

## UNDUE PAYMENT OF GOODS BETWEEN ROMAN TRADITION AND THE PRESENT TIME

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### ABSTRACT

*Undue payment is one of the numerous legal institutions created by the eminent Roman legal advisers, who, by exquisitely developing the legal technique and practice would create that certain tool which would valorize the subjective rights in regard to reestablishing the equilibrium and the equivalence which the parties of a legal obligation report owe to one another, within an uncorrupted legal circuit; these institutions would later prove their viability and permanence across centuries, being reconfigured according to the new factors which configure law in the modern and contemporary age within the continental system of law.*

**KEYWORDS:** *payment, unjust enrichment, legal fact, civil obligation, quasi contract*

### INTRODUCTION

The principle of equity which would later become one of the postulates of Roman law, was expressed in the phrase used by Celsus according to which, *Jus est ars boni et aequi*,<sup>1</sup> is suggestively shown in the legal construction named “undue payment”, an institution seen by the Roman lawmakers as of one the forms of manifestation of quasi contracts, in regard to the effects it causes.

Although quasi contracts were known as distinctive sources of civil obligations, in Roman doctrine they were seen as those licit legal acts which would produce legal effects similar to those which reside in contracts<sup>2</sup>. Thus, in regard to the form, there are some differences between contracts and quasi contracts, while in regard to the legal effects they cause, there are certain similarities which lead to perfect symmetry.

Undue payment aims to terminate an obligation; in reality it expresses the licit legal deed seen as a distinctive source of obligation. The mechanism of this legal operation resides in the fact that a person performs a payment by error, which was in fact not owed to the person known as *accipiens*.

In a subsequent age, Pomponius would rephrase the principle of equity and equivalence of performances in the light of natural law by showing that “according to natural law it is equitable that no one would unjustly enrich by causing damage to another person<sup>3</sup>.”

According to the principle of equity, the person who made an undue payment had the right to demand the restitution of payment, namely the repeat of the undue performance<sup>4</sup>, an issue which, a few centuries later, would be expressed under the direct influence of Roman law, in the regulation of article 1092 first alignment of the 1864 Civil Code, which stated that “any payment entails a debt; that which was paid without being owed is subject to repetition in

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<sup>1</sup>E. Molcuţ, D. Oancea, *Roman law*, Sansa Publishing House, Bucharest, 1993, page 6

<sup>2</sup>*Ibidem*, page 309

<sup>3</sup> D.50.17.20.6

<sup>4</sup>A.E. Gittard, R. Villers, *Droit romain et ancien droit français. Les obligations*, Paris, 1976, page 295

regard to the conditions in which it was performed, as well as in regard to the effects which it produces; all these would later be regulated in article 992-998 of the old Civil Code. In the light of the new Civil Code according to article 1470 “any payment entails a valid debt; if the payment occurred in the lack of a valid legal obligation, the person who pays without owing would be entitled to restitution” (see article 1341, first alignment).

Even if the term for payment, by its semantics, indicates that providing an amount of money of transferring property, would synthetically be expressed in the modern age, by showing that by payment “*latosensu*”, we mean the execution in nature of an obligation whose object can be different, starting from providing an amount of money or performing any other activity (see article 1469 second alignment of the new Civil Code).

In order for a person to be held to perform a payment, a valid debt must exist; otherwise the payment is undue.

The fundament of the legal nature of undue payment would be qualified by most roman practitioners as a practical application of unjust enrichment.

This is partially true as in the opinion of Roman practitioners, starting from the fact that, in a particular approach in a specific case, if either an amount of money or any goods would be received without being owed, they are to be returned. When performing a systematic analysis, there are no essential differences between unjust enrichment and undue payment.

However, the fact which made possible a certain connection between these two institutions in regard to the legal effects they cause was the postulate which would govern the system of “*juscivilae*” according to which good faith – *ex bona fidae* – must direct the conduct of civil law subjects within the civil circuit.

A fortiori, in the old age, when merchandise exchange were rare, given the natural character of economy, the legal relations, especially the civil ones, were created between people who had complete confidence in one another; furthermore, the excessive formalism of legal acts derived from the will agreement of the parties and was subject to the this legal concept with strong moral characteristics. From the perspective of this historic-legal relation, specialty doctrine publicly stated the fact that - good faith - as a constant of law is practically presumed – *boe fides praesumitur* – when concluding any legal act.

This postulate of Roman law was perpetuated until the modern and contemporary age, as under the influence of the law school built by the eminent Roman legal advisers of the classic and post classic age, where we find this principle of presumed good faith, rephrased under a modern form, a principle with strong socio-human implications.

Thus, the 1804 Napoleon Civil Code expressly states this principle in article 2268 which stated that “*La bonne foie et toujourspresumee*”, a legal regulation also found in the 1864 Civil Code which states in article 1899 second alignment that - “Good faith is always presumed” - while in the new Civil Code, the Roman concept is expressed in the following manner, in article 14 second alignment - “Good faith is presumed until proven otherwise”.

This subjective conditions with strong moral significance is particularized in the contractual relations where it is directly applied in the matter of civil obligation thus “*de plano*” forbidding double payment for any performance derived from a contract, thus – *Bona fides non partiturutbis idem exigatur*.

In the opinion of Roman legal advisers of the classical age, undue payment was a form of unjust enrichment<sup>5</sup>. This solution was based on the principle of equity which emphasized an ethic aspect and a legal interdiction according to which the deed of the person who would enrich at the expense of another person, which made possible the creation of a legal identity between undue payment and unjust enrichment.

It is however obvious that, in case of transferring values form one patrimony to another, this is achieved without the consent of the person who is impoverished and without the guilt of the

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<sup>5</sup>C. Murzea, *Roman law*, All Beck Publishing House, Bucharest, 2003, page 295

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enriched person<sup>6</sup>, as if we were in the presence of this situation, the general provisions which govern the institution of tort civil liability would apply.

The essential difference is that, in case of undue payment, an apparent legal relation is presumed to exist between solvens and accipiens, namely between two subjects of law, with an apparent “contractual relation”, one being the creditor and the other one the debtor.

Solvens makes an erroneous payment, as in the first situation the payment was made to a creditor which does not in fact exist, but, in the end, the payment was made to a person other than the real creditor or, eventually an existing debt was paid by another person than the real debtor.

In the above mentioned situation “at least one of the parties is the real creditor or the real debtor and the person who makes the payment, does so by error, as otherwise we would be in the presence of a valid legal relation”.

In the current law, the two licit legal deeds seen as sources of obligations are sanctioned by distinctive actions; thus, in case of unjust enrichment the specific action – *actio de in rem verso* – is not identified with – *condictio sine causa* – namely the action on the repeat of the undue payment.

In Roman law, undue payment is seen as a particular situation of unjust enrichment, sanctioned by a – *condictio* - which practically achieves a true action of repeat which, as a result of praetorians’ intervention, would later become the – *condictio sine causa*.

In the old age, the *condictiones* were those personal actions by which “restitution of an amount of money or other fungible goods or other determined objects was requested”<sup>7</sup>, thus the source of the obligation was a literal contract or a *mutuum* contract.

Thus, *Silia* law introduces “*condictio certae pecuniae*”, while *Capurnia* law “*condictio triticaria*”.

However, it was not possible to establish if the general line of evolution or Roman law between the old age *condictiones* and – *condictio incerti* – which aimed the restitution of undue payment in the classical age, was a determination and influence relation; however the connecting element is the moral and legal fundament which entails the situation according to which someone is not allowed to enrich to the damage of another person. “*Jurenaturae aequum est, neminem cum alterius detrimento et juria fieri locupletiores*”<sup>8</sup>.

For identical reasons, based on principles of factual symmetry, a continuity and evolution relation between “*condictio certi*” of the classical age and the diverse forms of manifestation of the *condictiones* of the post classical age can’t be established, with express reference to Justinian’s law – *condictio indebiti*, *condictio ab causa ratorum*, *condictio ab turpem causarum*, *condictio ab iniusta causa sine causa*<sup>9</sup>.

This system, generically designed in the classical age by the expression – *condictio sine causa* – is subsequently completed in Justinian’s age under numerous forms of expression, according to their role and the area of application as shown above. However, we must mention that what was determined by *condictio sine causa* of the classical age is not identified in regard to the legal form with *condictio sine causa* as a special *condictio* of Justinian’s age. Regardless of the Roman age which we analyze and the form of *condictiones*, these entail the restitution of an undue performances which resulted in the unjust enrichment of a party at the same time another party was impoverished, a deed which would likely create an imbalance between the subjects of law; this imbalance was to be repaired by solvens returning the undue payment whose object could be different in regard to the shape regulated by the activity finalized as a result of the systematization of law performed in Justinian’s age.

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<sup>6</sup>Ibidem

<sup>7</sup>I. Cătuneanu, *Elementary course of Roman law*, Cartea Românească Publishing House, Cluj, 1922, page 348

<sup>8</sup>D. 50-17.20.6

<sup>9</sup>I. Cătuneanu, op.cit., page 350

The common denominator of all these conditions is that according to which the performance was made by error – *condictio indebiti* – whether it was made by fulfilling a dishonorable deed by the person who received payment – *condictio ab turpem causam* – or by expecting a licit fact which did not occur – *condictio causa data non secuta* – or the performance resulted in the payment of interest above the legal limit or the performance would result in the restitution of amounts of money paid as down payment for concluding a contract which was no longer concluded – *condictio sine causa*.

The task of providing evidence in order to obtain the restitution of performances would belong to the person who filed a complaint before the court, according to the following principle – *ei incumbit probatio qui dicit non qui negat*<sup>10</sup>.

In regard to the object of restitution, it would “return to the person who was entitled to own it, as modified when the good was unjustly taken from his patrimony, with all its accessories, fruits and so on”<sup>11</sup>. In case the good was estranged, *accipiens* was held to return the usual price, as the fact that he sold someone else’s possession was considered, thus resulting in unjust enrichment.

By commenting and interpreting the classical texts and by the systematic analysis of the Digests “Unjust enrichment which is to be returned means all that was left to the plaintiff to use as a result of the value which was transferred without cause”<sup>12</sup>. As a consequence “restitution was demanded, restitution of the good and the use which would have been the plaintiff’s”<sup>13</sup>, obviously in the situation in which he would have been of good faith.

If the good faith *accipiens* would have proved that the good was destroyed as a result of an emergency situation, he would not be held to return the good, thus considering that the rules which apply are those which regulate the situation of the bad faith person who, by receiving a undue payment commits a crime, namely theft, and, as a consequence the rule “*fur semper in mora*” would apply. Possession of such a stolen good can’t be achieved, as the conditions of useful possession were not met. Thus, it resulted in a particular situation of - *condictio indebiti* – sanctioned by *condictio possessionis*, which emphasizes the case according to which the object of restitution can be simple possession.

In the light of the above mentioned issues, we can conclude that all these conditions were nothing more than forms meant to valorize subjective rights in the form of personal actions of abstract character, as is the material fact which was the basis of the plaintiff’s claim and which would result in unjust enrichment.

The conditions would sanction those obligations derived from outside contractual relations which would connect the parties and regulate their legal conduct.

The regulation of undue payment also has a prevention component by not allowing debtors to double pay, a sanction which was applied in case a debt was denied but later proved in court, thus the debtors would rather pay and then, by filing an *condictio indebiti* would request repetition of payment, a situation which was favorable to them in those historic times “as the person who makes the payment would indirectly deny that he owes what he paid, but would not risk a double conviction”<sup>14</sup>.

Under the direct influence of Roman doctrine, there are similar present days opinions, sometimes even symmetrical opinions in contemporary judicial specialty doctrine, which converge toward the conclusion according to which undue payment is a form of unjust enrichment, but obviously the two licit deeds are always distinctive sources of obligations.

Undue payment is different from unjust enrichment without basis in regard to extent of the restitution obligation, as in the second case bad faith *accipiens* is held to pay damages to solvens for the entire prejudice, as well as by the specific forms of valorizing, namely the

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<sup>10</sup>I. Cătuneanu, *op.cit.*, page 350

<sup>11</sup>D. 12.6.15

<sup>12</sup>I. Cătuneanu, *op.cit.*, page 350

<sup>13</sup>*Ibidem*

<sup>14</sup>E. Molcuț, D. Oancea, *op.cit.*, page 310

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actions which are distinctive *retractio in re verso* in case of unjust enrichment and the complaint for the restitution of undue payment<sup>15</sup>.

In **conclusion**, under the new Civil Code, the lawmaker regulated the two distinctive categories, by qualifying them as licit judicial facts which are sources of civil obligations.

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<sup>15</sup>I.Adam, *Civil law, General theory of obligations*, second edition, CH Beck Publishing House, Bucharest, 2014, page 270