

NATIVE SOURCES AND COMPARATIVE RESOURCES: UNJUSTIFIED ENRICHMENT IN BRAZIL AFTER THE 2002 CIVIL CODE

FONTES INTERNAS E FONTES COMPARADAS: ENRIQUECIMENTO SEM CAUSA NO BRASIL APÓS O CÓDIGO CIVIL DE 2002

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ABSTRACT: When the 2002 Civil Code introduced a new (and more systematic) legislative treatment of unjustified enrichment in Brazilian Law, the new legislation encountered a highly permeable judicial and doctrinal environment to the influence of comparative law. This article aims at identifying the changes in the Brazilian law of unjustified enrichment that resulted from the confluence of the new legislation and the open environment in the first decade after the Code came into force. The discussion of specific developments is structured around the traditional categories in which Brazilian legal writers break down the enrichment claim and the corresponding rights.

KEYWORDS: Comparative law – Sources of obligations – Unjustified enrichment – General clause.

RESUMO: Quando o Código Civil de 2002 introduziu um novo (e mais sistemático) tratamento legislativo do enriquecimento sem causa no Direito brasileiro, a nova legislação encontrou um ambiente doutrinário e jurisprudencial altamente permeável à influência do Direito Comparado. Este artigo almeja identificar as mudanças ocorridas, no Direito brasileiro, no campo do enriquecimento sem causa, as quais resultaram de uma confluência entre a nova legislação e o ambiente de abertura identificável na primeira década após a entrada em vigor do Código de 2002. A discussão dos desenvolvimentos específicos da matéria estrutura-se em torno das categorias jurídicas tradicionais, em relação às quais os doutrinadores brasileiros dividem o enriquecimento sem causa e seus direitos correlatos.

PALAVRAS-CHAVE: Direito Comparado – Fonte das Obrigações – Enriquecimento sem causa – Cláusula geral.

SUMÁRIO: A. Introduction – B. The place of unjustified enrichment in Brazilian Law – C. Elements of unjustified enrichment in Brazilian Law – 1. The enrichment of the *solvens* – 2. "Effect" on another's personal or patrimonial rights – 3. Causation connection between enrichment and

impoverishment – 4. The absence of *causa* – 5. Subsidiarity – D. The content of the obligation to reverse the enrichment – E. Conclusion – Appendix 1. Background facts on the Brazilian Legal System – Appendix II. List of Brazilian cases.

A. INTRODUCTION

This¹ paper aims to present an account of the doctrinal and judicial development that unjustified enrichment has undergone in Brazil since the enactment of the 2002 Brazilian Civil Code (hereafter “CC 2002”), and identifies the ways in which solutions to unjustified enrichment problems introduced in other legal systems have influenced that development. This account is relatively complex and incorporates elements pertaining to two levels of generality. A significant part of the discussion below occurs at the level of specific solutions found in doctrinal and judicial sources to problems within Brazilian unjustified enrichment law. However, through the discussion of specific problems, I intend to demonstrate some more general trends in the Brazilian law of unjustified enrichment. In very broad terms, to be further specified below, those trends are:

(i) a tendency to abandon patchwork solutions for enrichment problems accepted by courts under the regime of the 1916 Brazilian Civil Code (such as

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The following abbreviations are used:

Alvim: A Alvim, “Do enriquecimento sem causa” (1957) 173 *Revista Forense* 55;

Astone: F Astone, *Larricchimento senza causa* (Giuffrè, Milano, 1999);

BGB: *Bürgerliches Gesetzbuch* (German Civil Code);

Birks, *Introduction*: P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, OUP, Oxford, 1985, revised 1989);

Birks, *UE2*: P Birks, *Unjust Enrichment*, 2nd ed (OUP, Oxford, 2003);

Burrows, *Restatement*: AS Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP, Oxford, 2012);

CC 2002: Brazilian Civil Code 2002;

Gallo, *Arricchimento*: P Gallo, *Arricchimento senza causa e quasi contratti: i rimedi restitutori* (UTET, Torino, 1996);

Johnston & Zimmermann: D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP, Cambridge, 2002);

Michelon (2007): C Michelon, *Direito Restituito* (RT, São Paulo, 2007);

Nanni: G E Nanni, *Enriquecimento sem causa* (Saraiva, São Paulo, 2004);

Noronha: F Noronha, “Enriquecimento sem causa” 1991 56 *Revista de Direito Civil: Imobiliário, Agrário e Empresarial* 51;

RSTJ: *Revista do Superior Tribunal de Justiça*;

STJ: Superior Court of Justice (*Superior Tribunal de Justiça*);

TJSP: Appeal Court of the State of São Paulo.

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