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“Would you tell me, please, which way I ought to go from here?"
"That depends a good deal on where you want to get to," said the Cat
"I don't much care where –" said Alice.
"Then it doesn't matter which way you walk.”[1]

1. Introduction

Legal systems, essential transactional costs of functioning society,[2] deem some *de facto* transfers of wealth unsustainable. And rightly so, thereby fulfilling one of its aims: To protect individuals from their assets being reduced in *contra legem* manner.

Ways of apprehending such a reduction vary considerably throughout the Europe[3] and authors of the Czech New Civil Code (hereinafter the ‘NCC’[4]) decided that by then contemporary Czech regulation of unjust enrichment needed revision. However, even though the explanatory report (hereinafter the ‘Report’[5]) would imply only slight diversion in the values of the absence of basis approach, provisions of the NCC are actually likely to result in a different approach whatsoever, one eminently closer to the English regulation. This will be discussed within this paper.

Moreover, I will cover the current and much lively English discourse, both judicial and academic, and will point out its intersections with the NCC proving that the Czech regulation averted from what the English law would describe as the absence of basis approach.

I will also compare the two approaches, the unjust factors approach and the absence of basis approach, and will identify which is to be recommended. The comparison will be carried out on examples of English case-law and academic articles, for both judges and academics cannot entirely agree which of these approaches is to be applied, the confusion hence resulting in both the approaches sometimes being used

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[1] Lewis Carrol, *Alice's Adventures in Wonderland* (Macmillan 1995) 89.
[2] Francesco Parisi, ‘Coase Theorem’ [2007] Research Paper No. 07-12 Minnesota Legal Studies Research Paper Series <http://ssrn.com/abstract=981282> accessed 18 December 2012.
3 Luboš Tichý, ‘Bezdůvodné obohacení, základní pojmy a návrh občanského zákoníku’ [2011] Bulletin Advokacie 5/2011 15
[4] Act No. 89/2012 Coll., the Civil Code, Czech Republic
[5] Explanatory Report to the NCC (n4), consolidated version <http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova-zprava-NOZ-konsolidovana-verze.pdf> s 2991 and following, accessed 28 February 2013

within the legal system at the same time, which gives one a great opportunity for comparison and evaluation of both solutions. It will be argued that the way which one 'ought to go from here' mainly depends on where one goes as well as where one is, and that only one of the examined approaches delivers the results required by principles of the legal system.

2. Existence of the Law of Unjust Enrichment within the English System

In English private law there are two most often used tools how to deal with the aforementioned *contra legem* transfers - liability for wrongs and liability for breach of contract nevertheless, it has appeared recently that there is a considerable mass of case-law which cannot be easily, nor indeed consistently with logic[6] (eg the implied contract theory followed in *Sinclair v Brougham*[7]), interpreted within (and subsumed under) the boundaries of either law of wrongs or law of contracts. Therefore, since one could not sustain the bipolar arrangement of the system, one needed to either resign for his efforts entirely, or admit existence[8] of a different logical structure ('find the scheme'[9]).

In occurrence of certain unjust situations the English legal system reverts a transaction and requires the parties to return the benefit of the transaction, the whole procedure being underlined with a simple and general principle 'a person who has been unjustly enriched at the expense of another is required to make restitution of another'[10], a principle in Virgos[11] view expressed as soon as in *Moses v Macferlan*[12] or in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[13].

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[6] Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 4 All ER 890;
[1996] AC 669 (HL) (Lord Browne-Wilkison). Burrows states implicit rejection can be found in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 in Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2010) 27.
[7] [1914] AC 398.
[8] Contra *Orakpo v Manson Investments Ltd* [1978] AC 95 (Diplock LJ).
[9] Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Claredon 1985) vii.
[10] Gareth Jones (ed), *Goff and Jones: The Law of Restitution* (7th edn, Sweet & Maxwell 2007) para 1-013 citing Restatement of the Law Third: Restitution, *Council Draft No 1* (November 19, 1999).
[11] Graham Virgo, *The Principles of the Law of Restitution* (Oxford Claredon Press 1999) 5.

Different approach is, however, being proposed under the influence of the principle that when there is invalid transaction, restitution is required without further justification.

3. Overview of the Current Discourse

The English legal academic discourse currently considers two main[14] interpretational approaches: the unjust factors approach and the absence of basis approach. Both coincidentally proposed by the fields leading academic late professor Birks.[15]

3.1. The Unjust Factors Approach

This approach, generally known as the unjust enrichment approach[16] currently applied by the common law courts, and as will be discussed later the NCC as well, seeks to prevent the defendant 'from retaining (...) the benefit derived from another which it is against conscience that he should keep', principle stated in *Fibrosa*[17] and after discussions invoked by the 'path-breaking'[18] text-book Goff and Jones, finally forged into English legal system by decision in *Lipkin Gorman*[19].

To identify the situation in which this doctrine is to be applied Birks constructed a five-question analysis regarding defendants enrichment, relevant claimants expense, unjust factor, claimants rights and existence of defences.[20] Only when the transfer of

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[12] [1760] 2 Burr 1005.
[13] [1943] AC 32.
[14] For general overview of competing theories of reverting unjust enrichment see Burrows, *The Law of Restitution* (n 6) ch 2.
[15] Cf Birks, *An Introduction to the Law of Restitution* (n 9) with Peter Birks, *Unjust Enrichment* (2nd edn, OUP, 2005). For the background see also Rose Francis, 'Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 13. For overview of the development in the theory see also Steven Hedley, 'Restitution: Contract's Twin' in Francis Rose, *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Oxford: Hart 1997) 247.
[16] For discussion on taxonomy see Peter Birks, 'Misnomer' in Gareth H. Jones, William Rodolph Cornish (eds): Restitution Past, Present and Future: Essays in Honour of Gareth Jones (Hart Publishing, 1998) 1; Andrew Tettenborn, 'Misnomer – a Response to Professor Birks' in Gareth H. Jones, William Rodolph Cornish (eds): Restitution Past, Present and Future: Essays in Honour of Gareth Jones (Hart Publishing, 1998) 1; Jones (n 10) footnote 1.
[17] *Fibrosa* (n 13).
Birks, *Unjust Enrichment* (n12) 4.
[19] Lipkin Gorman (n 6).
[20] Birks, An Introduction to the Law of Restitution (n 9) 39.

wealth fulfils thereby stated criteria, the right for restitution shall be granted. These questions are similar to what Czech courts will need to ask from 1.1.2014 onwards.

This paper uses the term unjust factors approach to distinguish the approach itself, which deals with the unjust enrichment, from the situation of enrichment which is considered unjust.

3.2. The Absence of Basis Approach

This approach states that no benefit can be retained, had it the defendant gained without a *legal basis*, in Jones' words the approach asks 'if there is any (...) explanation (...)why the recipient should be allowed to retain what he has received'.[21] Such attitude evokes the civilian concept of *sine causa* doctrine, one upheld by the Czech regulation in the old Civil Code, however the hereby discussed approach was 'formulated by Birks specifically for English law',[22] and based on case law to prevent structural discrepancies possibly occurring by simply implanting the civilian doctrine into common law system. This doctrine, even though tailored for English law similar to the old Czech approach towards the unjust (or unjustifiable) enrichment, is therefore also denoted as the New Birksian Approach.[23]

4. Regarding the NCC Regulation

Firstly, the conclusions which could be made out of the Report can be more than ambiguous. Apart from a historical overview of the development, the issue of the ultimate principle test (as set out in chapter 7) is not discussed whatsoever and the legislator does not explain why he opted for the proposed solution, moreover he outrageously limits his explanation for laconic fraction stating that "sometimes lack of basis does not necessary implies unjust enrichment". Based on the Report one simply cannot identify the huge leap which has been legislated for.

[21] Jones, Goff and Jones: The Law of Restitution (n 10) para 1-016, footnote 5.
[22] Burrows, The Law of Restitution (n 6) 99.
[23] Andrew Burrows, Kit Barker, William Swadling et al: 'The New Birksian Approach to Unjust Enrichment' [2004] LRL 260; Burrows, Rodger (n 15); Burrows, *The Law of Restitution* (n 6).

This, one could say legislator's laziness, will cause severe risk for the new concept and its application. It is likely that the courts will tend to explain lack of basis in a transaction automatically as a trigger of restitution.

This is not, however, what the NCC states. Section 2991, ss. 2 lists what can constitutes enrichment, which is amongst others consideration gained without a legal basis. Nevertheless, even though such a situation would be "unreasonable enrichment", it is still not necessarily enrichment, which is unjust and therefor meant to be returned.

There can be, nonetheless, second opinion, for the crucial ss. 2 is expressed rather clumsily and the Report is far away from clear and unambiguous. For this reason, ss. 2 can be seen as a demonstrative list of unjust factors, absence of basis being one of them and thereby automatically implying the necessity to return the enrichment. Outrageously, Petrov without any reasoning or further analysis states that no interpretation can 'lead in the Czech reality to the unjust factors approach applied in common law'.[24] Lacking any arguments for or against this claim, Petrov´s statement must be rejected as insufficient and without any base. Furthermore, he reaches different conclusions in point 6 just above. Moreover, this conclusion would however make the unjust factors approach just a mere illusion in a way which will be explained in chapter 8.

Tichy expresses opinion that using the term 'unjust reason' is a mistake and the legislator should rather opt for 'legal reason', hence effectively preserving the old absence of basis approach. He states that 'unjust reason' (or factor) is supralegal category which will cause severe interpretational difficulties for the courts. Admittedly, true, complications like this are a feature of a newly established, qualitatively superior, paradigm tackling unjust enrichment and will need to be resolved by courts interpretation. Such a fact, however, does not devaluate the new approach.

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[24] Jan Petrov: 'Bezdůvodné obohacení v NOZ: reakce na příspěvek prof. Tichého' [2011] Bulletin Advokacie 5/2011 27; 28

5. Mutual Relation and Comparison of the Approaches in the English System

Since the heroic decision of professor Birks to revoke his life-time efforts and his Kafkian call for burning of all his papers,[25] thorough reviews of the English absence of basis approach were carried out[26] and the academia divided into several camps with different opinions which approach should be preferred.[27] In the process several advantages, as well as disadvantages and possible issues of each approach were identified, so was nevertheless a gamut of differences between the two approaches.

5.1. Advantages of the Absence of Basis Approach

Although the absence of basis approach has been heavily criticised, its advantages are considerable, the crucial one being 'elegance and clarity'[28] or 'logical coherence'[29] and from that quelling an easily identifiable logically constructed system avoiding current 'categorical overlap between the unjust enrichment and the law of "wrongs"'.[30]

By providing single unifying principle (no basis equals restitution) a majority of issues, hitherto integrated in the subject of law of unjust enrichment, needs to be shifted to the relevant area of law (e.g. mistake or duress are questions of free will rather relating to entering into a contract and should be therefore addressed within the ambit of contract law), a result strongly promoted by Hedley[31]. Burrows argues this is just a cosmetic alteration not actually solving anything[32] however, the opportunity

[25] Birks, *Unjust Enrichment* (n15) i.
[26] Burrows, Rodger (n 15); Burrows, *The Law of Restitution* (n 6) ch 5.2; Burrows, Barker, Swadling et al (n 23); Jones (n 10) para 1-016 footnote 5; Thomas Krebs, 'In Defence of Unjust Factors' [2000] Oxford University Comparative Law Forum <http://ouclf.iuscomp.org/articles/krebs.shtml>, ch 6; accessed 19 December 2012.
[27] Duncan Sheehan, 'Unjust Factors or Restitution of Transfers Sine Causa' [2008] Oxford University Comparative Law Forum <http://ouclf.iuscomp.org/articles/sheehan.shtml>, Introduction; accessed 19 December 2012.
[28] Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Burrows, Rodger (n 15) 33.
[29] Thomas Krebs, 'In Defence of Unjust Factors' (n 25).
[30] Barker in Burrows, Barker, Swadling et al (n 23) 263.
[31] Steven Hedley, A *Critical Introduction to Restitution* (Butterworths 2001) ch 1.
[32] Burrows, 'Absence of Basis: The New Birksian Scheme' (n 28) 25.

itself just to consider each issue within a category systematically relevant to it, rather than in one huge all-encompassing category with the unifying criteria for every issue causing injustice, must be praised.[33] *Nota bene*, what is a common feature of difference between open and closed swap cases, mistake, presumption, duress and illegality, which would allow organising internally the current system of unjust factors, other than: It is an unjust factor?

Surprisingly, Birks did not grasp the opportunity to 'go small'[34] and constructed a concept of pyramid, whereby he again 'imperialistically'[35] includes into the doctrine all the unjust factors, but this time, with a new classification of the same, because their common feature is *being a causative event* of absence of basis.[36] This notion is (although admittedly briefly, simplistically and not entirely correctly) dismissed by Burrows[37] for it is inapplicable to key-stone cases such as *Kelly v Solari*[38], *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd*[39] or *Woolwich Equitable Building Soc v IRC* [40].

5.2. Disadvantages of the Same

On the other hand, arguments against implementing the absence of basis approach have been brought up, some of them not entirely relevant or true, such as the need of reinterpretation of all the case-law produced up to then,[41] difficult explicability to non-lawyers,[42] or the law of unjust enrichment becoming a 'residual and secondary category, with agreements and wrongs being the primary classifications'.[43]

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[33] Barker in Burrows, Barker, Swadling et al (n 20) 262-263. On that matter also Hedley, A *Critical Introduction to Restitution* (n 31).
[34] Kit Barker in Burrows, Barker, Swadling et al (n 23) 263.
[35] ibid 263.
[36] Birks, *Unjust Enrichment* (n 15) 116.
[37] Burrows, *The Law of Restitution* (n 6) 113.
[38] [1841] 9M & W 54; [1841] 11 LJ Ex 10; 152 ER 24.
[39] [1980] 1 QB 677.
[40] [1993] AC 70 (CA and HL), [1989] 1 WLR 137.
[41] Jones, Goff and Jones: The Law of Restitution (n 10) para 1-016, footnote 5.
[42] Burrows, 'Absence of Basis: The New Birksian Scheme' (n 28) 47.
[43] Tattenborn in Burrows, Barker, Swadling et al (n 23) 287.

Many arguments, however, pointed out unresolved (and possibly irresolvable) issues of the absence of basis approach in the English law,[44] the biggest of them being extremely wide conception of gift[45] which would otherwise mean the theory failing to explain so called by-benefits[46] (in economic terms *positive externality*).

To sum up the two subchapters, both approaches bring benefits into the legal system; however none can entirely avoid all the problems and therefore one should consider these problems marginal. More importantly, there are essential structural distinctions playing significant role, which eventually provide the necessary data for decision which approach should the law prefer.

6. Essential Structural Differences

Burrows aptly points out the main distinction between the civilian and the common law approach by distinguishing the civilian 'unjust unless' (negative assumption) from the common law 'unjust if' (positive assumption).[47] Due to opposite nature of these assumptions imbedded into core of both approaches, there are at least two indispensable differences: placing of burden of proof and following the principle of liberal legal systems 'lawful, unless prohibited'. In both cases the absence of basis reaches irrational (in case of the former) or principally entirely unacceptable (in case of the latter) results.

6.1. Burden of Proof

The negative approach of the absence of basis theory effectively assumes that transfer is invalid, unless basis exists (which needs to be proven).[48] The positive approach implies validity of the transfer, unless there is a reason (unjust factor which needs to be proven) to say otherwise.

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[44] ibid 278-289; Burrows, 'Absence of Basis: The New Birksian Scheme' (n 28) 46-48.
[45] Burrows, 'Absence of Basis: The New Birksian Scheme' (n 28) 46.
[46] ibid.
[47] Burrows, *The Law of Restitution* (n 6) 95-96.
[48] Sheehan (n 27) ch 1 subch a.

If one follows the principle that burden of proof lies on the claimant (which is requirable, since he is the one who may potentially benefit existence of the fact), one should require, in case of application of absence of basis approach, the claimant to prove non-existence of the basis. Proving non-existence of a fact is, however, effectively impossible, or rather complicated to say the least.[49] The only other solution then (even though not used even in German law[50] – and thereby asking the claimant to prove non-existent fact) is to move the burden of proof on the defendant - an exceptional policy step and an *ultima ratio* tool to be used only in extra-sensitive situations of information asymmetry (such as customer protection in EU law), a step which surely should not be taken in an ordinary economical dispute.

Irrational it though may be, legislator may find reasons - and maybe irresponsibly does more than often - to shift the onus on the defendant in the case of absence of basis; more importantly Burrows notes, 'it could just only be in a very few cases that a difference in the burden of proof(...)would lead to a difference in result'.[51]

6.2. Handling Extra-legal Transactions

There is however, the second entirely unacceptable result of the negative assumption: Dealing with non-prohibited transactions as if they were illegal. The absence of basis approach is based on (and constructed with regards to) the case-law, otherwise the doctrine would be entirely indefensible before the academia. Thus, in majority of crucial cases, by its application we reach the same results - this was proven by Burrows' helpful analysis.[52]

In certain border-line cases however, as will be shown later, the outcome would be different and the only answer left to resolve the conflict would be proposing the case in question as being incorrectly decided.

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[49] Stevens in Burrows, Barker, Swadling et al (n 23) 272.
[50] Thomas Krebs, 'In Defence of Unjust Factors' (n 26) ch 1 subch 2.
[51] Burrows, 'Absence of Basis: The New Birksian Scheme' (n 28) 45.
[52] Burrows, *The Law of Restitution* (n 6) 101-108.

For this reason, one needs to ask two further questions. What is the corner-stone principle of the private law? (ie where one is and where he goes) and does the outcome after the relevant approach is applied, fall within the scope of the principle in the first question? (ie where one ended up).

7. The Ultimate Principle Test

Since both approaches are based on the same case-law of the same legal system, the answer to the first question must be the same for both. The corner-stone of principle of the private law in every free (liberal) country is the axiomatic statement *everything which is not forbidden is allowed* (hereafter the ultimate principle).

Only unjust factors approach, however, passes the test set out in the second question. There are two essential cases pointed out by Burrows[53] which need to be scrutinised to answer to the second question. In *CTN Cash and Carry Ltd v Gallaher*[54] a buyer paid a non-existing debt under the supplier´s legitimate pressure consisting of the (lawful) threat to stop the buyer´s credit facilities in the future dealings. The supplier was acting bona fide believing the debt existed. The transfer concerned was a transfer with no basis (there was no debt), nevertheless the court decided the defendant shall keep the enrichment - there was no other reason (unjust factor) for the defendant to return the benefit other than it was an extra-legal (but if we subscribe to the ultimate principle, not illegal) transfer unknown to the law.[55] Were the absence of basis approach to be applied, the benefit would have been needed to be returned.[56]

Reverse situation occurred in *Deutche Morgan Grenfell v IRC*[57] where a taxpayer was eventually allowed to recover corporate tax paid under the mistake of law (it turned out there was no obligation), even though he paid it in accordance with the law. The benefit was to be returned regardless of the fact that there was a basis.

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[53] Burrows, *The Law of Restitution* (n 6) 109.
[54] [1994] 4 All ER 714.
[55] Thomas Krebs, 'In Defence of Unjust Factors' (n 26) ch 1 subch 1.
[56] Supported by Burrows, *The Law of Restitution* (n 6)109.
[57] [2005] EWCA Civ 78; [2006] 2 WLR 103; [2005] STC 329.

Common law therefor does not care if the transfer is valid or invalid (has or has not a basis), other justification is needed for the transaction being reverted by restitution;[58] for there are cases where there was no basis but the benefit could have been kept (*CTN Cash and Carry*), as well as cases where was a basis, but the benefit must have been returned (*Deutche Morgan Greenfell*). And secondly, the English legal system, by examining the unjust factors, adheres to the ultimate principle, while the new Birksian (and old Czech) absence of basis approach in some cases reaches, by handling *praeter legem* transfers as illegal, entirely conflicting result.

In other words, the absence of basis approach actually takes an opposite view - it says that what is not known to the law, is not to be recognised and thereby, even if the behaviour is *preater legem* [*sic*], effectively prosecuting parties of the transaction imposing an obligation to return the benefit, even though there is no legal problem (ie no unjust factor to revert the transaction) and it would be economically efficient to keep the consideration.

8. Implications of the Result

8.1. Regulativity of the Legal System

One might then ask, if, when the unjust factors approach is applied, there is any difference between contracts and enrichment[59] in some cases in its essence, esp. when the consideration was services provided. If court orders to reverse the unjust enrichment by paying *quantum meruit* to the claimant for services provided to the defendant, the contract actually happened. Claimant has the consideration he had ordered, and the defendant got paid for it, as it happened in *Pavey & Matthews Pty Ltd v Paul*[60], an Australian case[61] where the claimant, a builder, concluded a

[58] Thomas Krebs, 'In Defence of Unjust Factors' (n 26) ch 5.
[59] This question is analysed from broader point of view in Hedley, A *Critical Introduction to Restitution* (n 31) 21-22; Hedley, 'Restitution: Contract's Twin' (n 15).
[60] [1986] 162 CLR 221.
[61] For analysis relevant for Australian common law and influence on development of Birkses thoughts cf Michael Bryan, 'Peter Birks and Unjust Enrichment' (Law Management, 26 August 2009) <http://lawisanass-wingate.blogspot.co.uk/2009/08/peter-birks-and-unjust-enrichment.html> accessed 2 January 2013.

construction services agreement in an oral form, which the law deemed insufficient. The agreement was therefore unenforceable and the defendant, who ordered the works, refused to pay for the consideration. The court held that it would be unjust for the defendant to keep the benefit and ordered him to pay *quantum meruit* to the claimant.

Several questions arise: Did the court construct a fiction of the basis? Is there a relation between the defendant and the claimant? Are there remedies for health-damages caused by the product? Is a customer protection applicable? Such questions, though seemingly deconstructing the unjust factors approach as unsystematic from the point of view of *absence of basis* approach, cannot be allowed. If we have rejected the absence of basis approach in the first place as inapplicable for its results opposing the ultimate principle, we must resist the temptation to ask why (in other words: on what basis) the defendant owns the object.

To opt for one or other approach when resolving the situation when world in law differs from the real world (A should be the owner of the object, but B actually *has* it and paid for it), is not a policy call. It is a philosophical choice regarding ones understanding of, and trust in, the legal system. Do we see the legal system as a perfect all-encompassing set of rules precisely covering every ethical choice to be made in reality, or rather as a humble system created by men which exists to prevent or correct the worst injustice in society? If the former, we want to synchronize the reality with the law, where legal system is the template; if the latter, we admit that the system cannot underpin everything and therefore its regulativity must (*ipso facto*) adapt to conform to the real world.

Burrows' proposition to use the absence of basis approach as a tool to ‘cross-check difficult cases’[62] seems therefore inapplicable, because, as discussed in chapter 7 of this paper, each approach has directly opposite outcome in the same case after it is confronted with the ultimate principle, and ergo contradict each other.

[62] Burrows, ‘Absence of Basis: The New Birksian Scheme’ (n 28) 48.

As explained above, one simply cannot view the unjust factors approach via the lens of absence of basis, because the former is a paradigm above the latter. If one insists on explaining the unjust factors approach with the help of the absence of basis approach, he is deemed to consider any transfer without neither the unjust factor nor with basis, as an outside-the-law (extra-legal) transfer; he has to, in words of Wittgenstein, either 'throw away the ladder after he has climbed up it', or accept that some transactions 'cannot be spoken about and therefore must be passed over in silence'.[63]

8.2. Unwanted Overprotection

Pavey and Matthews remarkably highlights another negative feature of the absence of basis approach: The legal system would force a protection upon parties, who reasonably do not wish to be protected or, indeed, do not deserve any protection at all. Both parties have economical interest in obtaining the agreed consideration, no injustice occurred and no public interest was breached, nevertheless, the legal system would still require to reverse the transaction, such approach being both uncalled-for and unacceptable.

[63] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Routlege Classics 2006) 89 point 6.54 and 7

9. Conclusion

The NCC regulation of the unjust enrichment is dangerously ambiguous and allows for interpretation in favour of both approaches. It is highly likely that Czech courts will want to ease their work-load and will continue in application of simple: No basis – restitution. This would mean the Czech legal system would miss a huge opportunity to develop; we are about to begin a discussion which is going on for twenty years in the common-law countries and hopefully the Czech academia will be as productive, as the English academics, eventhough up to now, the subject of unjust enrichment was more than just ommited.

The civilian-law based approach may be deemed by some more 'transparent',[64] however, being based on a general clause, the wording covers more than it should[65] and, so to say, throws out the baby with the bathwater, thereby contradicting the ultimate principle of private law, and for this reason it must be rejected.

Nevertheless, adopting the unjust factors approach used in the English common law and its application even to invalid transfers of property cannot be accepted without further a due and calls for entirely different system of inner organization of the subject - starting with identification of an unifying feature of the unjust factors; dozens of challenging questions and issues quelling from the 'other required justification' will otherwise become difficult to explain or even identify.

The unjust factors approach knows where we are, where we go and where we want to end up. On the way, to paraphrase Wittgenstein, it helps us not to pass over some transactions, however it seems still unable to allow us (systematically) speak about them however, by requiring further justification to allow restitution, it provides better service then absence of basis approach.

[64] Francis, 'Evolution of the Species' (n 15) 22.
[65] Krebs, 'In Defence of Unjust Factors' (n 26) ch 1 subch 2.