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Comparative Legal Analysis of Unjust Enrichment, with an Outlook on the Roman Legal Foundations

Abstract

In developed legal systems, it can be observed that the majority of private law claims arise either from contract or tort. There is, however, a group of claims that cannot be derived either from contract or tort, namely claims for unjust enrichment. The subject of my lecture will lead to this area of law. Unjust enrichment was already an already known concept in Roman law. In Rome, the so-called *condictio* applied to such claims. The different types of *condictio*, which first developed under Iustinian (*condictio causa data causa non secuta*, *condictio ob turpem vel iniustam causam*, *condictio indebiti* and *condictio sine causa*), can still be discovered in their essence in continental legal systems, where they form the core of enrichment claims. My aim is to examine to what extent the Roman legal influence can be detected behind the rules of certain European states on unjust enrichment and what differences and similarities can be found between the related rules of these countries. The research method to be used is the comparative legal method. I will first turn my attention to Roman law, briefly exploring the Roman legal solution to the question of unjust enrichment. I will then turn to the legislation in force in certain European countries (Germany, France, England), comparing the relevant provisions and rules while looking for similar or different legal solutions. As a result of the research, we will have a picture of to what extent, and in what respects, the European states regulate the question of unjust enrichment in a similar way; furthermore, to what extent can the Roman legal roots of the legal institution under examination be identified.

Keywords: unjust enrichment, Roman law, law in force, comparative legal method

I. Introduction

In developed legal systems, it can be observed that the majority of private law claims arise either from contract or tort.[2] There is, however, a group of claims that cannot be derived either from contract or tort, namely claims for unjust enrichment.[3] My research deals with this field of law.

Unjust enrichment was a legal concept already known in Roman law. Firstly, I would like to take a look at how unjustified enrichment was regulated in Roman law, then, I would like to turn my attention to the regulation of modern legal systems. By doing so, I would like to highlight some similarities and differences regarding this field of law while paying attention to the Roman origin of these regulations.

II. Unjustified Enrichment in Roman Law

In Rome, the so-called *condictio* was available for claims arising from unjustified enrichment. The classical jurists attempted to form certain typical situations in which they were „prepared to grant the *condictio*".[4] However, in classical law, strictly speaking, they did not

1 University of Szeged Faculty of Law and Political Sciences.
2 Konrad Zweigert – Hein Kötz: Einführung in die Rechtsvergleichung. J. C. B. Mohr. Tübingen, 1996. 539. p.
3 Benedek Ferenc: Jogalap nélküli gazdagodás jogellenes és erkölcstelen magatartásból a római jogban. Pécs, 1984. 7. p.; Zweigert-Kötz 1996, 539. p.
4 Reinhard Zimmermann: The Law of Obligations. Oxford University Press. Oxford, 1996. 838. p.

recognize specific types of *condictiones*, but, it is important to mention, that they did apply the *condictio* to several situations in which they thought it wols be unfair to leave the plaintiff without some kind of redress.[5]

Later, Iustinian formed several *condictiones* for the specific types of situations. As a result, the Digest contains separate titles for: *condictio causa data causa non secuta* (D. 12,4), *condictio ob turpem vel iniustam causam* (D. 12,5), *condictio indebiti* (D. 12,6), *condicto sine causa* (D. 12,7) and *condictio furtiva* (D. 13,1)

Next, I would like to shortly sum of the essence of these *condictiones*. Firstly, the *condictio ex causa furtiva* was applied in cases of theft by which the victim could demand the return of the object or the monetary value of the object from the thief.[6] It was also available against a person who had acquired something through an innocent encroachment on somebody else's property or through force of nature.[7]

All the other special enrichment claims are characterized by the fact that the plaintiff tries to reclaim what he has transferred to the defendant if the purpose which this transfer was intented to attain has either been frustrated or is, for some other reason frowned upon by the community.[8] The two main requirements of the unjustified ernichment in Roman law were the *datio* and this *datio* to be *sine causa*.[9] Under *datio* we mean some kind of transfer of assets and the requirement of *sine causa* means that the recipient has no sufficient reason for retaining this benefit.

Condictio causa data causa non secuta was applied to cases when someone has provided a perfomance in the hope of a certain counterperformance, but the return, the hoped-for goal, has not been achieved.[10] It derived its special significance from the fact that not every agreement was enforceable in Roman law.[11]

Condictio ob turpem vel iniustam causam was available if the performance had been such that ist acceptance and/or offer offended the law or traditional standards of honest and moral behaviour.[12] We can say that it is a subcategory of *condictio causa data causa non secuta* because it it required a *datio ob rem*, but, it is really important to emphasize, that its success did only depend on the infringement of the *boni mores*, not on on the further requirement of *causa non secuta*.[13]

Condictio indebiti was served to retransfer *indebitum solutum*, meaning that if someone provides a service to someone else without owing it to them, he can claim it back.[14] The two requirements for this *condictio* were that the obligation did not in fact exist and the plaintiff made his performance in the mistaken belief that he was owing (*error*.)[15] Justinian made error a core element of *condictio indebiti*.[16]

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5 Zimmermann 1996, 839. p.

66 Molnár Imre – Jakab Éva: Római jog. Szeged, 2021. 334. p.; András Földi – Gábor Hamza: A római jog története és institúciói. Eszterházi Károly Egyetem Oktatáskutató és Fejlesztő Intézet. 2018. 569. p.; Benedek Ferenc – Pókecz Kovács Attila: Római magánjog. Dialóg Campus Kiadó. Budapest-Pécs, 2013. 318. p.; Brósz Róbert– Pólay Elemér: Római jog. Tankönyvkiadó. Budapest, 1989. 463. p.

7 Zimmermann 1996, 840. p.

8 Uo. 841. p.

9 Siklósi Iván: Római magánjog II. kötet. ELTE Eötvös Kiadó. Budapest, 2021. 1589-1589. pp.; Brósz – Pólay 1989, 453. p.; Földi – Hamza 2018, 553. p.; Molnár – Jakab 2021, 325-326. pp.

10 Molnár – Jakab 2021, 326. p.; Brósz – Pólay 1989, 453-454. pp.; Földi – Hamza 2018, 553. p.; Benedek – Pókecz Kovács: 314. p.

11 Zimmermann 1996, 843. p.

12 Uo. 845. p.

13 Uo.

14 Molnár – Jakab 2021, 326. p.; Brósz – Pólay 1989, 453. p.; Földi – Hamza 2018, 553. p.; Benedek – Pókecz Kovács: 313. p.

15 Zimmermann 1996, 848-849 pp.; Benedek – Pókecz Kovács: 313- 314. pp.

16 Zimmermann 1996, 850. p.

Finally, *condictio sine causa* was an ianus-face institution, because on one hand: it was meant to serve as a residuary category: it contained whatever did not fit in with any of the other *condictiones* (for example *condictio liberationis* and *condictio ob causam finitam*).[17] On the other hand, it „swallowed up, as a kind of *condictio* (*sine causa*) *generalis*, all the standard situations of enrichment liability".[18]

III. Law in Force

One can say, that Roman *condictiones* „proved extraordinary long-lived and made their way into many modern legal systems".[19] The various types of *condictio* still exist today in more or less clearly expressed form in the continental codifications, where they form the core of enrichment claims.[20]

In my research I will analyse, first of all, the German system in detail. The reason for that being: probably the German legal system preserves best the Roman legal tradition. Also, to be able to make comparison between continental systems, I will have a look at the French regulation too regarding unjustified enrichment. In addition, I want to examine the English common law system too. In my opinion it is really intrigung to see how these rather different legal systems rule the legal question of unjustified enrichment.

I will highlight several questions regarding unjustified enrichment, and analyse the different (or rather similar) solutions given by the examined countries. Consequently, in the following sections I would like to highlight certain differences and similarities between these, below mentioned, European legal systems. Also, paying attention to the possible Roman roots, origins of this institution in modern legal systems.

IV. General Enrichment Clause

The first problem I would like to turn my attention to is the question of a general enrichment clause.

The German Civil Code (and also the Swiss Code of Obligations) regulate claims arising from unjust enrichment in a special section, at the head of which is a comprehensive general clause.[21] The German general enrichment action is based on Savigny's opinion.[22] He said that the common feature of the different Roman enrichment *condictiones* was the „enlargement of the assets of one party by way of diminution of the assets of another, leading to a state of unjustified „habere" – because a legal basis (a causa) for this shift of assets had either not existed in the first place or had subsequently fallen away".[23]

In contrast, the French Code Civil does not contain a general clause for unjustified enrichment. This is attributed to the fact that Pothier, whose writings had a decisive influence on the law of obligations of the Code civil, did not deal with the claim for unjust enrichment in a summarised manner, but rather only described the case of condictio indebiti in more detail of all the cases that could be considered.[24] However, after the entry into force of the Code civil, French case law initially attempted to resolve cases of unjust enrichment with the help of the provisions contained in the Code, but it became clear that these provisions were not sufficient

17 Uo. 857. p.
18 Uo.
19 Uo.
20 Zweigert – Kötz 1996, 540. p.
21 Zweigert – Kötz 1996, 541. p.; §812 BGB.
22 Zimmermann 1996, 872. p.
23 Uo. 872-873. pp.
24 Zweigert-Kötz 1996, 546-547. pp.

to resolve all cases of unjust enrichment.[25] The textbook by Aubry and Rau therefore argued that a general claim for enrichment should be granted, and this view was finally endorsed by the Court of Cassation in 1892.[26] The general claim requirements developed by case law are the following: transfer of assets meaning, that the plaintiff is diminished and the defendant is enriched and the transfer of assets has taken place *sine causa*.[27]

Thirdly, In England it is only since the first publication of the groundbreaking book by Goff and Jones in 1966, that the view has prevailed in jurisprudence and literature that there is a general legal principle of liability for restitution of an unjust enrichment.[28] Later, a general enrichment principle has been also recognized by the House of Lords.[29] According to Goff and Jones the principle of unjust enrichment presupposes three things: first, the defendant must have been enriched by the receipt of a benefit; secondly, that benefit must have been gained at the plaintiff's expense; thirdly, it would be unjust to allow the defendant to retain that benefit.[30]

In this section, we can see, that the basic reqiurements of unjustified enrichment are really similar in the examined countries. In all of these three legal systems the requirements for unjust enrichment are the following: firstly some kind of transfer of assets is needed with the with the outcome of one person is being diminished and the other person is being enriched (on the expense of the first person), secondly there is no legal ground, no *causa* for retaining this benefit (*sine causa*), it would be unjust to allow that.

Also, what is really intrigiung to see is that even in Roman law the same requirements can be seen. As I wrote earlier, the two requirements for unjust ernichment were *datio* and the requirement of *sine causa*.[31] *Datio* meaning some kind of transfer of assets and *sine causa* meaning that there is no legal ground for retaining that benefit. We can conclude, that the Roman roots can clearly be seen.

V. Types of Unjustified Enrichment Cases

In this section, I would like to turn my attention to the types of cases in the field of unjustified enrichment. I want to have a look at the practical seide of this institution too. With that it is possible to see how different the end results are in the examined countries.

Firstly, In Germany, BGB makes a distinction as to whether the unjustified transfer of assets has taken place „through the performance of another" or in „some other way".[32] The first group of so-called „performance *condictiones*" (Leistungskondiktionen) includes cases in which the claim for enrichment is based on the restitution of a performance, which the plaintiff consciously and intentionally procured for the defendant, but which he now demands back because the performance was effected without legal reason.[33] For the other group it is very difficult to find a general, workable positive denominator.[34] The most important case of this group, enrichment „in any other way", is when someone has used, utilised or consumed another person's property or rights without being entitled to do so.[35] This is referred to as „encroachment

25 Uo. 547. p.
26 Uo.
27 Uo. 549. p.
28 Uo. 553. p.
29 Reinhard Zimmermann: Unjustified Enrichment: The Modern Civilian Approach. Oxford Journal of Legal Studies, Volume 15. 1995. 414. p.
30 Zweigert-Kötz 1996, 556. p.
31 Siklósi 2021, 1589-1589. pp.; Brósz – Pólay 1989, 453. p.; Földi – Hamza 2018, 553. p.; Molnár – Jakab 2021, 325-326. pp.
32 Zweigert-Kötz 1996, 541. p.
33 Uo.
34 Zimmermann 1995, 417. p.
35 Zweigert-Kötz 1996, 545. p., Zimmermann 1995, 419. p.

condictio" (Eingriffskondiktion).[36] The purpose of the claim for enrichment is not to compensate for a loss that has demonstrably occurred in the assets of the disadvantaged party, that would be the payment of damages, but to transfer a gain that has occurred in the assets of the enriched party to the party that has the better right to it.[37] According to this principle, in this case of enrichment on encroacment the plaintiff does not have to prove loss, whereas the action in delict recquires proof of damage.[38]

In France the situation is a bit more complex. French law makes no distinction as to whether the transfer of assets took place through a „performance<"by the plaintiff or „in any other way".[39] The majority of „performance *condictiones*" (Lesitungskondiktionen) will fall under the répétition de l'indu regulated in the Code civil (which is the oldest codified *condictio indebiti*);[40] where this is not the case - as in the case of the provision of services - the general enrichment clause applies.[41]

If we now look at the most important types of cases in which Anglo-American law grants enrichment claims, we will find that the distinction between „performance *conditio*" and „*encroachment* condictio" is also suitable for the presentation of common law.[42] They categorise the different groups of cases according to whether the defendant has obtained a pecuniary advantage from or by the act of the plaintiff, which roughly corresponds to our „Leistungskondiktionen", or whether he has obtained it by his own wrongful conduct, which corresponds to „Eingriffskondiktionen".[43]

It can be found that the German and English legal systems come to a similar conclusion when thinking about the different cases brought under unjust enrichment. The French solution is ,however, different, because it does not make distinction between „Leistungskondiktionen" and „Eingriffskondiktionen". In the case of German and English law parallels can be drawn between these legal systems and Roman law. In Rome the *sine causa* requirement meant that he did not deserve to retain the object of the transfer becuse of an absence of *causa retinendi*.[44] This resulted from, in the cases of *condictio causa data causa non secuta* and *condictio indebiti*, the failure of the purpose of the perfomance, and in the case of *condictio ex causa furtiva* from unjustified imterference. In conclusion, the two main categories can be seen here too.[45] We can conclude, that the Roman legal roots are also detectable here, although in some respects they have been greatly broadened.[46]

VI. „Versionsklage"

Next, I would like to mention the interesting problem of the so-called „version cases" („Versionsklage"). It comes from the Roman *actio de in rem verso*. This is one of the actions which, under certain conditions, gave the business partner of a slave or a son under the father's power direct recourse against the pater familias and thus formed a certain surrogate for the institution of direct representation, which was not recognised in Rome.[47]

36 Zweigert-Kötz 1996, 545. p.; Zimmermann 1995, 418-419. pp.
37 Zweigert-Kötz 1996, 545. p.
38 Zimmermann 1995, 419. p.
39 Zweigert-Kötz 1996, 549. p.
40 Zimmermann 1995, 410. p.
41 Zweigert-Kötz 1996, 549. p.; Zimmermann 1995, 410. p.
42 Zweigert-Kötz 1996, 557. p.
43 Uo.
44 Zimmermann 1996, 855. p.
45 Uo. 872. p.
46 Zimmermann 1995, 421. p.
47 Zweigert-Kötz 1996, 540. p.

In French law the Versionsklage exists, which means French law also recognises a claim for unjust enrichment in cases in which the benefit accrues to the defendant only indirectly, i.e. only after it has passed through the assets of a third party.[48]

In contrast, in Germany the enrichment claim is only granted where the transfer of assets took place directly between the plaintiff and the defendant.[49] Swiss law is also of this opinion.[50] The Austrian ABGB, on the other hand, contains a provision which, according to its wording, allows the Versionsklage without restriction.[51]

In this section it is also really intriguing to see that among the otherwise quite similar regulations there is in this regard a significant difference between these countries.

Conclusion

In conclusion, we can say that all the examined legal systems provide enrichment remedies in a more or less similar way. Even between continental and English law there are not significant differences at the level of the actual results reached by the courts in typical restitution situations.[52]

It can be found that the modern civilian approach towards unjust enrichment appears to be characterized by the recognition of a general remedy for the restitution of benefits conferred without obligation.[53] The core features of unjust enrichment are transfer and the lack of legal ground.[54] This uniformity of approach is based on the common Roman law heritage.

48 Uo. 550. p.
49 Uo. 544. p., 550. p.
50 Uo. 544. p.
51 Uo.
52 Zimmermann 1995, 414. p.
53 Uo. 411. p.
54 Uo. 412. p.

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