THE DOCTRINE OF "SUBSIDIARITY OF THE ACTION FOR RECOVERY OF AN UNJUST ENRICHMENT" IN FRENCH AND ETHIOPIAN LAW.

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INTRODUCTION

The purpose of this article is to make a comparative study of the doctrine of "subsidiarity" of the unjust enrichment action in French and Ethiopian law. The following is an outline of the overall organization of the paper.

In order to provide background for our discussion of the "subsidiarity" doctrine, we will touch on the subject of unjust enrichment in general in Roman law and on what the French Civil Code has to say about it. We will then trace briefly the establishment by French courts and writers of the principle of unjust enrichment as an autonomous source of obligations in French law.

The second major section examines the doctrine of "subsidiarity" of the unjust enrichment action in French law. It is preceded by a short consideration of the doctrine of "just cause" because of the interplay that exists between the two doctrines. An understanding of both doctrines as they appear in French law is essential for our discussion of Ethiopian law.

Because the term "subsidiarity" encompasses several principles, it has been analysed from the point of view of four different situations, or type-cases. With respect to each type-case, French judicial decisions and the solutions proposed by legal theorists have been considered. That in turn is followed by a discussion of the major theories developed to explain the doctrine of "subsidiarity" and the overlap between it and the doctrine of "just cause". Proceeding in the manner indicated here serves a dual purpose. To begin with, it will obviously serve as an exposure of the doctrine of subsidiarity in French law. More important though, as we are handicapped by a complete silence in the Ethiopian Civil Code as regards the doctrine of "subsidiarity", our analysis of French law will provide us with a starting point for our discussion in Part II of the doctrine in Ethiopian law and elucidate the points one ought to bear in mind in considering the doctrine.

PART I : FRENCH LAW

I. Historical Development of the Notion and of the Action.

1. Roman law

The civil law notion of "enrichment without just cause" originated in Roman law[1] although "it cannot be said that there was any such general rule"[2] that prohibited all forms of unjust enrichment. What the Romans did was to establish

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1. Mazeaud et Mazeaud, *Leçons de droit civil*, Tome II, No. 693, p. 636.
2. W. Buckland, *A Text-Book of Roman law* (3rd ed. revised 1963), p. 545.

a number of personal actions, or *conditiones*, which in particular instances allowed the victim of an enrichment realised by another at his expense to claim pecuniary compensation for the prejudice he suffered.

In addition to the *conditiones*, Challies states that "Roman law recognized some other actions the purpose of which was to obtain the restitution of unjust enrichment."[3] One of these, the *actio de in rem verso*, lay where a slave, without the authorization of his master, made a contract with another and transferred to the owner the enrichment that resulted from the other party's performance of his obligations under the contract. The impoverished party could bring the said action and recover the enrichment which the master derived from the contract.

This action *de in rem verso*, originally of such a narrow scope, was later extended to cover many other cases of unjust enrichment.

Nicholas explains the development thus:

> "The basis for an extensive interpretation (of the *actio de in rem verso*) was provided by a few interpolated texts (in the Codes and Digest) which appeared to allow the *actio de in rem verso* in situations in which the defendant had benefitted as a result of a contract between the plaintiff and a (free) third party. On this slender basis later commentators built up a remedy, first for any enrichment arising through a third party's contract and then for any enrichment whatever."[4]

2. The French Civil Code and After

One does not find in the French Civil Code a stated general principle to the effect that no one may unjustly enrich himself at the expense of another,[5] but there are found in the Code a number of provisions[6] which are particular applications of the broad principle of unjust enrichment. According to Colin and Capitant,

> "The most important and the most usual (application of the principle of unjust enrichment) can be stated thus: Whenever a person is obliged to restitute a thing, be it because his title of acquisition is annulled or because it is null, he is entitled to reimbursement of the necessary expenses he incurred as well as his useful expenses to the extent of the value added to the thing. That is what Articles 861-862 provided for where an immovable is returned to the estate by a hereditary donnee; Article 1673 where the seller avails himself of a right of redemption; Article 1381 where the person to whom the thing is returned must compensate the possessor even if the latter is in bad faith; Article 1947 which provides for the reimbursement of expenses a depositor incurs to preserve the thing deposited with him; article 2080 which provides for the reimbursement of the expenses incurred by a creditor to preserve a pawn; and Article 2175 which provides

3. G. Challies, *the Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (2nd ed. 1952), p. 2.
4. B. Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law," *Tulane L. Rev.*, vol. 36 (1961–62), p. 619.
5. Planiol et Ripert, *Traité pratique de droit civil français* (2nd ed. by P. Esmein), vol. 7, no. 752, p. 47.
6. Planiol et Ripert, *op. cit.*, footnote (3) to No. 752, p. 47 enumerates the provisions as being Article 548, 554–5, 570–71, 861–62, 1241, 1312, 1381, 1437, 1673, 1864, 1926, 1947, 2080, 2102(3), 2175.

for reimbursement where the third party possessor relinquishes a mortgaged immovable or where it is expropriated from him."[7]

Articles 548, 554, 555, 570, 571 and 577, which deal with various cases of accession, and Article 1437, which governs the community of property between spouses are also, they say, applications of the same principle.

In the second half of the nineteenth century, some authors began a movement to set up unjust enrichent as a source of obligations and to make the *actio de in rem verso* an autonomous action. Among its foremost proponents were Aubry and Rau, who considered *paiement de l'indu* and *gestion d'affaires* as but two instances of unjust enrichment and proposed that the *actio de in rem verso* be open whenever one's patrimony is enriched at the expense of another.[8] The Court of Cassation ignored these proposals for quite some time,[9] but in 1873 it gave in to the extent of allowing an action based on a theory of *gestion d'affaires anormale*.[10]

In a later case,[11] the Court of Cassation fell back upon the same technique to prevent a case of unjust enrichment.[12] In the *Boudier* case, the Court abandoned the above practice and established the unjust enrichment action as an independent source of obligations. Its definition of the nature and scope of the action for the recovery of an unjust enrichment differed markedly from Aubry and Rau's, from whose formula it was inspired.[13] The Court espoused the said authors' formula in two subsequent cases.[14]

As spelled out fully in the *Brianhaut* case, the unjust enrichment action may be instituted if the following elements are shown to be present;

(a) Defendant's enrichment;
(b) Plaintiff's impoverishment;
(c) A causal relationship between the impoverishment and enrichment;
(d) Absence of a just cause for the enrichment;
(e) Plaintiff does not or did not have any action arising from a contract, a quasi-contract, a delict or quasi-delict or the law.

The last condition was taken by legal writers[15] to be a manifestation of the "subsidiary character of the *action de in rem verso*." In Section II we will try to determine what exactly this doctrine of subsidiarity connotes.

7. A. Colin et H. Capitant, *Cours élémentaire de droit civil français* (7th ed. 1932), vol. 2, no. 238, p. 223–334.
8. Mazeaud et Mazeaud, *op. cit.* No. 694, p. 637.
9. Ibid. No. 695, p. 637, They add that the Court was prevailed upon by Rau to grant the action.
10. Commune de Saint - Chinian c. Guy, D. 1873.1.457.
11. Lemaire c. Chambon, Syndic de la faillite Lamoureux, D. 1891.1.49, note by Planiol.
12. Julien-Patureau–Miran c. Boudier, D. 1892.1.596 for possible explanations of the Court's move see Nicholas, *op. cit.*, and Planiol et Ripert, *op. cit.*, No. 752, p. 49.
13. The author's formula as stated in Aubry et Rau, *Cours de droit civil français* (4th ed.), No. 578 is reproduced in F. Goré, *L'enrichissement aux dépens d'autrui* (1949), no. 183, p. 188.
14. Clayette c. Liquid. de la congrégation des Missionaires de la Salette, S. 1918.1.41 and Ville de Bagnères-de-Bigorre c. Brianhaut, D. 1920.1.102.
15. Planiol et Ripert, *op. cit.*, no. 761, p. 66.

By contrast with the detailed enunciation of the requirements for the exercise of the unjust enrichment action in French law, Ethiopian law merely states that the action lies where a person is enriched without just cause by the work or property of another and no mention of subsidiarity is made.[16]

II. "Subsidiarity"

This article is primarily concerned with the doctrine of the subsidiarity of the unjust enrichment action. It is preferable, however, to precede our study of "subsidiarity" by a brief look at the "cause" requirement. This is for two reasons. First, in our analysis of the doctrine of "subsidiarity" in French law, we will see that one aspect of the doctrine is assimilated with the "cause" requirement. Second, we will have to rely mainly on the "cause" requirement to determine the presence or absence of the doctrine of "subsidiarity" in Ethiopian law. To see the overlap between the two doctrines in French law and to proceed with our consideration of the existence or non-existence of the doctrine in Ethiopian law, we must have some idea as to what sources constitute a just cause for an enrichment. That done we will move on to the central theme of the article as far as French law goes, i.e., the doctrine of "subsidiarity", which in turn is followed by a look at the justifications proffered for the existence of the doctrine and the overlap that exists between it and the doctrine of "just cause."

1. "Just Cause"

In the opinion of Planiol and Ripert,

> "Enrichment has a just cause when it is obtained in conformity with the stipulations made in a contract by onerous or gratuitous title or in the performance of a legal or natural obligation."[17]

Thus any enrichment or impoverishment which flows from the terms of a valid contract concluded between the impoverished and enriched parties has a just cause.

Similarly an enrichment has a just cause where it is obtained pursuant to the terms of a valid contract concluded between the enriched party and a third party even if the latter obtained the means for the performance of his obligations under the contract from the impoverished party and did not compensate him for it.[18] By way of illustration they cite a case[19] where a lessee hired a labourer to do some work on the immovable he held under the lease but failed to pay him the agreed sum. Since it was provided in the contract of lease that the lessee would not be entitled to any indemnity for improvements he might make in the immovable, the labourer's action brought against the lessor to recover the sum the lessee failed to pay him was dismissed by the Court.[20]

The enrichment of a person resulting from the generosity (*intention libérale*) or the performance of a natural obligation by the impoverished party has a just

16. Civil Code Art. 2162.
17. Planiol et Ripert, *op.cit.*, no. 757, p. 57.
18. Id., no. 759, p. 61.
19. Herbert c. Bois-Hardy et Chanson, D. 1900.2.154.
20. *Id.*, no. 760, p. 63–64.

cause and cannot give rise to an action *de in rem verso*.[21] Any contrary solution, they argue, would for all intents and purposes abolish donations and deny the existence of natural obligations.

The last source of just enrichment is the law itself. If a person discharges an obligation imposed upon him by the law, the recipient of the benefit is not enriched without just cause.[22]

We need not consider the opinions of other authors separately, because they merely reproduce the sources enumerated by Planiol and Ripert, and the slight variations they introduce here and there are inconsequential.[23]

2. "Subsidiarity"

The requirement that the plaintiff have no other course of action or must have had no other action does not convey anything explicit and it could be taken to mean any one of several things. For instance Bartin[24] pointed out that

> "the term "subsidiary" could mean three things: first, that the plaintiff in the action cannot succeed unless the facts giving rise to the enrichment of the defendant have given him no other possible action against either defendant or a third party; secondly, that the plaintiff must, if another action was open to him, have lost that recourse; or third, that the other possible action must have been rendered useless by the insolvency of the person against whom it might have been taken".

In order to clear up doubts like these and to determine the exact purport of the said requirement, it is proposed to take four different situations and consider the solutions offered both by doctrine and jurisprudence.

(1) The plaintiff had another action at his disposal but it is blocked by a legal obstacle, i.e. a provision of law. Can he take the action *de in rem verso?* To give an illustration, the plaintiff could have brought a contractual action to vindicate his claim but it is now barred by prescription.

The authors agree unanimously that the action *de in rem verso* does not lie. "The reason for such unanimity is that contrary view would permit the enrichment action to upset the established legal order."[25]

The following excerpts from Planiol and Ripert, and Mazeaud and Mazeaud, are typical of the view entertained by other authors.

Planiol and Ripert, after reviewing with approval court decisions which held the unjust enrichment action inadmissible whenever an alternative action is rendered ineffective by a provision or provisions in the law, justify the court's holdings thus:

21. *Ibid.*
22. See for instance Mazeaud et Mazeaud, *op. cit.*, nos. 702–705, p. 640–641; Colin et Capitant, *Traité de droit civil* (1959), vol. 2, nos. 1321–1323, p. 749–750.
23. Note 10, p. 361, para. 578 in Aubry et Rau, *op. cit.*, (5th ed.) vol. 9; quoted in Challies, *op. cit.*, p. 120.
24. This is a more or less standard pattern of analysis and is used by most authors. See for example Mazeaud et Mazeaud, *op. cit.*, nos. 707–709, p. 642-643.
25. Challies, *op. cit.*, p. 128.

> "The obvious reason which in all these cases moved the courts to declare the action *de in rem verso* inadmissible is that by granting it they would set at naught established rules of our written law, such as those dealing with proof, prescription, forfeiture and *res judicata*. Even if the effect of these rules is to sanction an enrichment without counter-part (contre-partie), they should not be abrogated by this circuitous course, as, for instance, saying that a borrower would not be freed by the process of prescription on the ground that he is unjustly enriched by not paying back the amount he borrowed. One may contemplate abolishing the institution of extinctive prescription or the requirement of written proof. But doing so by the circuitous means of the action *de in rem verso* would constitute a scheme which amounts to (perpetrating) a fraud on the law."[26]

Unlike Planiol and Ripert, Mazeaud and Mazeaud do not make a broad general statement to the effect that the unjust enrichment action does not lie in these circumstances, rather they deal with specific instances where an alternative action is blocked by some rule of law. They say, "where the action the law had put at the disposal of the impoverished person has prescribed, one cannot possibly allow him to institute the action *de in rem verso*. Holding otherwise would, in effect, be evading the rules on prescription. By the same token, the action *de in rem verso* could not serve as a means of getting around the rules on usucaption or C. Civ. Article 2279."[27]

With that, let us turn to a study of decisions given by the courts, particularly the Court of Cassation, when confronted with this situation.

Decisions wherein the unjust enrichment action was dismissed if brought when another action was blocked by a legal provision are quite numerous.[28]

In the *Clayette* case, the widow's unjust enrichment action was thrown out because upholding it would have been tantamount to allowing her to get around Articles 1341 and 1347, failure to meet the requirements of which had caused her original action based on the loan to fail.

Similarly the unjust enrichment action was dismissed in the *Brianhaut* case because the plaintiff resorted to it only to get around the requirements of Article 1793. A similar case is *Demoiselle d'Auguste de Sinceny c. Grumbach et Cie.*[29] The plaintiff brought an unjust enrichment action against a firm for 17,000 francs, that being the sum she paid out to recover the ownership of her jewel-box from the person who had it in his possession. The possessor bought it from the thief who stole the box from the plaintiff. Her claim was dismissed because she could not have met the requirements of Articles 2279 and 2280 if she had brought another action, presumably one based on the extra-contractual liability of the firm; she could not have proved the commission of a fault by the intermediary seller, the firm that is, on which sole ground she could have recovered the sum she paid the possessor from the company.

(2) The plaintiff could have brought another action but it is blocked by an obs-

26. Planiol et Ripert, *op. cit.*, no. 761, p. 67.
27. Mazeaud et Mazeaud, *op. cit.*, no. 708, p. 643.
28. See Planiol et Ripert, *op. cit.*, no. 761, p. 66, footnotes (1), (3–7) p. 67, footnotes (1–3).
29. D. P. 1931.1.129.

tacle of fact which was brought about by his fault. May he bring an unjust enrichment action? The obstacle to the exercise of the alternative action lies in the fact that he did not take all the measures prescribed by the law for the exercise of the action. This in turn was due to his fault which consists either of his ignorance of the requirements laid down by the law or sheer negligence to comply with them.[30] We have found no author who maintains that the unjust enrichment action should lie in these circumstances. Planiol and Ripert seem to make no distinction between an obstacle of fact and a legal obstacle as they consider both obstacles in terms of circumvention of the law. They state:

> "But there are instances where faced with interrelated enrichment and impoverishment one cannot be certain whether or not an imperative rule of law obstructs (the payment of) an indemnity. This may happen in certain cases where a person who has a claim against another for the payment of the price of supplies he provided him with and who could have got a security entitling him to a right of preference (over other creditors) and thereby make sure that he would get paid fails, by his negligence, to take this measure so that the other creditors rank equally with him or even get a priority over him. Would the action *de in rem* which he institutes against them to recover the gain that he procured for them at his expense, find an obstacle in the principle of the equality of creditors which provides that a right of preference subjected by the law to certain formalities does not exist unless the latter have been met? The answer should, we believe, be in the affirmative." (Citation to D. 1924.1.129)[31]

Marty and Raynaud as well are of the opinion that the unjust enrichment action cannot lie. Like Planiol and Ripert, they make no distinction between an obstacle of fact and a legal obstacle and cite the same case cited by Planiol and Ripert in support of their contention. They say, "if the normal action is rendered ineffective by an obstacle of law, one may not resort to the action *de in rem verso* to make up for the loss (of the normal action). Thus ... a creditor with a right of preference or a mortgagee who has let his security be lost, as for example by failing to register it as he ought to have done, cannot act against the equally ranked creditors who benefit from this situation by alleging that they are enriched (without just cause)." (Citation to D. 1924.1.129).[32]

And Rouast put it succinctly when he wrote "le caractère subsidiaire s'oppose à ce qu'elle soit utilisée comme une bouée de sauvetage par celui qui a fait naufrage par sa faute."[33] (The subsidiary character (of the unjust enrichment action) is

30. In addition to these obstacles, i.e., ignorance or negligence, there are some authors who allegedly treat "fortuitous error" as an obstacle of fact. According to Challies, *op. cit.*, p. 121; Colin et Capitant, *op. cit.*, (5th ed.), vol. 2, p. 417; Josserand, *Cours de droit civil positif français* (2nd ed.), vol. 2, no. 574, p. 316 and Ripert, *La Régle Morale*, (2nd ed.), p. 150; would grant the action *de in rem verso* in such instances. Of the works cited only Ripert's is available in the library, an examination of which discloses that the page refered to deals with the rescision or modification of contracts. As that is something wholly different from unjust enrichment, I have disregarded Challies' assertion and excluded "fortuitous error" from my discussion of obstacles of fact.

31. Planiol et Ripert, *op. cit.*, no. 762, p. 68.

32. Marty et Raynaud, *Droit civil*, Paris (1965), no. 353(2), p. 320–321.

33. Rouast, "L'enrichissement sans cause et la jurisprudence civile", *Rev. Trim. Dr. Civ.*, 1922, p. 86; quoted in Drakidis, "La subsidiarité, caractére spécifique et international de l'action d'enrichissement sans cause", *Rev. trim. Droit civil*, vol. 59 (1961), p. 585.

opposed to the notion that it can be used as a lifebuoy by someone who was shipwrecked by his fault).

There are a number of judicial decisions which dismissed the unjust enrichment action where an alternative action was blocked by an obstacle of fact.[34] In a 1924 decision,[35] the plaintiff loaned his son-in-law money to pay for the supply of materials and labour required for the erection of a building on land which belonged to the latter. Upon the completion of the works, both the building and the land were contributed to a partnership which the son-in-law had joined. After a while the partnership become bankrupt and its assets were liquidated. The plaintiff then instituted an enrichment action against the other creditors of the partnership and alleged that he should be given preference over them as regards the increase in the value of the land brought about by the erection of the building thereon. That, he contended, was made possible by the money he loaned his son-in-law and the other creditors were therefore enriched without just cause at his expense. The claim was rejected because the plaintiff had failed to secure for himself a right of preference over other creditors by complying with the requirements of Article 2103 (4) and (5).

(3) The plaintiff could institute another action but it is rendered ineffective by an obstacle of fact which was not brought about by his fault. For all practical purposes,[36] this situation can arise only where a contractual action is rendered useless by the insolvency of one of the contracting parties. Hence the enrichment action is aimed at a third party, and the question is whether or not it can be taken against him.

With very few exceptions, practically all authors are of opinion that the enrichment action can be brought against the third party. This situation can be distinguished from the preceding and subsequent situations in that it involves three persons instead of two and the question of giving the plaintiff a choice as to what action to exercise does not arise because the normal action and the unjust enrichment action are not directed to the same person. Moreover it should be noted that the matter of exercise of the action cannot come up if the third party was enriched with just cause. It is only where the plaintiff's performance of his obligations under the contract have benefitted a third party without just cause that the authors say that the enrichment action can be taken. As pointed out by Planiol and Ripert,[37] even if the third party's enrichment is related to the plaintiff's impoverishment, most often the latter could not institute an action *de in rem verso* against the former because the third party's enrichment has a just cause.

> "But it may that he (the enriched third party) had no good cause. Then the unpaid creditor may certainly act *de in rem verso* against the third party. By granting it no contravention like that mentioned above (fraud on the law) is perpetrated on the written law. (Here) no one is looking for a roundabout means of attaining a goal which cannot be had through the normal course, as, in theory, the contractual action is (still) open."

Drakidis too,[38] would grant the action because, he says, equity demands it and the enrichment action in this instance does not jeopardize the legal order.

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34. Crédit foncier de France c. Arrazat, D. 1889.1.393; Jacquin c. Lebel freres et Bertinot jeune, D. 1913.1.433. Several more are to be found in other reporters.
35. Laurrens, syndic. de la faillite Soc. Miguel et Tarayre c. Marty, D. P. 1924.1.129.
36. Marty et Raynaud, *op. cit.*, no. 353(2), p. 321.
37. Planiol et Ripert, *op. cit.*, no. 763(2), p. 72.
38. Drakidis, *op. cit.*, p. 586.

Chevalier,[38] an author who is a proponent of the theory that the enrichment action should be denied only if it is used as a means of circumventing the law, finds it only natural that the action should lie in this case. He says "it is only if this (contractual) action runs into the debtor's insolvency that the supplier can, in a subsidiary action, act against the third party to recover from the latter the enrichment which he had no right to keep."

Esmein,[40] as well, in a commentary on a decision given by the Court of Cassation, where the action was granted under these circumstances said, in part, "Nothing obstructs the granting of the action *de in rem verso* in this instance. ... No imperative provision of the law is circumvented by the institution of this action against a third party...."

In contract to Esmein and the great majority of authors, Goré asserts that the enrichment action should not lie, for otherwise it would violate an imperative rule of law. He reasons thus:[41] Should the action be granted under the circumstances in question, it would amount to giving the impoverished party a direct action against the enriched third party. A direct action can however, only be brought by the creditor against the debtor of his debtor, whereas here the action is brought not against the debtor of the impoverished party's debtor but against a third party intermediary.

Another author who has qualms about granting the unjust enrichment action is Almosnino.[43] He states that the impoverished party can take the enrichment action against the enriched third party only if the mass of the creditors of the insolvent party cannot sue the third party. In other words, the impoverished person can institute the unjust enrichment action if he is the insolvent party's sole creditor. But if there are other creditors, he cannot claim from the third party an indemnity corresponding to his impoverishment because that would be confering a privilege upon him. In the absence of an express provision confering such a privilege, he must be treated like any other creditor and take whatever portion of the third party's assets accrues to him.

The stand taken by the courts agrees with that of the majority of the authors. They grant the impoverished party an unjust enrichment action against a third party enriched without just cause by his performance of his contractual obligations, provided that the insolvency of the other contracting party is established. In 1940, the Court of Cassation affirmed a lower court's decision given along these lines.[44]

A person who bought a house from a company engaged a contractor to do some work on the building. Sometime later he became insolvent and was unable to

39. J. Chevalier, "Observations sur la répétition des enrichissements non causés" in *Le droit privé français au milieu du XX^e siècle* (1950), vol.2, p. 248.

40. Quoted in footnote 181 in Goré, *op. cit.*, p. 185.

41. Goré, *op. cit.*, no. 180, p. 184.

42. Art. 1165 provides that contracts produce effects only as between the contracting parties, but under Art. 1166 a creditor is entitled to sue the debtor of his debtor directly as long as that right is reserved to the creditor's debtor.

43. Almosnino, *L'enrichissement sans cause et son caractère subsidiaire* (1931), no. 83, p. 166 et *seq.*, cited in Challies, *op. cit.*, p. 122–123.

44. Société des habitations bon marché de Saint-Servan c. Gorge, D.H. 1940.150, reproduced in part in Mazeaud et Mazeaud, *op. cit.*, pp. 642–643, 648, 649.

pay off the company or the contractor, whereupon the company took back the building. Admittedly, the contractor had a contractual action against the buyer, but it was no use bringing one because the latter was insolvent. He then instituted an unjust enrichment action against the company on the ground that it had benefitted from the labour and materials he had provided to the buyer, and the action was held admissible. On appeal the Court of Cassation affirmed.

(4) The impoverished party has at his disposal another effective action. Can he leave that aside and bring an unjust enrichment action?

The preponderance of doctrinal opinion is that the plaintiff cannot do so. For instance, Mazeaud and Mazeaud say, "if the impoverished person can bring an action arising from a contract, a delict or a quasi-delict, an undue payment, unauthorized agency or a real right, there is no question but that the principle of subsidiarity leads to the dismissal of the action *de in rem verso*: the impoverished person need only resort to the normal action put at his disposal."[45]

According to Marty and Raynaud, "... the rules of unjust enrichment which are judge-made and a characteristic display of the judge's intervention to fill in gaps in the law can come into play only to the extent that there are gaps (in the law) and are excluded if there are (other) applicable provisions."[46]

To the question: "What is the exact consequence or significance of subsidiarity," they answer that such a question never arises where the other action can be effectively exercised. They point out that the normal action is usually more advantageous than the enrichment action, however "if the question does arise, the action *de in rem verso* must be denied. ..."

Similarly Goré would allow the plaintiff no option. He justified his stand on a theory of hierarchy of sources of law[47] in the French legal system. According to this theory decisions of courts and custom, vis-à-vis legislatively enacted rules, are a subsidiary source of law. And as the principle of unjust enrichment was expounded by the courts, the action arising from it cannot be taken where the law provides the impoverished person with another action.[48] Planiol and Ripert[49] say that the question of choice of action does not arise as regards contracts and that it is inconceivable if the other action is one based on unauthorized agency. The question of option may arise, in theory that is, if the other action is based on extra-contractual liability, but the action for unjust enrichment is ruled out by the requirement of a causal connection between the enrichment and impoverishment.

With that, let us turn to the authors who advocate that the plaintiff should be left free to choose what action to bring.

Challies[50] tells us that it is the recent writers who hold such a view. The gist of their arguments is "that the only limitation upon the (enrichment) action

45. Mazeaud et Mazeaud, *op. cit.*, no, 707, p. 642.
46. Marty et Raynaud, *op. cit.*, no. 353(2), p. 320.
47. Goré, *op. cit.*, no. 199–204, p. 202–209, This theory will be analysed in greater detail in a later part of this section.
48. *Id.*, no. 288, p. 300–301.
49. Planiol et Ripert, *op. cit.*, no. 763(1), p. 72.
50. Challies, *op. cit.*, p. 125.

arising from subsidiarity is the requirement that no imperative law be contravened or circumvented or in other words that there be no "fraude à la loi."

For example he says[51] that Esmein in his note to S. 1941.1.121 criticized the subsidiarity formula of Aubry and Rau and suggested that the requirement of subsidiarity should be expressed as follows:

> "It is better to say that the action *de in rem verso* cannot be taken where it is instituted to replace another action which the plaintiff cannot exercise because of prescription, a forfeiture or forclusion or because it is *res judicata*, or because he cannot produce the proof the action requires or because of another legal obstacle.

As the situation in Belgium is analogous to that prevailing in France as regards the enrichment action,[52] the opinions of Belgian writers on the question of choice of actions can be relevant to our discussion here. Rutsaert,[53] in discussing the issue of choice of actions wrote, "but if, the intention of fraud aside, the requirements for the exercise of the action *de in rem verso* are met at the same time that the requirements of another action are, one cannot at all see why the choice between those actions should be prohibited ..." Almosnino[54] and Beguet,[55] we are told, entertain the same view.

Unlike doctrinal opinion, the courts are unanimous in rejecting the unjust enrichment action where the plaintiff has another action at his disposal. Beginning with the *Clayette* and *Brianhaut* cases, the courts have repeatedly and consistently held that the unjust enrichment action must give way to the other action. For instance, in 1949, the Court of Cassation said:

> "The theory of unjust enrichment applies where it is sufficiently shown that no contract was concluded between the parties, and that the impoverished person does not have an action arising from a delict, a quasi-delict..."[56]

And as late as 1959, the same court reiterated its position in the following words:

> "By virtue of its subsidiary character, the action *de in rem verso* must not be granted except in cases where the patrimony of one person being enriched without just cause at the expense of the patrimony of another, the latter does not have any action arising from a contract, a quasi-contract, a delict, a quasi-delict or the law to recover what is owing to him."[57]

The trouble with assertions like these, however, is that they were not made in cases that denied the plaintiff an option of actions where he could bring another action arising from some other ground. They were merely made by way of *dicta*, because in all these cases the enrichment action was dismissed on some ground

51. *Ibid.*, p. 126.
52. Challies, *id.*, p. 160.
53. Rutsaert, "Du caractère non subsidiaire de l'action d'enrichissement sans cause," *Revue du Droit Belge*, 1937, no. 13, p. 40, quoted in Challies, *op. cit.*, p. 128.
54. Almosnino, *op. cit.*, no. 86, p. 177.
55. Béguet, "L'enrichissement sans cause," Paris, 1945, no. 147, p. 253, no. 154, p. 263.
56. Bull. Cass. Civ. 1949. 614, quoted in Drakidis, *op. cit.*, p. 601.
57. Bull. Cass. Civ. 1951.1.26, quoted in Drakidis, *op. cit.*, p. 601.

other than the concurrence of actions. For example, the *Clayette* and *Brianhaut* cases were both dismissed to prevent a circumvention of imperative legal provisions. It is difficult to find a case where an enrichment action was dismissed for the precise reason that an action based on, say, a contract, should be instituted rather than the enrichment action.

Though one reads in the Encyclopédie Dalloz[58] that an enrichment action was dismissed on this ground, others, Challies[59] for one, claim that the decision turned on some other point. Be that as it may, the courts do seem to subscribe to the notion that the action *de in rem verso*, being an action in equity created by jurisprudence, cannot be ranked equally with actions arising from other sources. And the implication of *dicta* like those quoted above is clearly that they would bar the action if some other action could be instituted.

(5) To the above four situations we may add a fifth one, which in fact is so obvious that the authors rarely bother to consider or even mention it.[60] It is the situation where the impoverished person has no action whatsoever at his disposal; i.e., he can invoke no contract, quasi-contract, delict or quasi-delict or rule of law to base his action upon. In other words, there simply is nothing in the law to govern the fact situtation and the granting of the action does not give rise to any controversial issues. In fact the action was primarily established to give the impovershed party a relief in such instances. It serves the useful purpose of filling in voids in the law and sees to it that a person who is enriched without just cause does not get away with it. Besides, the phrasing of the formula itself, be it Aubry and Rau's or the modified version adapted by the courts, dictates that the action should lie.

The following two decisions illustrate what is meant by absence of any other course of action.

In the first,[61] a woman died intestate in France and her estate was partitioned among her collateral heirs. A genealogist did some research on his own and discovered that the deceased was survived by nephews living in America. He contacted and informed them, without disclosing anything specific, that there was a succession to which they could be called. A few days later, he told them that if they made a contract with him promising him a certain percentage of the succession, he would disclose to them the place where the succession could be claimed and provide them with details as to how much it was worth etc. In the meantime however, they had contacted the American Consul in France and were assured that they could have any information that was obtained regarding their lineage free of charge. Armed with that assurance they told the genealogist they would have nothing to do with him. In due time, they were declared heirs of the deceased and came into the succession. The genealogist then brought suit against them claiming compensation for the information he supplied them with. The defendants argued that he had no ground on which he could make such a claim, as no contract of any sort was concluded with him and as he could not be considered as an unauthorized

58. *Dalloz, Encyclopédie juridique, répertoire de droit civil* (1952), vol. 2, Enrichissement sans cause, no. 135.

59. Challies, *op. cit.*, p. 130.

60. Drakidis, *op. cit.*, is one of the few exceptions. See p. 588.

61. Consorts Duourg c. Antoine, Db. 1908.2.332.

agent. The court of first instance conceded that much, but held that because he had helped them trace back the succession and claim it, he should be indemnified for it, as otherwise, it said, "le principe d'équité qui veut que nul ne s'enrichisse aux dépens d'autrui serait violé; que ce principe ouvre à Antoine l'action dite *de in rem verso*." On appeal the Court of Cassation affirmed the lower court's decision.

In the other case,[62] the plaintiff, initially employed as the defendant's housekeeper, became his mistress and went on attending to the house work, but without any wages as of the moment she became his mistress. She was given to understand that the defendant, who had divorced his wife, would marry her when he became free to do so. After seven years, the defendant breached his promise and put an end to their relationship. The plaintiff instituted an action wherein she claimed 35,000 francs on two grounds: (a) damages for the breach of the promise of marriage and (b) compensation for the services rendered during the seven years. The first ground need not concern us here.[63] As for the second ground, the Court of Cassation said that in default of any contract concluded between them, the plaintiff could seek recovery by way of the action *de in rem verso*. It held that the defendant had been enriched by the plaintiff in that she served him for seven years without remuneration; and thereby spared him the trouble of hiring other maids. And since his enrichment could not be justified on any ground, the Court ruled that he had to idemnify her for her services.

3. Justifications of The Doctrine of Subsidiarity

From the foregoing study of doctrine and judicial decisions, we may discern two theories behind the doctrine of subsidiarity which are offered as justifications of the doctrine.

We may call the first the theory of hierarchy in the sources of law. The proponents of this theory maintain that legislatively enacted laws are the primary source of law in the French legal system and other sources are subordinate or inferior to them.[64] The principle of unjust enrichment, and the action deriving therefrom, they say, are based on custom and enunciated by judicial decisions. Consequently the role of the unjust enrichment action is supplementary and subordinate in that it can be taken only where the plaintiff can bring no action based on an express provision of the law. According to Rouast, the customary source of the unjust enrichment action is a principle of natural law. In other words, it was inspired by that sense of justice or equity which is opposed to one person's unjustified enrichment at the expense of another. This principle was in turn given effect by the courts which established it as a source of rights and obligations and defined the scope of its application. Goré[65] is of the same opinion. He says there is no doubt that unjust enrichment is a source of obligations which is derived from customary law. His definition of customary law is elastic and embraces "all sources of law other than (legislatively enacted) law, taking the last word in its widest application."[66] The only point on which he takes issue with Rouast is as

62. Leblanc c. Dame Vial, D. 1928.2.169.
63. Court's ruling on procedural issues omitted.
64. Rouast, *op. cit.*, No. 38 and following, quoted in Drakidis, *op. cit.*, no. 33, p. 604–605; Goré, *op. cit.*, no. 204, p. 207–209; Planiol and Ripert, *op. cit.*, no. 761, p. 67.
65. *Id.*, no. 201, p. 204 and following.
66. *Ibid.*

to the way this customary law came into existence. He disagrees with Rouast's statement that "the right of the impoverished person to be indemnified for his impoverishment was not created by the courts, but rather by a usage which was given effect by the former."[67] Goré argues that it was the courts that declared the existence of the principle, because the mere existence of the usage on which it was based would have remained ineffective as it could only inspire the legislator to enunciate a principle based on it. The courts did not stop at that; their decisions became a source of law.

That said, Goré proceeds to defend Rouast's, and his own theory against the criticism levelled at it by Bonnecase.[68] The essence of Bonnecase's criticism is that one cannot invoke the inferior position of custom vis-à-vis legislatively enacted laws to justify the subsidiarity of the unjust enrichment action. Rouast never said, Goré points out, that custom by contrast to the written law is an inferior source of law. He merely said that custom has a subsidiary role or function in French law and cannot come into play in those situations which have been covered by legislation. An action based on customary law cannot rank equally with an action arising from written legal provisions where the two actions lead to the same result. Custom merely fills in voids in the law.[69]

After thus defending and elaborating on the theory of hierarchy in the sources of law, Goré proceeds to discuss the Courts' stand on the question of the respective roles of customary and legislatively enacted rules. There is a school of thought, he points out, that maintains that legislatively enacted rules are replaced by customary law as they fall into disuse. On the other hand, the courts have always been hostile to such opinions and have often decided that a legislatively enacted rule will stay in force as long as it is not abrogated by a new one. "In light of the courts' stand," he concludes, "one must admit that from the point of view of case-law, custom is a secondary source of law. One may therefore say, as M. Rouast did, that the subsidiary character of the action *de in rem verso*, is a logical result of the subsidiary character of custom as a formal source of law."[70]

Finally, Goré points out that this theory has nothing to do with prevention of "circumvention of the law"; it merely means that an action arising from custom must give way to an action arising from legal provisions if both serve to vindicate the same claim.[71]

Bonnecase[72] arrives at the same conclusion by a slightly different route. He analyzes the matter in terms of separation of powers. As a matter of principle, judges must, he says, apply the laws enacted by the legislature in adjudicating cases. They may resort to custom or equity by way of filling in gaps in the law, where legislatively enacted rules are lacking. From that it follows that custom or equity is subsidiary to legislation. Logically, actions based on the former are subsidiary

67. Rouast, *op. cit.*, no. 38, p. 104, note 1. Quoted in Goré, *op. cit.*, no. 202, p. 205.
68. Bonnecase, *Supplément au Traité théorique et pratique de droit civil de Baudry - Lacantinerie* (1926), vol. 3, p. 297; quoted in Goré, *op. cit.*, no. 201, p. 204.
69. Gore, *op. cit.*, no. 203, p. 206.
70. *Ibid.*, no. 204, p. 207–208.
71. *Ibid.*, p. 209
72. Bonnecase, *op. cit.*, reproduced in narrative form in Goré, *op. cit.*, p. 209.

to those based on the latter, and their subsidiarity derives from the subsidiary character of the sources they emanate from.

The other theory behind the doctrine of subsidiarity is that of prevention of "fraude à la loi." The gist of this theory is that the unjust enrichment action cannot be taken where another action asserting the same or substantially the same claim is rendered ineffective by the law. The rationale is that granting the enrichment action in such instances would simply amount to "evading" (tourner) an imperative rule of law and defeating its purpose. Two common examples of such an "evasion" are granting the unjust enrichment action where an alternative action fails for lack of conformation with the requirements of form of contracts or where it is barred by prescription. As Drakidis[73] put it, "since the legislator did not want the plaintiff to achieve his aim (by instituting the alternative action), it is improper that he should be able to achieve it by a strategem, thanks to the devious means (provided by) the action *de in rem verso*." Obviously if the rules and institutions of the written law are to be maintained intact and remain meaningful, such sleights of hand cannot possibly be tolerated. Planiol and Ripert[74] rightly point put that the law cannot at the same time provide for the institution of prescription and allow the exercise of the unjust enrichment action by someone who has let the period of prescription expire; for a self-contradictory stand like that would strip the institution of prescription of any effect. In short it is, in the words of the same authors, "logical and practical considerations"[75] that lead both doctrine and jurisprudence to deny the exercise of the unjust enrichment action in these circumstances.

Whereas the theory of prevention of "fraude à la loi" is accepted by all authors, the theory of "hierarchy in the sources of law" does not find any favour with recent writers. As far as the dissenters are concerned then, the two theories are competing. The preponderance of the authors and the courts on the other hand, treat the two theories as supplementary and employ both of them to define the reach of the unjust enrichment action.

4. Overlap Between The Doctrines of "Just Cause" and "Subsidiarity"

It will be recalled that we preceded our study of the doctrine of "subsidiarity" by a brief look at the doctrine of "just cause." One of the reasons given for so doing was that "subsidiarity" is often analysed in terms of "just cause" and that we would not be able to see the relationship between the two doctrines unless we knew sources constituted a just cause for enrichment. Now that we have considered both doctrines we will examine where and how the overlap between them occurs.

Mazeaud and Mazeaud take it as a self-explanatory proposition that there is an overlap between the two doctrines. They say, "undoubtedly, in all cases where an enrichment has a just cause, the principle of subsidiarity overlaps (fait double emploi) with the requirement of absence of just cause . . ."[76]

Now, if we were to talk in terms of the theories behind the doctrine of subsidiarity, which of them could they have had in mind when they made the above

73. Drakidis, *op. cit.*, no. 8, p. 584.
74. Planiol et Ripert, *op. cit.*, no. 761, p. 68.
75. *Ibid.*
76. Mazeaud et Mazeaud, *op. cit.*, no. 711, p. 644.

statement? It certainly could not be the theory of "hierarchy of sources of law" because (a) it deals with cases where the enrichment is without just cause and (b) the unjust enrichment action is excluded simply because it lies concurrently with another action arising from a contract, a delict etc. Whereas here we are concerned with cases where an enrichment has a just cause, wherefore the unjust enrichment action cannot be taken because the requirement that it be without a just cause is not met. Since the other theory has been eliminated, it means it is the theory of "fraude à la loi" that coincides with the requirement of "just cause."

This conclusion is borne out by the examples Mazeaud and Mazeaud give to illustrate their above quoted assertion and by their subsequent discussion of the reach of the respective doctrines of "just cause" and "subsidiarity."

For further corroboration of the conclusion we reached, let us take another author who deals with the overlap between the two doctrines from another angle.

Chevalier holds the view that the "subsidiarity" requirement is superflous and meaningless because the scope of the *actio de in rem verso* can be determined by the sole analysis of the "cause" requirement. He writes:

> "Authors (la doctrine) explain the exclusion of the action for the recovery of an enrichment only in terms of the subsidiary character they attribute to it. That is obscuring the reason for the exclusion. The action is excluded. . . because the defendant has a right to retain the enrichment and because this enrichment finds a cause to justify it in the application of rules of law as well as in agreements (concluded between the parties). This definition of (just) cause for enrichment suffices to harmonize (the exercise of) the action for recovery (of an enrichment) with (the functioning) of our judicial system. It serves to assure that the action for the recovery of an enrichment is not used as a means of modifying imperative rules of law by a rule of idemnity left to equity or to the discretion of lower court judges."[77]

According to him, the just causes for enrichment are contracts[78] or legal provisions "which allow a defendant in an action (for unjust enrichment) to retain the enrichment. As the enrichment is conferred by the law, it is not without a just cause."[79] By way of illustration he cites several cases wherein the unjust enrichment action was dismissed because an alternative action was blocked by an imperative rule of law. That is to say they were dismissed to prevent a "fraude à la loi." Hence far from rejecting the doctrine of "subsidiarity" in its entirety, Chevalier concedes that it is present in French law to the extent that it overlaps with the "cause" requirement. His criticism of the doctrine of "subsidiarity" then really comes down to a rejection of the theory of "hierarchy of sources of law," which excludes the unjust enrichment action for considerations other than the presence or absence of just cause. From his statement that Rouast's theory of the primacy of legislation over custom as a source of law is "too good to be true,"[80] it is clear that that is what he is really opposed to.

77. Chevalier, *op. cit.*, p. 246.
78. *Id.*, p. 243–245.
79. *Id.*, p. 245.
80. *Id.*, p. 247.

It is submitted that the incorporation of the theory of "fraud on the law" with the doctrine of "cause" is a tenable one. The former holds that an enrichment action cannot lie where another action is barred by a legal provision. The doctrine of "just cause" in turn states that the action cannot be taken where the enrichment has a just cause. Whereas in the case of the theory of "fraud on the law" it is the rule that bars the alternative action which acts as the just cause for the enrichment, it is the source of the enrichment itself which acts as the just cause for the enrichment in the case of the doctrine of "just cause." Therefore, except for the fact that it intervenes one step later, it is the law that acts as the just cause for enrichment where the enrichment action is excluded to prevent a "fraud on the law." To that extent then, there is an overlap between the doctrines of "subsidiarity" and "just cause."

5. Conclusion

The doctrine of "subsidiarity" connotes the following things in French law:

(a) The action for the recovery of an unjust enrichment does not lie where another action arising from a contract, a quasi-contract, a delict, a quasi-delict or from the law is blocked by a legal obstacle or an obstacle of fact brought about by the plaintiff's fault. Both the courts and authors agree unanimously on this point.

An obstacle of fact is distinguished from a legal obstacle in that the former consists of a plaintiff's failure to meet the conditions laid down by the law for the exercise of an action arising from any of the sources enumerated, above, either through his ignorance of the existence of those requirements or through mere negligence to comply with them. A legal obstacle, on the other hand, is a rule of law that operates independently of the plaintiff's ignorance or negligence. The distinction is obscure at best and most authors lump both types of obstacle into one and talk of a legal obstacle. But the reasons given for the exclusion of the action vary. The courts and the great majority of authors exclude it or advocate its exclusion in order to prevent a "fraud on the law," i.e., to prevent the evasion of imperative rules of law. Others hold that the action should be excluded simply because the enrichment in these instances has a just cause.

(b) The unjust enrichment action cannot be taken where the plaintiff has another effective action arising from a contract, delict, etc. at his disposal. This is the clear implication of the courts' opinions, expressed by way of *dicta*, in discussing the conditions under which the action can lie. Most authors entertain the same view. The underlying reason is that they consider the unjust enrichment action as one that arises from a subsidiary source of law. Recent authors, on the contrary, reject this theory of hierarchy of sources and maintain that the plaintiff is free to choose between the concurrent actions at his disposal.

(c) The unjust enrichment action lies where the plaintiff is faced by an obstacle of fact which was not brought about by his fault. For all practical purposes this means that if the plaintiff is confronted by the insolvency of the person he contracted with, he may sue a third party who was enriched without just cause by the plaintiff's performance of his contractual obligations. Here the unjust enrichment action is subsidiary in the procedural sense of the term because it can be taken only if his normal, and therefore his primary course of action, is ineffective.

(d) The unjust enrichment action lies where the plaintiff has no action arising from a contract, a quasi-contract, a delict, a quasi-delict or from the law. Neither the authors nor the courts contest this because the action was primarily established to

give the impoverished person a relief in such cases. Moreover there can possibly be no perpetration of a "fraud on the law" or the replacement of actions arising from sources based on legislation by an action arising from a customary source of law.

PART II: ETHIOPIAN LAW

I. Source of the Law

Our starting point in the consideration of the doctrine of "subsidiarity" of the action for the recovery of an unjust enrichment is Civil Code Article 2162. For the purposes of this paper, we will use Professor Krzeczunowicz's corrected English translation[81] of the French version of Title XIII of the Civil Code firstly because it presents a more faithful rendition of the master text drafted in French and secondly because the latter is much closer to the prevailing Amharic version of Article 2162 than the English version.[82] Professor Kzreczunowicz's translation runs: "Whosoever has derived a gain from the work or property of another without a cause justifying such gain, shall indemnify the person at whose expense he has enriched himself to the extent of the latter's impoverishment and within the limit of his own enrichment." The source of the provision is not, as one would be prone to assume, French law *per se*, rather it is Article 67 of the Moroccan Code of Obligations[83] which provides, "Celui qui de bonne foi a retiré un profit du travail ou de la chose d'autrui sans une cause qui justifie ce profit, est tenu d'indemniser celui aux dépens dequel il s'est enrichi dans la mesure où il a profité de son fait ou de sa chose."[84]

However, the mere fact that the principle was introduced to Ethiopian law by a circuitous route, does not render a comparison between French law and Ethiopian law any less valid. Considering France's colonial presence in Morocco, it is fairly safe to assume that it was responsible for codifying the Moroccan law of obligations. That aside, the fact that the said Article 67 reflects closely the French position on the question of unjust enrichment bears out the above assumption. Hence for all intents and purposes, Article 2162 traces back its source directly to French law.

But our law is distinguishable from its French counterpart in two important respects: (1) Unlike the judge-made French law, a general principle prohibiting unjust enrichment has been expressly incorporated in the Civil Code and (2) there is no mention of the subsidiarity of the enrichment action in Article 2162 or elsewhere. As it stands, the elements of Article 2162 are,

(a) the plaintiff's impoverishment;
(b) the defendant's enrichment;
(c) a causal connection between the two;
(d) absence of cause justifying the enrichment.

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81. Distributed as class materials in the Faculty of Law, H. S. I. U..
82. Article 2162 of the English version reads thus: "Whosoever has derived a gain from the work or property of another without just cause shall idemnify the person at whose expense he has enriched himself to the extent to which he has benefitted from his work or property."
83. Explanatory notes prepared by the Codification Commission, p. 56 "la formule du principe général admis par l'article 130 (Art. 2162) est empruntée au Code marocain des obligations (art. 67)."
84. Reproduced in Challies, *op. cit.*, p. 170.

II. Consideration of "Subsidiarity"

In this section we will consider whether the doctrine of "subsidiarity" exists, or should exist, in Ethiopian law despite the conspicuous absence of any mention of it in the Code. A convenient way of doing that is to take up the two theories behind the doctrine in French law and consider

(a) whether the argument of hierarchy in the sources of law holds good in Ethiopian law;

(b) whether the doctrine of subsidiarity exists in Ethiopia to the extent that it is compelled by the "fraud on the law" theory.

(a) Hierarchy of Sources.

We noted above that as regards unjust enrichment, our law differs markedly from the French in that it incorporates a stated general principle which provides for the payment of indemnity for unjust enrichment. Unlike the French Code, the Ethiopian Civil Code does not confine itself to enumerating a few specific applications of the principle. Rather it states the principle expressly in such a way that it covers the whole range of unjust enrichment. The principle of unjust enrichment then has not developed as an "extra-codal" product of jurisprudence,[85] because it was legislatively enacted. Thus the source of the unjust enrichment action is on an equal footing with all other sources of actions provided by the law, such as contracts, delicts etc. Like all other principles, of course, the principle of unjust enrichment is designed to cover specific situations and whenever a situation is such that it falls within the purview of the principle, an unjust enrichment action can be brought without further ado about the existence or non-existence of other actions arising from other sources. Therefore the doctrine of subsidiarity as expressed by the "hierarchy of sources" theory in French law cannot exist in Ethiopia.

(b) Fraud on the Law.

Does or should the "fraud on the law" theory prevail in our law? To begin with, this principle or theory is not stated anywhere in the Ethiopian Civil Code; nor for that matter is it ever stated in any other code. Still the principle is inherent in the idea of law itself. The stand taken by French doctrine and case-law brings home this point very well. We have seen how concerned all the theorists and courts are about preserving the established legal order and how they argued that it would be fallacious and meaningless to enact some provision or set up some institution if it could be contravened with impunity. Similar arguments can be put forth in the context of Ethiopian law in favour of the exclusion of the unjust enrichment action where an alternative action is barred by a legal obstacle. Take for example a contractual action that is barred by prescription. If the plaintiff could turn around, institute an unjust enrichment action and succeed in his action what would happen to Article 1845? It would for all intents and purposes be reduced to naught as would all the provisions which for some reason or other prevent the exercise of an otherwise valid action. Now, if we are to assume that the legislator wanted to enact a coherent and working code, we must hold that he did not intend the enrichment action to lie where another action asserting the

85. Nicholas, *op. cit.*, p. 639.

same or substantially the same claim is blocked by a legal provision. Any other conclusion would be neither logical nor practical.

A less rhetorical and more convincing way of making the same point though, is to analyse the doctrine of subsidiarity in terms of just cause. We have seen that in French law, there is an overlap between the doctrine of "subsidiarity" and that of "just cause" to the extent that the former connotes that the enrichment action cannot lie where an alternative action is barred by a legal obstacle. The rationale was that the law confers the enrichment on the defendant and therefore acts as just cause for the enrichment by blocking the plaintiff's alternative action. We will here consider whether or not that line of reasoning can be validly utilized in Ethiopian law. According to Article 2162, the unjust enrichment action does not lie if, among other things, the enrichment has a just cause. A study of the Civil Code discloses that in Ethiopian law the just causes for enrichment are either contracts or the law itself.

The question here is whether or not a rule that bars another action is a just cause for enrichment in the same way that a contract or a provision that expressly confers an enrichment is. Before deciding either way let us consider a hypothetical case. Suppose a succession devolves on a minor, and his tutor, pursuant to Article 282(1) prepares an inventory specifying the value of the succession. Let us also assume that something was due to the tutor from the succession but he fails to state it in the inventory. After some time he is removed from his office and he institutes a petitory action under Article 1206 to claim that part of the succession which was due to him. His action will fail because the requirement of Article 282(2) is not met. The minor of course keeps his ex-tutor's share of the succession and is thereby enriched some more. Now what was the cause for his enrichment? It is definitely not a contract, so that leaves us with the law.

In this fact situation we can distinguish between two ways in which the law operates as a just cause for enrichment. The minor's enrichment which resulted from that part of the succession which devolved upon him personally is *directly* confered upon him by the law, namely the law of successions. His enrichment which resulted from his ex-tutor's default on the other hand, is confered upon him only *indirectly* because it depends on his ex-tutor's failure to comply with the requirement of Article 282(1). Thus, but for the matter of directness or indirectness the law is the just cause for the minor's enrichment in both instances. The same can be said of all other cases where a legal provision, such as prescription, modes of proof etc., bars an otherwise valid action. It follows from that that the unjust enrichment action cannot lie in such instances because the requirement that the defendant's enrichment be without just cause cannot be met. Hence the doctrine of "subsidiarity" is present in Ethiopian law to the extent that it overlaps with the doctrine of just cause.

CONCLUSION

Nothing is stated in the Ethiopian Civil Code as regards the doctrine of "subsidiarity" of the action for the recovery of an unjust enrichment. In our effort to determine whether, despite the Code's silence, the doctrine prevails in Ethiopian law in some form or other, we analysed the question in terms of the two theories behind the doctrine in French law, from which it results that

(a) The doctrine of "subsidiarity" does not hold good in Ethiopian law in so far as it connotes the exclusion of the unjust enrichment action on the basis of a

theory of "hierarchy in the sources of law." The principle of unjust enrichment is a product of legislative enactment, and the action arising therefrom cannot be subsidiary to other actions arising from other sources.

(b) The doctrine, as expressed by the theory of "fraud on the law," is present in Ethiopian law. Logical and practical considerations militate for its presence. That aside its presence is compelled by the "cause" requirement in Article 2162. In the last analysis, this theory stands for the proposition that the unjust enrichment action cannot be taken where the defendant's enrichment has a just cause.[86]

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