THE PRINCIPLE OF UNJUST ENRICHMENT FROM THE EUROPEAN CODES TO THE EUROPEAN CIVIL CODE

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Abstract
Despite a very long history and the unanimous recognition of solid moral grounds, the principle of unjust enrichment found its place in the legal systems only very late and its acceptance occurred after many hesitations and imposed many conditions for its application.
This paper takes a comparative view at the way the principle of restitution (according to which the unjustified enrichment is not allowed) is reflected in three leading continental European legal systems (French, German and Swiss) and the possible role this principle will play in a future European Civil Code.

Keywords - *restitution, codification, Europe, unjustified enrichment, principles.*

Introduction

Lawmakers have always avoided the legislative sanction of principles that are too general as they did not wish to undermine the legal system by introducing principles whose general applicability would have called into question many of the special legal institutions. It is however undeniable that, although it was not taken up as a principal tenet of law, unjust enrichment represented a "formative force behind a variety of rules and institutions of positive law"[1].

Originating in the Roman Law, the moral principle of restitution is currently recognised under all modern legal systems represented in Europe. Nevertheless, its recognition by the jurisdictions of the Old Continent is inconsistent. Even though differently reflected in various legal systems of European states, the principle of restitution could, and in our opinion should, be regarded as one of the fundamental pillars of the European Civil Code, if such a code is ever to be enacted. It is therefore of great interest to look at the main current European codifications in order to identify the elements which need to be harmonised.

By having a have a closer look at some of the civil law (Romano-Germanic) jurisdictions (focusing on the French, German and Swiss Codes) we aim at indentifying the elements related to the principle of not allowing unjustified enrichment which might potentially find their place in a future common European codification.

1. General comments regarding Romano-Germanic Legal System

The jurisdictions in the Romano-Germanic system were the first to adopt the principle of unjust enrichment through legal actions. But even in this system there were two quite different approaches of the issue which in turn generated radically different consequences.

In the Romano-Germanic system there were two fundamental codifications that underlay all subsequent civil codifications: the French Civil Code and the German Civil Code. The Swiss Code of

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[1] Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition*. 1990.

Obligations is also worth mentioning because it influenced the codifications of some of the states of Latin America in the first half of the past century and its translation was adopted in Turkey in 1926.

2. The French Model

The first major codification was made during Napoleon's time, in France - the Napoleonic Civil Code of 1804. It is one of the great achievements and prides of its creator and namesake who used to say that his victories might be forgotten, but his code will last throughout history. And he was most definitely right. The Napoleonic Civil Code was a model to follow for countries from all corners of the world (such as Romania, which in 1864 adopted a Civil Code strongly inspired from the French one). When Spain adopted, in 1889, a Civil Code of French inspiration, it brought the spirit of the Napoleonic Code to its colonies, and many South American states followed suite.

The Napoleonic Civil Code contains no explicit reference to unjust enrichment per se, but many of its specific institutions are evidently based on this principle. The lack of a clear legislative sanction thereof is attributed to a great extent to the code's authors being influenced by the writings of famous legal scholars, such as R.J. Pothier (1699-1772) and J. Domat (1625-1696) which did not uphold unjust enrichment as a source of obligations, but did however expressly regulate *negotiorum gestor* and undue payment under the name of quasi-contracts. These two latter institutions, together with other important institutions of the French law[2], can be considered special applications of the general principle. Pothier and Domat, together with other jurists, considered that "the principle is too vague to be proposed as legal rule and that, like an underground river, it feeds precise rules, which prove its existence, but it never surfaces"[3].

Nonetheless, the need for a general sanction of the principle, so as to avoid unjust situations, was increasingly felt. The merit for creating the modern theory of unjust enrichment in the French legal system is attributed entirely to doctrine and jurisprudence.

At first, the courts or law had constantly rejected the principle of unjust enrichment in cases that were not perfectly regulated by the existent legal rules. It was deemed that its general applicability could have unfortunate consequences on other law institutions, preventing their application, and that the system of legal rules as a whole could be blown away like a house of cards by the equity current being manifested. Practically, it was said then that the two fundamental principles, *neminem laedere* (which underlies tort) and *suum cuique tribuere* (which refers to the non admittance of unjust enrichment), could replace all civil law rules, and that was unacceptable.

At the end of the 19th century, a strong doctrinal movement militated in France for the recognition of unjust enrichment as a source of civil obligations. The prestigious French jurists, Aubry and Rau, authors of the classical patrimony theory, developed a theory of unjust enrichment within their very theory on patrimony. They considered that one of the rights of a patrimony owner is the right to claim, by means of a personal action, which we can classify as *de in rem verso* action, the restitution of the patrimonial objects and assets. They also asserted that *actio de in rem verso* should be taken as a sanction of the equity rule according to which no one can enrich themselves at the expense of another in all cases where a person's patrimony is unjustly enriched at the expense of

[2] For example accession, restitution in case of incapacity. The Napoleonic Civil Code contains many similar special applications of unjust enrichment. Aubry, Charles, and Rau, Charles. *Cours de Droit Civil Français*, 246. Quatrieme Edition, T. VI.

[3] Ripert, Georges, *La regle morale dans les obligations civiles*, 246. Quatrieme Edition: 1949.

another person's patrimony, unless the latter does benefit by obtaining what is due to him, through any action arising from contract, quasi contract, tort or quasi tort"[4].

Nonetheless, the jurisprudence hesitated to adopt this solution. In 1892, in a famous case (known as the "Boudier affair" or the "fertilizers affair"), the Court of Cassation in Paris decided to allow an action grounded on unjust enrichment. It "opened the flood gates wide"[5], taking it as far as to support that the exercise of such action "deriving from the equity principle, which prohibits enrichment at the expense of another, is not subject to any condition if not stipulated by any text of law,"[21] .

It is unanimously accepted that the judgement given in this case represented an acknowledgement of unjust enrichment as source of civil obligations; however, the general nature of this formula, which was so wide that it could have destroyed the entire legal order[6], was bound to be amended. Therefore, in a judgement on 12 May 1914, the Court of Cassation in Paris found, in another case, that *actio de in rem verso* cannot be allowed unless certain conditions are met, and listed therein the conditions enunciated by Aubry and Rau.

The judgements that followed adopted these conditions, and unjust enrichment and *actio de in rem verso* were taken on by most jurisdictions of French inspiration.

Last, but not least, it should be mentioned that in many jurisdictions that can be considered of French inspiration, where the Civil Codes were amended or even where new codes have been adopted, the institution of unjust enrichment is expressly regulated (for example, article 2298 of the Civil Code of the State of Louisiana, articles 1493 to 1496 of the Civil Code of Quebec, article 212 of the Dutch Civil Code as well as the regulation in the newly enacted Civil Code of our own country, Romania), in some cases the new texts departing from the conditions established by the French law. As a matter of fact, even a draft of the Romanian Civil Code, drawn up during the Communist period, was supposed to include five articles regarding unjust enrichment and undue payment, the latter, we believe, being rightfully considered a particular situation of the former.

At the end of this historical overview of the sanction, in the modern law, of unjust enrichment as source of obligations, we can conclude that, notwithstanding the immense merit of having acknowledged this legal institution, French law is also responsible for preventing many of its useful applications by formulating certain conditions, not so much restrictive, as discouragingly abstract and insufficiently defined, such as the "absence of cause".

3. The German Model

The second extremely important codification in Europe is the German Civil Code (B.G.B.)[7]. After long hesitations of the German jurists and having generated famous controversies, it became effective, almost 100 years after the adoption of the Napoleonic Code.

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[4] Aubry, Charles, and Rau, Charles. *Cours de Droit Civil Français*, op. cit, 246. Quatrieme Edition, T. VI.

[5] Carbonnier, Jean, *Droit Civil, 4, Les Obligations*, n° 312.

[6] Stark, Boris, Roland, Henri, and Boyer, Laurent. *Droit Civil, Les obligations, 2. Contrat,* 767. Sixieme edition.

[7] Bürgerliches Gesetzbuch, German Civil Code of 1896, effective as of 1900, is chronologically the second most important codification in Europe, after the Napoleonic Civil Code of 1804, and, is similarly an inspiration model for many modern civil codes.

After the fall of Napoleon, Germany continued to be politically influenced by France. Baden Baden kept the Napoleonic Code and continued to apply it, while other states rejected it and returned to Ius Commune. However, all German states increasingly raised the issue of codification, wishing to achieve a simplification and rationalization of the law. The position of a well-known jurist, Friedrich Karl von Savigny, played an important role in postponing the codification at the time. He was the founder of the so-called *Moderne Rechtsschule* which drawn up the "New Pandectae", in which an overwhelming importance was given to terms and definitions.

The adoption of the Code was strongly supported by Ihering, and due to his efforts, in 1896 the B.G.B. was adopted and became effective as of January 1st, 1900.

It has been said that the German Civil Code is more academic and more technical and its rules are more precise than those of the Napoleonic Code[8]. Unfortunately, as we shall see, when it comes to the issue of unjust enrichment the German jurists did not live up to the expectations and the current regulation is not the best there is.

Significantly influenced by the conclusions of the Modern Law School of Savigny and based on Pandectae, B.G.B. has a structure completely different from that of the Napoleonic Code and consists of five books:

1. General Principles (one of the novelties as compared to the Napoleonic Code, comprising the common rules of the private law system, as a whole);
2. Obligations (it comprises the main product of the Roman law and *Ius Commune.* It should be mentioned that in the German system, as opposed to the French one, the construct of obligation is more important than that of property, since after the industrial revolution, it was deemed that not property is essential, but obligation);
3. Property (note the existence of the principle of abstraction, which allows for the existence of two contracts in the field of transmission of property: one of "obligation" and one of "transfer" ("disposition");
4. Family; and
5. Inheritance.

The differences between the two most important European codifications did not refer only to their structure, but also to the institutions they regulated. Unlike the Napoleonic Code, the German Civil Code not only acknowledges unjust enrichment, but in addition to applications thereof in numerous subject matters[9], it includes ten articles (from 812 to 822) dedicated expressly to this institution grouped in a subchapter entitled "Unjust Enrichment" (*Ungerechtfertigte Bereicherung*)[10].

The German Civil Code is often presented as a codification characterized by precision, consistency and clarity, thus showing consistency with the Roman law, but in the regulation of unjust enrichment, the long praised code lacks precisely in precision and clarity. The shortcoming seems to be attributed to the fact that the regulation contains a general action, followed by several lists of situations, to which no clear correlations are made. This reflects a compromise between Savigny's

[8] Tetley, William, *Mixed jurisdictions: common law vs civil law (codified and uncodified).*

[9] For example: article 324 provides for the application of the unjust enrichment rules, when a contract is terminated due to circumstances for which the party is not responsible; article 682 when the parties do not have business management capacity; article 684 when management is contrary to the interests/will of the managed party; articles 987, 988 and 993 where it is raised the issue of restitution of an asset by its holder.

[10] V.BGB, Title 24, Section 7, *Obligations Book*, articles 812 to 822.

ideas, supporting the introduction of a general action based on unjust enrichment and the other authors of the code, who preferred the traditional approach, based on *condictiones*.

However, it remains unquestionable the application of unjust enrichment where, due to the principle of abstraction, a transfer made on the basis of a valid "transfer contract" could give rise to restitution if the "obligation contract" ceases to be valid, thus the "transfer contract" losing its cause. Some of the other situations where actions based on unjust enrichment apply were mentioned when we talked of *condictiones.*

Last, but not least, we should be mentioned that, used to the technical nature and clearly defined concepts of the German law, German courts were quite reluctant to an extensive application of unjust enrichment when faced with general terms such as "enrichment at the expense of another" or "unjust". As a result, unaccustomed to such extremely wide constructs, German courts also limited the application of the principle.

4. Swiss Code of Obligations

Without going into details, it should be nonetheless mentioned that the Swiss Code of Obligations of 1912 includes a chapter (entitled "Obligations Deriving from Unjust Enrichment") dedicated entirely to the institution that makes the object to our analysis. The seven articles regulating the field refer to:

- General Conditions (article 62, which in the first paragraph asserts the principle, demanding restitution when a person has been unjustly enriched at the expense of another and in the second paragraph lists several particular cases of restitution, derived from Roman law, namely: when something was obtained (1) for no valid reason; (2) for a reason that was not achieved; or (3) for a reason that subsequently ceased to exist);
- Undue payment (article 63 defines in the first paragraph the conditions when the general rule applies in case of undue payment and sets out the condition that the *solvens* provide proof of error; the second paragraph sanctions the inapplicability of the general rule of restitution in case of natural obligations);
- Scope of the restitution obligation (article 64 stipulates what in German law is known as "objection to the loss of enrichment" – that is, the defendant's possibility to obtain a rejection of the claim made against him, if he proves that he is no longer "enriched" at the time of the claim – and also specifying the exceptions from this situation, cases when the defendant is bound to the restitution, even if he is no longer "enriched": (1) if he alienated in bad faith the benefit received; (2) if he should have known, at the time of the alienation, that he might be bound to return them);
- Rights in respect to expenditure (article 65 establishes the condition of restitution of the expenses made by the defendant who is obliged to return the benefit, as it follows: in the first paragraph, it stipulates that the defendant is entitled to reimbursement of the expenses necessary or useful, although where unjust enrichment was received in bad faith, the useful expenditure must be reimbursed only within the limits of the added value existing at the time of the restitution; the second paragraph makes reference to compensation for other expenditures, to which the defendant is not entitled, but where no such compensation is offered to him, he may, before returning the property, remove anything he added to it, provided this is possible without damaging it);
- Statutes of limitation (article 67 the first paragraph contains the rule: the statutes of limitation and the date on which it begins to elapse is the time when the injured party learned of his right to restitution, without, however, exceeding ten years after the date when such right arose; the second paragraph stipulates an exception, which allows the "impoverished" party to refuse to satisfy

the claim, even if his own claim for restitution exceeds the statutes of limitation, when the enrichment consists of a debt.

Without risking any final conclusion as regards the regulation of the unjust enrichment in the Swiss law, we notice that this regulation can be considered a solution of compromise between the German system, where unjust enrichment is extensively regulated, and the French system, where such regulations is completely absent.

5. Towards an European Codification

In today's Europe tendencies of legislative harmonization manifest in all aspects of the law, including those traditionally considered "strictly national", such as civil law. It has been quite a few years already since, despite a great number of opponents, there were serious debates about the drafting of a European Civil Code. Once the idea was launched, many realized that this is an immense challenge and the European jurists are facing probably the most important and delicate task requiring an in-depth comparative analysis, which meant going back to the principles. After launching the call for initiating this step, many commissions have been established and many reputable jurists become involved in this mission, starting, arbitrarily or not, from the Obligations Law, an area that saw another group of states try to come up with a common codification, almost a century ago.[11].

Moreover, as Professor Christian von Bar, coordinator of the Osnabrük group, who, at the request of the European Parliament, made a study of the private law systems in the European Union, in view of creating a European Civil Code, said, it is undisputable that there is a "need for a common legal code, valid all over Europe, particularly a code governing the distribution of wealth, now that the Common Market has a common currency". In this context, the moral principle of rejecting unjust enrichment, acknowledged by all legal systems, but applied so differently, even by great law systems, proves to be again at the centre of attention, more than a century after it was acknowledged as a source of obligations in the continental European law.

Conclusions

Traditionally considered an institution of "civilian" tradition, the principle of unjust enrichment has lately been quoted[12] as one of the "civilian" principles adopted by the common law, and it lies at the basis of the theory of restitution. Not long ago, the common law system did not allow actions that included general claims of restitution based on unjustified enrichment, but once the forms of action were abolished, the substantive principle of unjustified enrichment acquired an extremely important role, being considered a fundament of all actions leading to restitution, not only of those originated from quasi-contract.

The equitable principle of non-admittance of unjust enrichment is currently applied in most national law systems of the five continents. In Europe and the Americas, both the "civil law jurisdictions" and the mixed ones (such as Scotland, Louisiana, Quebec) are based on this principle, and lately even the "common law" jurisdictions afford a wide acknowledgment of the unjust enrichment, due to a wider acceptance of the theory of restitution in those countries.

[11] We refer here to the French and Italian Project of Code of Obligations, v. Steurmann, *Contribution a l'etude du Projet Franco-Italiende Code des Obligations et a son introduction en Roumanie*. 1933.

[12] Tetley, William, op. cit.

In the civil law system, unjust enrichment appears to be expressly regulated as source of obligations in some countries (such as Armenia, Bulgaria, Switzerland, Philippines, Germany, Greece, Italy, Louisiana, Mexico, Mongolia, Quebec, Peru, Portugal, and Tunisia and more recently our own country, Romania) or, without being sanctioned in special texts of law, it was synthesized and developed by the doctrine and jurisprudence (such as, for example in France, Spain, Romania, Argentine), and the principle of unjust enrichment underlies many of the fundamental institutions of the system.

The importance of this principle is confirmed also by the structure proposed for the European Obligations Law, which is deemed to be formed of three main braches: Contract Law, Tort Law and Restitution Law, the latter being based on the principle of non-admittance of unjust enrichment.

In this day and age, when globalization has become an almost obsessive subject, lawmakers have an understandable tendency to return to principles, particularly to moral principles based on which to develop a global and coherent if not uniform legal system. Moral principles, as undisputable source of judicial institutions, are increasingly rediscovered and carefully considered by jurists of all legal systems. The obvious purpose is to find common ground for the law institutions functioning in various regions of the globe, and this is why the generous principle of unjustified enrichment should continue to be the object of many research studies, being one of those principles with universal vocation.

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