

## Unjustified Enrichment in the New Hungarian Civil Code

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The law of obligations in Hungarian private law rests – as with European private laws in general – on the trichotomy of sources of obligations: contract, tort and unjust enrichment. Although we try to draw border lines between them, in practice they prove to be overlapping categories. The policy behind contract law and tort law can clearly be delimited and is clearly distinguishable: contract law is for protecting trust in promises; tort law is (basically) for prevention and compensation. The policy behind unjust enrichment is far less clear. It may be seen as a kind of justice, but, at the very end of the day it is about the general control of the state over the transfer of or shifts in wealth between members of society.

### I Unjustified Enrichment in Hungarian Private Law

The idea that no one shall be enriched at another's expense is rooted in ancient Roman law<sup>1</sup> and is part of the concept of justice which is inherent to European culture.<sup>2</sup> Legal systems, however, may differ in how they assess whether the shift in wealth from one person to another is to be restored on the basis of unjustified enrichment. The difference in terminology, i.e. *unjust* enrichment in Anglo-American law, while *unjustified* enrichment in continental legal systems, reflects the conceptual differences as well. Requiring *causa* in continental legal systems for transfer of property or as a prerequisite of enforceability for contractual obligations is the manifestation of the control of the state over changes in the wealth of individuals on the basis of their own will. If there is no *causa*, or the *causa* is illicit, the transfer is not enforceable and the shift in wealth is not recognised by the state. Sticking restitution to absence or incompleteness of *causa* in continental legal systems results in the difference between the continental and the Anglo-American approach. Continental legal systems focus on the question whether there is a legal basis on the side of the defendant for retention of a transfer or performance, while the

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\* Head of Department and Professor of Private Law (ELTE). Fellow of European Tort and Insurance Law (ECTIL, Vienna).

<sup>1</sup> *Nem hoc natura aequum est neminem cum alterius detrimento et iniuria fieri locupletioem* [By the law of nature it is right that nobody should be *unjustly enriched at another's expense*] (Pomponius).

<sup>2</sup> Aristotle, *Nicomachean Ethics*, Book V on rectificatory justice.

common law approach requires the claimant to point to a particular unjust factor or grounds for restitution to support their claim.<sup>3</sup>

For restitution of unjust enrichment, the Hungarian Civil Code provides a general clause without specifying the circumstances or factors which may make the enrichment unjustified. This general clause is the same as the rule provided in the Civil Code (1959). According to § 6:579 (1) of the Civil Code (2013), if someone was, without legal grounds, enriched at the expense of another, they shall be obliged to return the gain to the aggrieved party. No typical scenarios or *condictiones* are specified in the Civil Code, nor are such categories used in theory or in practice. As a general clause, however, restitution of unjust enrichment is to apply in all kind of patrimonial relationships. The *typical cases* of restitution of unjustified enrichment – in contrast to the common law approach where distinction between enrichment by wrong and enrichment by subtraction is used – are if the claimant rendered a performance (money or other) to the defendant for which there was no legal basis; if the defendant encroached on the claimant's property or interfered with the claimant's other protected right (especially personality rights or rights to intellectual property); or if the value of the property of the defendant increased due to expenses incurred by the claimant or if the claimant paid the defendant's debt.

## II The Prerequisites of Restitution

There are *three prerequisites* for establishing the obligation of the defendant for restitution of unjustified enrichment: the defendant was enriched; at the expense of the claimant and did it without any legal basis (without legal title). As a further, negative prerequisite, there can be the absence of recognised defence.

### 1 Enrichment

Enrichment can be described, in a way, as the *mirror image of damage*: while damage is a negative change in the patrimony of the victim (loss), enrichment is a positive change in the wealth of the enriched person (gain). This *gain* can be *manifested* in a lot of ways. It can be an increase in the value of property, acquiring property, possession or other rights, decrease or termination of obligations, benefit from using another's property, or saving costs. It can be the result of different behaviours as well. The cause of enrichment can be the act of the claimant (performance), the act of the defendant (processing, conversion, or merging things belonging to the claimant with his own) or a natural event. The cause of the enrichment can be either direct or indirect. The indirect nature of enrichment does not preclude the obligation for restitution. The enrichment is indirect if, for example, the claimant provided alimony to persons to whom the defendant was obliged to provide alimony.<sup>4</sup>

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<sup>3</sup> Charles Mitchell in Andrew Burrows (ed), *English Private Law* (3rd edn, Oxford University Press 2013, Oxford) 18.01 – 18.05.

<sup>4</sup> Supreme Court, Legf. Bir. Pfv. II. 20.416/2010. – EBH 2010. 2228.

## 2 Absence of Legal Ground (Causa)

The legal basis of the increase of wealth of the defendant is missing if it is not justified by the law, with a *causa*. This shall not be restricted to searching for a valid legal title for shifting the gain to the defendant. If the plaintiff benefitted the defendant in the absence of any legal title but on a moral basis, as performing an existing or assumed moral obligation, the enrichment shall be justified.<sup>5</sup> It shall be assessed, on the basis of the legal title *and* on the basis of the general values accepted in society, if the enrichment is justified or not. Thus, if the party performed a *naturalis obligatio*,<sup>6</sup> he is prevented from claiming it back on the grounds of the rules of unjustified enrichment. The enrichment can be the result of the act of the plaintiff (e.g. performing without any existing obligation) or of the defendant (e.g. this is the case if the defendant's gain was acquired as the result of interference with the plaintiff's protected rights (property or personality rights)).

## 3 Restitution

The enriched person is obliged to restore the gain but only if he acquired the gain to the detriment of the aggrieved party (and without the proper *causa*). This determines who is the claimant of the value to be restored as well; it can be only the person to whose detriment the gain was acquired. 'To the detriment,' however, does not mean that a loss suffered by the plaintiff was sufficient to establish a claim for restitution. The enriched party shall be obliged to restore the enrichment if he acquired a gain that was allocated to the aggrieved person by the law, even in the absence of decrease in the latter's wealth. Hence, using or making a profit on using items or positions that belong to the property of the aggrieved person may establish the claim for restitution on the basis of unjustified enrichment, even if the aggrieved person did not suffer a loss by this. The same holds for exploiting information or a business opportunity which belonged to the aggrieved party, even if the aggrieved party could not make the same profit for himself. Hence, e.g. the director (manager) of a company or one of his relatives makes a profit by concluding a contract in violation of the rules covering conflicts of interests<sup>7</sup> and exploiting a business opportunity that belonged to the company; he shall be obliged to restore the gain according to the rules of unjustified enrichment. This obligation does not depend on whether the company was in the position (e.g. by availing of the required resources to be invested) to exploit the same opportunity or not.

<sup>5</sup> Supreme Court, Legf. Bir. Pfv. II. 21.402/1998. – EBH 1999. 103.

<sup>6</sup> Claims that are neither invalid nor enforceable, such as claims originating from gambling or betting, except if the gambling or betting operation has been authorised by the relevant authority; claims originating from a loan promised or granted explicitly for the purposes of gambling or betting; claims that may not be enforced by judicial process, as expressly excluded by law (e.g. as a consequence of limitation); claims arising from contracts or terms guaranteeing or confirming such claims § 6:121 Civil Code 2013.

<sup>7</sup> § 3:115 (2), § 3:346 (5) Civil Code 2013.

### III Typical Scenarios

#### 1 Payment in Absence of Debt

This situation occurs if the aggrieved person performs a non-existent obligation. This may be the case either if the aggrieved person performs an obligation which never existed<sup>8</sup> or performs an obligation which originally existed but had already been terminated at the time of providing performance (payment).<sup>9</sup> An obligation never existed if there was no accepted source of obligations (typically contract, tort or unjustified enrichment) that could have created it. The Hungarian system is unique in so far as there are specific rules provided for restitution of performances on the basis of an invalid contract. Legal systems, in general, provide the restitution of performances with the rules of unjust(ified) enrichment if an invalid contract was performed. That was the traditional solution of Hungarian private law before the 2<sup>nd</sup> World War too. In the 1959 Civil Code, however, a specific regime was provided as the consequences of performing an invalid contract. This system has been maintained in the 2013 Civil Code, too. The idea behind creating a specific regime for restitution of performances that were provided on the basis of an invalid (either null and void or unenforceable) contract was that direct rules covering the consequences of invalidity may result in a simpler system. Not only could problems of set-offs with performances of a different nature be simplified with a direct regime but also the traditional defences of restitution of unjustified enrichment (especially change of position) could be excluded from the regime.<sup>10</sup> This specific system of direct consequences of invalidity did not prove to be perfect in court practice, as courts had to apply the rules of unjustified enrichment also amending the regime of direct restitution, especially if there was a change in the value of mutual performances.<sup>11</sup> In spite of the critics of the solution of the 1959 Civil Code the legislator upheld the specific system of restitution of performances of invalid contracts but maintained and extended the application of rules of unjustified enrichment as well.

According to the rules providing the specific regime of restitution with regard to performing an invalid contract, the primary consequence is restitution in kind. Thus, each party has the right to reclaim the service they provided from the other party in kind, if that party also returns the service they received in kind. The obligation to return what was received applies to the party requesting restitution, irrespective of whether the time of prescription or the duration of adverse possession has lapsed. In the process of restitution, the original value-service ratio must be maintained. If restitution in kind is not possible, the court shall order payment for the monetary value of the services yet uncompensated. The court may also invoke that sanction if restitution is likely to harm the relevant lawful interests of either party. A party shall not be

<sup>8</sup> Supreme Court Legf. Bir. Gf. IV. 30 040/1980. – BH 1981. 370.

<sup>9</sup> Supreme Court Legf. Bir. Pfv. IV. 21.351/1996. – BH 1997. 395., Supreme Court Legf. Bir. Pfv. VIII. 21.421/1998. – BH 2000. 300., Supreme Court Legf. Bir. Pfv. VIII. 21.649/1999. – BH 2001. 371., Supreme Court Legf. Bir. Pfv. VIII. 20.207/2007. – BH 2008. 63. (EBH 2007. 1606.).

<sup>10</sup> Lajos Vékás, *Parerga – Dolgozatok az új Polgári Törvénykönyv tervezetéhez* (HVG-ORAC 2008, Budapest) 175 et seq.

<sup>11</sup> Supreme Court, Resolution no. 1/2005 PJE on the restitution of invalid transactions.

required to provide payment for the monetary value of the services yet uncompensated if able to prove that the reason for their inability to return the service they received is attributable to the other party. If the party paid for the service, they may request to have it returned even if they are unable to return the service received, and provides proof that the reason for their inability to return the service received is attributable to the other party. The parties shall provide compensation for proceeds and interest not restored according to the principle of wrongful possession. The party who did not perform their service, or received the service without compensation shall provide compensation for proceeds and interest according to the principle of unjustified enrichment.<sup>12</sup> Thus, the rules of Civil Code 2013 provide for returning the monetary value of the service – as a restitution of unjustified enrichment – if restitution in kind is not possible. The main goal of maintaining this specific regime was to exclude the possibility of getting relief for the enriched party on the grounds that they lost the gain and were in good faith (change of position).

The payment can also be claimed back as a restitution of unjustified enrichment if there was an enforceable contractual relationship between the parties but the performed payment exceeded the contractual obligation. Not only overpayments,<sup>13</sup> but also performing a service of a value which exceeds the value of the contractual obligation in general,<sup>14</sup> providing additional services falling outside of the contractual obligation<sup>15</sup> or performing obligations depending on conditions precedent (e.g. contingency fees)<sup>16</sup> in the absence of conditions precedent materialising are also typical cases of restitution of unjustified enrichment.

Even if the payment or other service was performed in the absence of a legal or moral obligation, the aggrieved party shall be prevented from restitution if – at the time of providing the service (payment) – they were aware of the absence of obligation (i.e. that the debt does not exist). As in such cases performing the service is up to the choice of the party, it would be against the requirement of good faith and fair dealing to let them go back on his own conduct and claim for restitution.<sup>17</sup> The situation is, however, different if the party was aware of the absence of obligation but had a legitimate reason to perform, e.g. if they never accepted the claim but were not able to prove its non-existence at the time of performance or if they performed under duress. In such cases, they are not deprived of the right to claim the performance back on the basis of unjustified enrichment. The same is true if the party was mistaken about the existence of the claim as they performed.

<sup>12</sup> §§ 6:112., 6:113 and 6:115 (1) Civil Code 2013.

<sup>13</sup> Supreme Court, Legf. Bir. B. törv. II. 586/1977. – BH 1977. 275.

<sup>14</sup> Supreme Court, Legf. Bir. Gf. V. 31 070/1978. – BH 1979. 217.; Supreme Court, Legf. Bir. Gf. VI. 30 751/1979. – BH 1981. 204.; Supreme Court, Legf. Bir. Gf. V. 31 202/1991. – BH 1992. 412.

<sup>15</sup> Supreme Court, Legf. Bir. Gf. II. 30 151/1979. – BH 1980. 253.

<sup>16</sup> Supreme Court, Legf. Bir. Gfv. IX. 30.041/2010. – BH 2010. 333.

<sup>17</sup> According to § 1:3 of the 2013 Civil Code in exercising rights and in performing obligations the parties are required to act according to the requirement of good faith and fair dealing. The same provision also provides that it shall not be in compliance with the requirements of good faith and fair dealing if the party's exercise of rights is contradictory to their previous actions which the other party had reason to rely on.

If the performance, provided by the aggrieved party, was to transfer property to the enriched party and it later turned out that there was no obligation to transfer property due to non-existence, invalidity or ineffectiveness of the contract which should have been the source of obligation, there is no title of passing of property.<sup>18</sup> As a result, property could not be passed to the enriched person. As such, nothing prevents the claimant from claiming the property back as an *in rem* right with a property claim. In such cases, the claim on the basis of the *in rem* right is *parallel with that of unjustified enrichment* and the plaintiff has a choice as far as the ground of the claim. If the enriched person or third parties acquired ownership due to property law (which is the case if money, for example, was transferred), only the claim of restitution is open to the claimant.<sup>19</sup>

If the performance was not a transfer of money or other thing but a personal service, the value of the service can be claimed back as restitution of unjustified enrichment.<sup>20</sup> If, however, personal services were provided without an obligation, the case should be assessed as a *negotiorum gestio*. Court practice does not seem to be taking this into account so far,<sup>21</sup> but it certainly has to be revisited in the future. The rules of *negotiorum gestio* may result in the application of rules of unjustified enrichment, but if the *gestor* was aware of the fact that they were acting on behalf of the other without any kind of legal ground for agency, they can enforce a claim for restitution on the basis of the rules of unjustified enrichment for the value of their services only as a set-off if the other party had a claim against them, but not as an independent claim.<sup>22</sup>

In Hungarian court practice, the claims of national health insurance agencies and the claims of the state and of the local municipalities against parties drawing allowances, benefits and subsidy illegally emerge as a separate group of cases. The same holds for maintenance paid to a person who is not entitled to that anymore<sup>23</sup> or allowances provided by private parties.<sup>24</sup>

## 2 Title Ceased after Performance

In Hungarian court practice and legal literature, a separate group of cases of unjustified enrichment is where the party performed an obligation which existed at the time of performance but after performance the obligation has ceased. According to the generally accepted view, the retroactive termination of the obligation (title) results in the performance becoming – due to the missing legal ground – unjustified. This is the case if the parties terminate the contract with

<sup>18</sup> The same holds if the title of transfer was compensating damages or restitution of unjustified enrichment.

<sup>19</sup> Supreme Court, Legf. Bir. Fpk. VI. 33.544/1995. – BH 1997. 87.

<sup>20</sup> Supreme Court, P. törv. IV. 20. 13/1978/5. – BH 1979. 175.

<sup>21</sup> Supreme Court, Legf. Bir. Gf. I. 30 940/1978. – BH 1979. 161.; Supreme Court, Legf. Bir. Gf. V. 30.986/1994. – BH 1996. 163.; Supreme Court, Legf. Bir. Gf. V. 30.255/1997. – BH 1998. 39.

<sup>22</sup> Civil Code 2013 § 6:586.

<sup>23</sup> Supreme Court, Pfv. II. 20410/1993. – BH 1993. 613., Supreme Court, Legf. Bir. Pfv. II. 21 392/1993. – BH 1994. 188.

<sup>24</sup> Supreme Court, Legf. Bir. Pf. IV. 20. 534/1991. – BH 1992. 25.; Csongrád County Court of Appeal, Csongrád Megyei Bíróság, 2. Pf. 20 516/1992. – BH 1992. 798., Supreme Court, Legf. Bir. Pfv. II. 22. 713/1994. – BH 1995. 637.

retroactive effect or if they do it with notice but one of the parties has already performed services that would have been due later.<sup>25</sup> The same shall be the consequence of frustration of purpose or other cases of hardship resulting in termination of the contract. Claiming gifts back on the grounds of frustrated expectations or due to the financial hardship of the donor fall under specific rules of contract law.<sup>26</sup> The consequences of termination of a contract with retroactive effect are also covered by specific rules in contract law.<sup>27</sup> These specific rules provide that in such situations performances are to be returned (if restitution is not possible, the parties are prevented from terminating the contract by mutual consent with retroactive effect). In the event of mutual termination of the contract, the specific rules of contract law preclude the application of unjustified enrichment. If the party was entitled to terminate the contract unilaterally then they may exercise this right, even if the other party is no longer in a position to restore the service. In such cases, if the party terminated the contract but the other party is not in the position of returning the service provided to them, they shall return the value of the service according to the rules of unjustified enrichment. The termination of the contractual relationship with retroactive effect also results in termination of the title of acquiring ownership of the transferred thing. In the Hungarian system, title is required for transfer of ownership. As termination of the contract with retroactive effect results in the title being also diminished, the party has *rei vindicatio* as an *in rem* right as well, because the thing possessed by the other party still belongs to them. In such cases, the *in rem* claim of *rei vindicatio* and the *in personam* claim of restitution are parallel remedies; it is up to the plaintiff which one to choose.

### 3 Restitution of Investments and Other Costs

In general, if someone increases the wealth of another person without an obligation to do so, it creates unjustified enrichment. Thus, if the plaintiff, with an investment performed at his own expense augments another's property although the other (enriched) person did not have a right to demand it, they may claim the value of the investment as unjustified enrichment.<sup>28</sup> However, in such cases it also holds that if the party performing the investment was aware of the absence of obligation then they shall not have the right to enforce the claim for restitution because it would be incompatible with the requirement of good faith and fair dealing.<sup>29</sup> The party may claim back the investments if they performed on the basis of expectations that were later frustrated.<sup>30</sup>

<sup>25</sup> Supreme Court, Legf. Bír. Gfv. IV. 31.406/1995. – BH 1997. 303.

<sup>26</sup> § 6:237 Civil Code 2013.

<sup>27</sup> § 6:212. (3) and 6:213.§ (1) Civil Code 2013.

<sup>28</sup> Supreme Court, Legf. Legf. Bír. Pf. 26.756/2001. – BH 2004. 461.

<sup>29</sup> § 3:1 (3) Civil Code 2013.

<sup>30</sup> Supreme Court, Legf. Bír. Pfv. IX. 21.648/2005. – BH 2006. 193.

## 4 Enrichment as a Result of Interference with Protected Rights of Others

Enrichment may result not only from providing services or transferring goods but also by taking advantage of interference with the protected rights (either personality or proprietary rights) of others. One of the typical scenarios of this is disposing of goods belonging to others and another typical case can be interference with others' personality rights.<sup>31</sup> Hence, a party who appropriated,<sup>32</sup> sold<sup>33</sup> or utilised<sup>34</sup> another's property without title shall be obliged to return it according to the rules of unjustified enrichment, even if their behaviour was not unlawful. Using another's property is an unjustified enrichment too, assuming that use of the thing has a value (as normally it has). The Hungarian court practice is consequent in awarding a fee as a price for the use if someone used the property of the other without legal grounds but courts award it *per se*, without reference to unjustified enrichment or applying the rules of it.<sup>35</sup> Any gain earned from unlawful interference with intellectual property rights shall be returned as an unjust enrichment according to specific statutory provisions.<sup>36</sup>

## 5 Triangle Relationships

In a great bulk of cases, the shift of wealth does not occur directly between the aggrieved and the enriched person but results from a transfer between the enriched or the aggrieved person and a third party. The unique problem of these cases is the difficulty of determining the party who was enriched and the one who is the aggrieved person. Such a situation occurs, for example, if the holder of a bill of exchange enforced the claim on the basis of the bill of exchange in spite of the fact that he did not have any claim on the basis of the personal legal relationship between him and the drawer or the previous endorsers.

According to Art. 17 of the Geneva Convention upon the uniform law for bills of exchange and promissory notes (1930) persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor. If, according to the personal relationship of the holder and the previous holders or the drawer, the holder did not have a valid claim according to the rules of private law against the debtor, the debtor shall pay (due to Art. 17 of the Geneva Convention) but will have a claim for restitution on the basis of unjustified enrichment. A triangle relationship also emerges if the lessor sub-leased the

<sup>31</sup> § 2:51. (1) *e*/Civil Code 2013.

<sup>32</sup> Supreme Court, Legf. Bir. Gfv. I. 30.209/2004. – BH 2005. 115.

<sup>33</sup> Supreme Court, Legf. Bir. Pfv. IX. 22.456/2001. – BH 2003. 66.

<sup>34</sup> Supreme Court, Legf. Bir. Pfv. IX. 20.894/2000. – BH 2001. 168.

<sup>35</sup> E.g. Supreme Court, Legf. Bir. Pfv. II. 24.145/1997. – BH 1999. 410.; Supreme Court, Legf. Bir. Pfv. II. 24.145/1997. – BH 2000. 448.; Supreme Court, Legf. Bir. Gfv. X. 30.405/2008. – BH 2010. 99., Supreme Court, Legf. Bir. Pfv. I. 20.573/2010. – BH 2011. 64.

<sup>36</sup> Act LXXVI of 1999 On Copyright § 94 (2) *e*; Act XI of 1997 on the Protection of Trademarks and Geographical Indications § 27 (1) *e*; Act XXXIII of 1995 on the Patent Protection of Inventions § 35 (1) *e*; Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition § 86 (1) *e*.



leased land or chattel to third parties and collected the rental fee after the termination of their relationship with the landlord. In such a situation the lessor was enriched to the detriment of the landlord, who can claim it from them according to the rules of unjustified enrichment. It can be said, in general, that triangle relationships of unjustified enrichment occur if someone collects a debt which belonged to another person. Thus, if one of the joint and several creditors collects the debt or, in a case of bankruptcy, one of the creditors benefited from violation of the rank of creditors, they are to restore the surplus on the grounds of unjust enrichment.<sup>37</sup> Allowing direct claims among creditors in cases like this would result in difficult scenarios with a lack of transparency. Hungarian courts therefore order restitution not between the creditors but for the creditor to pay the unlawful benefit back to the estate under liquidation.<sup>38</sup>

As with collecting the debt of another creditor, there is a triangle relationship of unjustified enrichment if someone performs without being obliged to do that on the basis of their legal relationship with the original debtor. This may occur if the plaintiff as one of joint and severally liable debtors pays more than his own debt according to the internal relationship between the debtors. Although, *vis à vis* the creditor, the plaintiff was indebted for the whole debt, according to the internal relationship of debtors – as a joint and severally liable debtor – he might have paid for other debtors too. If there was no contract between the debtors about internal allocation of the debts and about the way of compensation if someone pays more than he should according to the debtors' internal relationship, the debtor who paid the debt will have a recourse claim *vis-à-vis* the other debtors according to the rules of unjustified enrichment. This can typically be the case in multiple tortfeasor scenarios. Another typical group of cases is where someone performs their own parallel or security debt because the main debtor failed to perform (surety, mortgagor, pledger, drawer of security bill of exchange, guarantor) or where they offered performance even without being a security debtor.<sup>39</sup> Such scenarios don't create cases for *negotiorum gestio* because, by performing the obligation, the party acted in their own interests. A specific case of payment in place of another person is where the bank restores a bank account as a remedy for erroneous transfer. In such cases it is the bank who becomes the claimant and entitled to collect the unjustified gain from the addressee of the transfer.<sup>40</sup>

## 6 Enrichment and Judicial or Administrative Failure

A party performing according to a judgement or decision of an administrative body which later proves to be false may claim restitution only if the judgement or decision was cancelled by a judicial or administrative act. Making restitution available on the basis of unjustified enrichment while the judgement (decision) is in force would undermine legal certainty and trust in the

<sup>37</sup> Supreme Court, Legf. Bir. Pfv. XI. 21.933/2006. – EBH 2007. 1614.

<sup>38</sup> Supreme Court, Legf. Bir. Gfv. X. 30.099/2010. – BH 2011. 140.

<sup>39</sup> § 6:57 Civil Code 2013.

<sup>40</sup> Supreme Court, Legf. Bir. Gfv. IX. 30.047/2005. – EBH 2005. 1226.

enforcement of judgements as well as in the decisions of regulatory authorities and the system of procedural remedies. These are why courts do not accept such claims.<sup>41</sup>

#### IV Subsidiarity of Restitution of Unjustified Enrichment

One of the most sensitive issues regarding unjustified enrichment in Hungarian court practice is its relationship to contracts and torts. Although these categories seem to overlap, unjustified enrichment shall be deemed an independent source of obligations. If the gain acquired by one party to the detriment of the other was the result of performing a contractual obligation then there is no unjustified enrichment, even if the enriched person breached the contract. Remedies for breach of contract that are available to the aggrieved party are to enforce the contract either in kind or in money. From this, it follows that if the party has a claim *vis à vis* the other party which is a remedy for breach of contract (e.g. damages or price reduction), then they are prevented from converting this claim into a one for restitution or using restitution instead of the regime of remedies for breach of contract.<sup>42</sup> The existence of the contract, however, should not exclude restitution of overpayment, contingency fees (e.g. if after paying the fee it turns out that the contractual preconditions of payment did not materialise) or the value of additional services that were performed 'outside' the contractual obligations.<sup>43</sup> The proper approach in this respect could be that the existence of a contractual relationship between the parties does not exclude the application of unjustified enrichment; however, if the contract did not provide a title for acquiring the gain for the party but remedies for breach of contract are not open to the aggrieved party then the gain shall be returned according to the rules of unjustified enrichment.<sup>44</sup> There are some restrictive tendencies in court practice: allowing such restitution only on the basis of an explicit contractual obligation<sup>45</sup> or establishing that the existence of a contractual relationship between the parties excludes *per se* the application of unjust enrichment<sup>46</sup> are clear oversimplifications that should be revised in future.

Courts often rejected claims for restitution of unjustified enrichment, establishing that referring to unjustified enrichment can be acceptable only if the plaintiff could not have any other title (contract or tort) for the claim.<sup>47</sup> Such oversimplified statements cannot be tenable, because if the party submits the claim on the basis of unjustified enrichment, the court is not in a position

<sup>41</sup> Supreme Court, Legf. Bir. Gfv. IX. 30.047/2005. – EBH 2005. 1226.; Supreme Court, Kúria Pfv. I. 20.885/2012. – BH 2013. 274.

<sup>42</sup> Supreme Court, Kúria Pfv. I. 21.479/2011. – EBH 2012. P.11.

<sup>43</sup> Supreme Court, Legf. Bir. Pfv. III. 22.615/1998. – BH 2001. 68.

<sup>44</sup> Supreme Court, Legf. Bir. P. törv. V. 20 620/1977. – BH 1978. 338.; Supreme Court, Legf. Bir. Gfv. IX. 30.041/2010. – BH 2010. 333.

<sup>45</sup> Supreme Court, Legf. Bir. Gfv. IV. 30.468/1998. – BH 2000. 70.

<sup>46</sup> Supreme Court, Legf. Bir. Pfv. VI. 22.261/1993. – BH 1996. 93.

<sup>47</sup> Supreme Court, P. törv. IV. 20 586/1984. – BH 1985. 230.; Supreme Court, Legf. Bir. Gf. II. 31 011/1989. – BH 1990. 308.; Supreme Court, Legf. Bir. Pfv. IV. 20.403/1996. – BH 1997. 483.; Supreme Court, Legf. Bir. Pfv. II. 21.853/2008. – BH 2010. 39.

to consider if any other claims – which were actually not brought to the court – could be awarded or not. The court may only consider whether the defendant has a title to acquire the gain (e.g. it had been transferred to them on the basis of a valid contract) but cannot consider if the plaintiff did have a right (claim for damages or remedies for breach of contract) which is not part of the procedure. Especially sensitive is – from this point of view – the relationship between restitution and damages. Hungarian courts seem to have the starting point, in this respect as well, that liability and restitution cannot be established together.<sup>48</sup> This doctrine, however, is not supported by the rules of the Civil Code, nor is there any policy that would prevent the plaintiff from choosing either of them or to submit the claim – alternatively – for both. Restitution of unjustified enrichment and liability for damages have different prerequisites; in essence, because restitution does not require unlawful behaviour and fault, different circumstances are to be considered and while damages requires a loss-based approach, restitution requires a gain-based one. From this point of view, unjustified enrichment could be seen as a kind of minimum of damages. The mere fact the plaintiff might have made a claim for damages cannot be sufficient grounds to reject a claim for restitution. The same holds for the relationship between enforcing property rights and unjustified enrichment. As – due to absence of title – the enriched person could not acquire ownership over the assets he came to, the plaintiff, as owner, may claim them back with a *rei vindication* as an *in rem* right. It is, however, also true that the defendant can be enriched simply by possessing the thing. As such, both unjustified enrichment and possession without title have to be established. Claims for restitution of unjustified enrichment, however, cannot be rejected on the grounds that the plaintiff could have claimed it on the basis of his proprietary rights or with a *rei vindicatio* according to the rules of protecting possessions. As such, the plaintiff cannot be deprived of choice as of the basis of the claim.

## V Restitution and Change of Position

Restitution shall be performed, primarily, in kind. If in-kind restitution is not possible, the value shall be returned.<sup>49</sup> In-kind restitution is excluded if the thing acquired no longer exists or the enriched person lost the ownership over it because a third party acquired its ownership. In so far as restitution in kind is excluded, the enriched person shall provide the value of restitution in money. This obligation covers not only the gain acquired originally but also the profit and its surrogates (e.g. damages, restitution, insurance-based compensation) it brought to the enriched person. The claim for restitution falls under prescription but, if the aggrieved party claims to return a thing (including land), the restitution in kind would be identical to the *rei vindicatio* as an *in rem* right. Proprietary (*in rem*) rights – including right to possess – do not fall under limitation in Hungarian law and can be enforced without time limits. If restitution is a restitution of value, the claim is due at the time when in-kind restitution became impossible, because that

<sup>48</sup> Supreme Court, Legf. Bír. Pfv. VIII. 20.051/2009. – BH 2009. 296.

<sup>49</sup> § 6:580 Civil Code 2013.

is the moment when the proprietary (*in rem*) right was converted into an *in personam* claim. That is the outset of the five-year limitation period, normally required for claims under the law of obligations.<sup>50</sup> If the claimant was not aware of the impossibility of restitution in kind (that is, impossibility of claiming to return it on the basis of property rights), this may be a ground for tolling of limitation periods. If enrichment is the consequence of the behaviour of the aggrieved party and this behaviour is incompatible with the general moral values of society (e.g. it was a benefit provided as the price for illicit advantages, such as bribery) the claim for restitution is to be rejected as to the requirement of good faith and fair dealing.<sup>51</sup> The court shall not assist in correcting shifts in wealth which are reprehensible in the eye of the society.

Restitution is independent from the unlawfulness of the behaviour of the enriched person as well as independent from fault.<sup>52</sup> The change of position of the enriched person may be a basis for rejecting the claim for restitution. The enriched person shall not be obliged to return the gains if he has been deprived of them before they are reclaimed, unless the gains were acquired in bad faith or he acted wrongfully as regards the loss of the gains. If the enriched person consumed the gains or exploited them for his own interests, it shall not be considered as losing the gains in the court practice. Thus, in such cases the enriched person is deprived of relying on the change of position defence.<sup>53</sup> The enriched person acted in bad faith by acquiring the gains if he knew or should have known that he does not have the right to acquire them. It is very difficult to assess if the party acted wrongfully as regards losing gains, because wrongfulness (fault) can be established only if the party had to envisage the opportunity of returning the gain, even if this is not explicitly provided in the 2013 Civil Code. Otherwise, there is no point of reference for establishing the required standard of conduct. If the party considered the gain, on proper grounds, as definitely his own, he could not be expected to act according to the interests of others (that is, the claimant) and could be free to dispose over it. If the gain was awarded by the court, the claimant performed but the judgement was reversed in the course of supervision, he cannot rely on not being at fault by losing the gain because the party must be aware of the possibility of the judgement being reversed while the procedural rules leave it open.

The Civil Code provides one general exception from restitution of unjustified enrichment. If the gain was provided and also used for subsistence, it can be claimed only if it was acquired by the enriched person via committing a crime.<sup>54</sup> In practice, in cases like this, it concerns limitations on returning alimony and maintenance.

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<sup>50</sup> § 6:22 (1) Civil Code 2013.

<sup>51</sup> § 1:3 Civil Code 2013.

<sup>52</sup> Supreme Court, Legf. Bir. Gf. III. 30 046/1974. – BH 1975. 190.

<sup>53</sup> Supreme Court, Legf. Bir. Pf. 20 946/1986. – BH 1987. 312., Supreme Court, Legf. Bir. Pf. IV. 21 166/1992. – BH 1993. 500.

<sup>54</sup> 6:581 § Civil Code 2013.

## **VI Conclusions**

The 2013 Civil Code did not introduce significant changes to the system and rules of unjustified enrichment. The regime of unjustified enrichment remained – at the level of the written norms – as flexible and open as it was designed in the 1959 Civil Code. The court practice, however, is too rigid and too formalistic in some aspects, especially with the doctrine of subsidiarity. This oversimplified approach may be the remnant of the socialist era and certainly needs to be improved, at least to the level of flexibility of traditional private law. Without such an improvement, court practice will not be able to give the proper responses of restitution to the challenges of modern life, economy and society. The new Civil Code may give a good occasion to revisit some tendencies in court practice, even if changes in written norms do not enforce it.