Birks says that Smith's argument would only further advance the restoration and securement of the quadration between unjust enrichment and restitution. That reason would only succeed in disrupting a usage which is barley trying to find its footing.[51]He says 'disgorgement damages' is a term unheard of and besides, it is not clear that restitution must naturally be giving back and not giving up. Similarly, that it is not every time restitution for wrongs will involve a giving up rather than a giving back and that following such a line of argument would tend to obscure the line between restitution and disgorgement creating worse confusion. He cites *Macferlan*,[52] stating that it is less artificial to say that Moses wanted restitution for wrongs and not for unjust enrichment, instead of saying that he wanted disgorgement.

3.1.2.1 Wrongs as a Causative Event.

According to Birks, he explains where a claimant relies on a wrong perpetrated on him, it follows that the causative event upon which he is relying is the wrong, not the unjust enrichment. Furthermore, when the connecting factor between the claimant and the enrichment, which the claimant seeks to recover is a wrong, then, the phrase 'at the expense of the claimant' means 'wrongdoing to the claimant'. In such instance, the cause of action is the wrong itself.[53] Thus his reason for grouping 'restitution for wrongs' as well as any inquiry as to gain-based awards, under the category of wrongs in his series of causative events.

3.1.2.2 Proprietary Rights Affecting Restitution for Wrongs.

In Birks' opinion, in the same way that a personal restitutionary right can arise from wrongs, so also can proprietary restitutionary rights. Proprietary rights can be restitutionary in purpose and effect and originate in a wrong. Being a proprietary right does not preclude it from arising out of unjust enrichment. Rights must respond to events. Though a restitutionary proprietary right can arise from unjust enrichment, so also can it arise from a wrong. He further posits that a response which takes the form of a proprietary right, has such proprietary right belonging to the law of wrongs (though ordinarily, it belongs to the law of property because that is the law of all proprietary rights). However, in a classification by causative events, it belongs under wrongs. He says a given right could operate as being proprietary, restitutionary, and wrong-based. He relies on the case of *A-G of Hong Kong v Reid*[54] and explains that the connection between the Hong Kong government and the bribes taken by Reid was that they had been obtained by a wrong, that is, by Reid's breach of duty. In other words, he was enriched at the employer's expense only in the 'wrong' sense of 'at the expense of'. The government had restitutionary right, and the purpose and effect therein was a proprietary right being a right in rem.

He buttresses the fact as to why wrongs have been failed to be seen as causative events as being because people have begun to term unjust enrichment as wrongs and for as long as this continues, liabilities (which unjust enrichment can neither explain nor support), may be attracted.

[51] See 'Misnomer' (n 26) 13.
[52] (n 12).
[53] Birks, 'Introduction to the Law of Restitution' (n 17) 321-316.
[54] [1994] 1 AC 324.

3.1.3 Unjust Enrichment as a Causative Event.

According to Birks, he says unjust enrichment includes all events that are materially of a similar nature to the receipt of a mistaken payment of a non-existent debt. That the defendant is enriched at the claimant's expense and there is a reason why the defendant should return such enrichment to the claimant.[55] He uses the case of *Kelly v Solari*[56] as an illustration, where insurance money was erroneously paid to a widow, who refused to give it up on discovery.

3.1.4 (Miscellaneous) Other Events.

Difficulties arising from cases like *Macmillan*[57] led Birks into establishing a fourth category which he calls (miscellaneous) other events. These are cases that do not fit into the previous three categories[58].

In this category, he includes instances of which obligations may arise to pay a salvor for saving a ship or cargo etc. He says the miscellaneous is an important category and that it should not be the case that every causative event must necessarily fit into one of the other three categories.[59]That no single generis description can capture the entire causative event within them.

By way of conclusion, he submits that restitution, though occasionally arises from unjust enrichment, it can also arise from one of consent, wrongs and miscellaneous other events. He further submits that at the core is still the identification and analysis of unjust enrichment which is an independent member of the series of causative events. For those reasons given by him, he holds that unjust enrichment cannot quadrate with the law of restitution: that it is a distinctive causative event; and restitution, a multi-causal response.[60]

3.2 Graham Virgo

Virgo's book[61] has attained recognition on a large scale amongst restitution scholars as well as judges. This is due to the different manners of approach in which he treats the subject, making his work distinct. He, like Birks, belongs to the multi-causalist school of thought.

In his book, he opines that quadrating the law of restitution with the reversal of the defendant's unjust enrichment is too simplistic an interpretation, and moreover, it does not mirror the correct scope of the law of restitution regardless of the fact that the definition has been recognized by the House of Lords.[62] He says rather than stating that the law of restitution is founded on the reversal of the unjust enrichment principle, that the true reflection given by case law is that it is founded upon three principles, namely: The reversal of unjust enrichment; prevention of a wrongdoer from benefiting from his wrong; and the vindication of property rights with which a defendant interferes[63]. In supporting his classification, he states that the awards of restitutionary remedies

[55] Birks, *Unjust Enrichment,* 2nd edn (OUP, 2003) 20.
[56] 152 ER 24.
[57] (n 23).
[58] 'Misnomer' (n 26) p 21 for general discussions on other events.
[59] Birks, *Unjust Enrichment* (n 55) 21.
[60] *Ibid* pt. 1.
[61] The Principles on the Law of Restitution (n 7).
[62] *Ibid* 7.
[63] *Ibid* 8.

depend on vastly different considerations, all depending on which principle it is that the claimant seeks to rely upon.

On reversal of unjust enrichment, he describes it as the most important of the three as majority of decided cases, where restitutionary reliefs are awarded fall under this head. He classifies unjust enrichment into two categories, namely: the descriptive sense; and the substantive sense and says that it is the failure to recognise this division that is responsible for the belief that the law of restitution quadrates with the reversal of unjust enrichment.

He describes the descriptive sense as the basis for the whole of the law of restitution[64] and the substantive sense as basically a means of determining when restitutionary remedies would be available which is determinant on four factors, namely: (i) The defendant having received an enrichment; (ii) the enrichment having been received at the claimant's expense; (iii) the receipt of the enrichment being unjust; and (iv) the defendant having no defence to the claim.[65]

On deprivation of benefits from a wrongdoer, he analyses this under two sub-topics; 'The nature of restitutionary wrongs' where a claimant may be able to claim a restitutionary remedy of the value of the benefit, where such benefit is based upon a wrongdoing, like in tort, breach of contract, commission of equitable wrongs and commission of criminal offences, as it is sufficient to establish that the defendant committed a wrong of the type which is perceived as triggering a restitutionary response against the claimant.[66]

The other, he calls 'the nature of the restitutionary remedy' which is most often personal, but sometimes proprietary though triggered by a wrong. Virgo admits that there might be an overlap between the two, but it is preferable to treat both claims as founded on wrongs, being that it is the wrong that gives rise to the recognition of the claimant's proprietary right. He claims that the underlying factor for the award of restitutionary remedies in cases where a wrong has been committed by a defendant is based on the principle that a wrongdoer should not profit from his wrongdoing. (This does not prevent a claimant upon whom a wrong has been committed from bringing a claim for compensation.) On vindication or property rights interfered with by the defendant, he describes such situation as where a defendant has received the claimant's property in which the claimants has proprietary interest, whether before the time, or as a result of operation of law. The claimant here has a right to a claim in restitution to obtain a remedy seeking to vindicate his proprietary right. According to Virgo, the claim takes two forms.

1. Where the defendant still retains the property, or substituted it for another, the claimant can bring a cause of action by way of proprietary restitutionary remedy to vindicate his continued property right; and

2. Where the property in which the claimant had a proprietary interest received by the defendant is lost, the only remedy available to the claimant in such circumstances, is a personal one where he can sue to claim the value of the property.

[64] Per Lord Clyde in *BanqueFinancière de la Cite v Parc (Battersea) Ltd* [1998] 2 WLR 475 at 488
[65] See Virgo (n 5) 9.
[66] *Ibid*.

However, the claimant can still bring a cause of action to vindicate his property rights, because he can establish that the property in question belonged to him at the time of receipt.

Virgo justifies why there should be awarded a restitutionary remedy in vindicating a claimant's property right relying on the fundamental principle of English law that due to its importance, property rights must be particularly protected. He counters the arguments that propriety restitutionary claim is founded on the principle of unjust enrichment and relies on *Macmillan*[67] as evidence to suggest that unjust enrichment principle does not explain why restitutionary relief is awarded where the claimant's claim is proprietary[68].

Furthermore, Virgo asserts that besides recognising that the above three principles affect the structuring and decision on the law of restitution, there are other existing practical implications[69] namely the effect on (i) pleading; (ii) defences;(iii) Private International Law, etc.

Finally, Virgo submits that the law of restitution would be better understood if we 'emphasize the remedial question and reject the equation between restitution and unjust enrichment'.[70] By so doing, the law of restitution would neither be relegated, nor would the validity of the unjust enrichment principle be displaced as it is seen as the most important principle triggering restitutionary remedies. The principle of unjust enrichment must not be seen to be overworked taking over the duties of other principles.

4.0 Criticisms

Despite all the contributions made by commentators, the issue as to whether unjust enrichment is the only cause of action that gives rise to a restitutionary response remains unresolved. Below are some of the criticisms expressed of the views of different writers as discussed above.

It appears that the most criticized work is that of Birks. This criticism being right from the topic he gives his work where he made the recantation, that is, 'Misnomer'.[71] It has been said that by choosing such a title, he is implying that restitution is a misnomer and that there should not be anything like the 'law of restitution', but rather, the 'law of unjust enrichment' and the 'law of restitution for wrongs'[72]. Similarly, Burrows also criticizes Birks' view that the subject be referred to as unjust enrichment and that the law of restitution for wrongs should have its own separate book. While admitting that Birks' new approach might be justifiable, he is of the view that the law of restitution is still too tender to have the view (that it quadrates with unjust enrichment) dismissed. He states that he foresees dangers that may arise in so doing and this would be of no useful advantage to the subject[73].

[67] *Ibid*.
[68] See Virgo p. 13 *Cp*. Burrows: *Quadrating Restitution and Unjust Enrichment* (n 18) 124.
[69] Cornish et al Restitution, Past, Present and Future, 318.
[70] *Ibid*.
[71] (n 26).
[72] See Cornish. *Ibid* 331.
[73] See Burrows, (n 18) 258.

Also, Birks' work has been described as problematic[74] in the sense that his definition of restitution and unjust enrichment are artificially expansive and artificially constrained[75], and in addition, he carries the scope of responses too far. That Birks' explanation is not only in terms of purposes which they serve but also on the basis of the effects they achieve.

Lastly, that Birks in explaining why contract ought to be a causative event which gives rise to a restitutionary response appears not to be very concise. That Birks dwells more on illustrating situations, but he hardly explains the reason for drawing his conclusions to such illustrations.[76] In the midst of the several criticisms alluded to his work however, it has been expressed that the exercise carried out by Birks in an attempt to disprove that unjust enrichment is the only cause of action giving rise to a restitutionary response is indeed a commendable one. This position was recognised by McInnes[77] where he stated that: 'it would be imprudent to insist that restitutionary rights can never be triggered by a causative event other that autonomous unjust enrichment; there simply are too many possibilities that have yet to be explored'.

This particular commendation by McInnes of Birks' work serve as a criticism to Burrow's view on the law of restitution. His work has been criticized on grounds that his view on the subject is too narrow. This was also admitted by Birks as it was the major reason for his recantation as earlier discussed. Virgo's work is also not left uncriticised. Burrows submits that Virgo's work which cuts across three different principles which give rise to a restitutionary response are not acceptable. He says that the third category (i.e., vindication of property rights) cuts across the first (the reversal of unjust enrichment). His reason for this submission is that it is possible to create property rights to reverse an unjust enrichment in the hands of the defendant. Secondly, Burrows disagrees with Virgo like he does with Birks on the ground that restitution for wrongs should be regarded as a separate cause of action from the principle of unjust enrichment. In further criticism to Virgo's work, Burrows points out that in spite of the fact that Virgo is anti-quadrationist like Birks, they both do not arrive at the same conclusions.[78] He concludes that Birks and Virgo are more concerned with the form the subject should take in terms of neatness and elegance rather than perceiving the subject as another development in the laws of obligation like the already existing laws of contact and tort.

Another critique of Virgo is Swaddling. In his work,[79]he accuses Virgo of four categorical errors, namely:

1. That Virgo's classificatory scheme is problematic due to its overlapping nature[80];
2. That Virgo's classification by event and classification by response are alternatives, Virgo's conflation of both by stating that a law of event exists independently of a law of responses to the events, leads him to another categorical error.

[74] See McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadration Thesis'. [1999] (7) RLR. 118.
[75] *Ibid* 119.
[76] See Peter Birks, *Misnomer, in W R Cornish and others* (eds), *Restitution: Past, Present and Future (n 26).*
[77] (n 73).
[78] Burrows, *The Law of Restitution*, (n 18) 6-7.
[79] See 'Misnomer' (n 26).
[80] As also identified by Burrows.

3. That his failure in further dividing his response category into creation of rights in personam and the creation rights in rem amounts to his third error.
4. Lastly, that his submission as regards the distinctness of the law of unjust enrichment and the law of property is his fourth categorical error.

In conclusion, Swaddling submits that Virgo has succeeded in establishing that there exists the law of the response to restitution rather than the subject called 'the law of restitution, which is separate from the law of events which give rise to that response[81]. He says Virgo's approach would not aid in achieving the correct understanding of the subject. Despite the criticism by Swaddling, he admits that Virgo has rightly pointed out the need for differentiating between restitution and unjust enrichment except that that he has overstretched his approach.

5.0 Conclusion

This paper examined the view of several authors in the area of the law of restitution and their attempts at justifying the importance of the subject as a separate branch of law, particularly away from contract and tort laws. Moral instincts dictate that a defendant is obligated to give up gains derived at the expense of a claimant, thus making it desirable to have a distinct set of legal principles to become enforceable on breach. Learned authors and judges have for decades, grappled to reach a common ground on acceptable guiding principles in relation to the subject. Rather, the haziness persists, and the question remains - is unjust enrichment isthe only cause of action that can give rise to a restitutionary response?

[81] See Swadling, p. 337.