INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

VOLUME X

RESTITUTION – UNJUST ENRICHMENT AND NEGOTIORUM GESTIO

Chapter 4

Unjust Enrichment in Eastern European Countries

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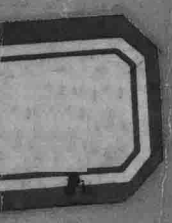

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Survey of Contents

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Chapter 4

UNJUST ENRICHMENT IN EASTERN EUROPEAN COUNTRIES

Ewa Łętowska

I. INTRODUCTION*

1. *Preliminary.* – The broad legal concept of unjust enrichment as a situation generating an obligation to restore the benefit obtained is of relatively recent origin. It is the generalization of a long series of specific holdings, the product of a long evolution in case law and doctrine. The range of situations included in it in any particular legal system is much affected, not always logically, by the traditions and concepts of that system.

Unjust enrichment presents difficulties for the comparative lawyer. There are two reasons for this. The first is, as has been mentioned, the typically "inductive" origin of the institution and the disparity of the situations covered by it in the various legal systems. The second is its characteristic function as a "safety valve" in the law of obligations, serving to render the legal system more flexible, like the role played in other areas and in different ways by concepts such as possession or general principles of law.

The development and function of unjust enrichment, however, render it unstable: it varies greatly in both time and space. Characteristically amorphous, its scope of application is determined by external factors not inherent in its own structure. This is because unjust enrichment serves to fill lacunas left by other legal institutions, emerging where their reach is inadequate or their effect inconvenient.

Unjust enrichment is thus rather like mortar, which fills the gaps between other elements in the system and whose size and shape depend on the configuration of the elements around it. This makes it difficult to give a clear portrait of unjust enrichment in a comparative setting, for one must go far beyond mere analysis of its own structure and rules. One needs to probe and test the structure and provisions of other legal institutions, the institutions which unjust enrichment serves to correct, before one can say why in any given country any particular problem of unjust enrichment is dealt with in one way rather than another. In this contribution, therefore, description will necessarily outweigh structural analysis and synthesis of the results.

For the same reasons, writers in different countries have quite different views on the scope of unjust enrichment. In some countries *e.g.* the use of another's property is treated as a case of unjust enrichment, in others not. The institution is also much affected by the nature of the economic system in which it operates. For example, in EASTERN EUROPEAN countries the law of insolvency, such as exists *e.g.* in POLAND and YUGOSLAVIA, is not thought, by either courts or scholars, to involve problems of unjust enrichment. The problems have just not been seen.

In her portrayal of the law and theory of unjust enrichment in each country, the author of this chapter has relied on its writers, but the attempt to generalize the findings and formulate the trend of development is her own.

The systems covered in this chapter are those of the CENTRAL AND EASTERN EUROPEAN, *i.e.* the former SOCIALIST countries, with the exception of ALBANIA, which proved inaccessible. This contribution had been intended to review the former socialist attitude to problems of unjust enrichment. Since the submission of the manuscript (in 1983) and during its translation and the editorial work, the political landscape of Eastern Europe has undergone decisive changes. Major federal states, especially the SOVIET UNION and YUGOSLAVIA, have been replaced by smaller successor states; the GERMAN DEMOCRATIC REPUBLIC has merged with the FEDERAL REPUBLIC OF GERMANY. Everywhere democratic institutions have been substituted for the former SOCIALIST systems.

These changes have influenced indirectly the legal systems of the former SOCIALIST countries, and in some areas, *e.g.* constitutional law, legal change has been quite fundamental. However, largely apolitical institutions of the civil law and

*I wish to express my sincere gratitude to Prof. *G. Eörsi* (Budapest), to Prof. *Z. Radwański* (Poznan), to Prof. *Z. Stalev* (Sofia), to Prof. *O. Kunz* (Prague), and to Prof. *L. Vékás* (Budapest) for the most valuable information and helpful comments which they supplied. Similarly I wish to acknowledge my gratitude to Prof. *G. Bley* (Potsdam-Babelsberg), Prof. *Y. Eminescu* (Bucharest), Prof. *Vilus* (Beograd), and to Prof. *N. Malein* (Moscow) for providing me with valuable information on the laws of the former GERMAN DEMOCRATIC REPUBLIC, RUMANIA, former YUGOSLAVIA and the former SOVIET UNION.

I also wish to express my indebtedness to Prof. *D. Lasok* (Exeter) who, despite his commitments elsewhere, found the time to translate my manuscript into English; the complexities of the original Polish text did not facilitate his task.

of unjust enrichment in particular, have not so far been affected. With some exceptions, even successor states have tended to maintain the law as it existed within their territories before they became independent.

In this situation, the author's contribution still reflects essential elements of the present state of the law in CENTRAL and EASTERN EUROPE. The editors have therefore decided to print it essentially in its original form. Until 1987 the author did her best to keep the manuscript up to date. For the sake of completeness, the law of the former GERMAN DEMOCRATIC REPUBLIC is still included. Some significant changes have, of course, been noted.

The expression *condictio* is often employed. Most EASTERN EUROPEAN countries draw no rigorous distinction between *condictio* on the one hand (*infra* s. 19–21) and those claims and obligations which arise from general unjust enrichment on the other. This point will be considered in the sections on *condictio* and obligations (*infra* s. 38–59).

2. *Structure of this contribution.* – The object of subch. II is to outline the scope of the subject-matter. It is devoted to a general view of unjust enrichment in law and theory, the sources of the relevant law, its ideological and theoretical rationale, the relation of *condictio* to other claims, *etc.* Comments on the relationship between claims arising from unjust enrichment and obligations arising from other sources are therefore found here rather than in subch. IV, which deals with the "dynamic aspects" of the *condictio*. Subch. III is devoted to the "static" features of unjust enrichment, *i.e.* the prerequisites of the obligation, while subch. IV is concerned with the *condictio* "in action", the extent and subject-matter of the enriched party's obligation. Comments on the subject-matter of the obligation are placed at the end of subch. IV because it is affected not only by the prerequisites but also by the context in which it arises and the function it is serving.

The effect of an offensive performance is considered separately in subch. V because in the former SOCIALIST countries the duty of restitution is often replaced by forfeiture in favour of the state, which distinguishes this situation in principle from other cases of *condictio*.

II. GENERAL CHARACTERISTICS

A. SOURCES OF THE RULES

i. *General Remarks*

3. *Main features of the legislation.* – The institution of unjust enrichment is recognized in all EASTERN EUROPEAN countries. Their legislation, however, is far from uniform. Some legal systems (HUNGARY and former EAST GERMANY) are satisfied with a monistic formula, referring to one general factual situation, while others prefer a plurality of rules, adding a list of examples of typical cases (POLAND, former CZECHOSLOVAKIA, BULGARIA and former YUGOSLAVIA, and, to a lesser extent, the former SOVIET UNION).

Countries in the latter group do not necessarily base their division on the distinction between enrichment from undue performance and enrichment from other sources, though clear traces of this tradition remain, especially in older legislation such as that of RUMANIA. The general trend is towards simplification of the rule, compressing unjust enrichment into a single synthetic formula. The trend is evidenced by the changes in the rules in the former SOVIET UNION when the civil law legislation of the twenties was replaced by the codification of the sixties, in POLAND when the pre-war legislation was replaced in the sixties, in the Civil Code of former EAST GERMANY and in the draft laws of BULGARIA and RUMANIA.

The connection between unjust enrichment and quasi-contract has generally been abandoned. This is evident in the more recent codifications even where it was traditional (BULGARIA) or inherent in the legislation (as in RUMANIA's 19th-century Code, where the connection is strongly marked). The tendency is for unjust enrichment to emerge as a separate source of obligation, emancipated from contracts, on the one hand, and from torts, on the other. The function and structure of the obligation,[1] however, give it some similarity with tort, and in certain countries sporadic references are made to the analogy of tort, especially as regards the scope and object of restitution.

A feature characteristic of all former SOCIALIST countries except RUMANIA is the special treatment of offensive enrichment obtained through a dishonest or illegal transaction, with the introduction in various guises of forfeiture of the enrichment to the state.

4. *Range of subject-matter.* – The views of writers on the scope of unjust enrichment differ greatly. This is in part because they do not all distinguish clearly between (1) cases recognized as unjust enrichment because they satisfy the factual preconditions laid down by the relevant rules; (2) cases which do not satisfy the factual preconditions but where those provisions are nevertheless applied (*e.g.* in cases of set-off or revocation of a gift); (3) cases which do satisfy the factual preconditions but which have special rules, perhaps only on certain points; here the problem arises, especially in systems which do not treat unjust enrichment as subsidiary, whether and to what extent one may treat these cases as special cases of unjust enrichment and fill any lacunas in their legal regime with general provisions relating to the *condictio*. The various legal systems do not always draw a clear distinction between these three types of case.

5. *Terminology.* – The name given to the institution in EASTERN EUROPEAN countries emphasizes the absence of a legal basis for a transfer of property. It is the function of unjust or groundless enrichment to undo the effect of that unjustified transfer. The formula is objective, free of the "ethical pathos" or moral overtones inherent in the term unjust enrichment characteristic of earlier law, as in POLAND, or earlier writings, as in the former YUGOSLAVIA, in BULGARIA and RUMANIA. The SOVIET writer *Fleĭshits*[2] took the initiative to make the name objective and legalistic; she wanted a name which reflected the lack of adequate legal basis for the transfer rather than disapproval of the resulting enrichment. This view has had a considerable effect on thinking in the other EASTERN EUROPEAN countries.

In the former SOVIET UNION the legislator has gone even further to render the name objective; *condictiones* are defined as "Obligations arising from a groundless acquisition or retention of property".[3] In order to avoid the implication that the "enrichment" itself is legally unfounded, the accent is placed on the defect in the transfer. For the same reasons, the expression

[1] *Knapp* 470.

[2] *Fleĭshits* 210.

[3] See RSFSR Civil Code title of ch. XLII (transl. *Kiralfy* who uses, however, "unjust" rather than "groundless"!); *cf.* Fundamentals of Civil Legislation of the USSR and the Union Republics art. 4 par. 2 altern. 4.

"Duty to return a performance obtained without justification" was used in former EAST GERMANY,[4] the stress being put on the means, namely the human act, by which the enrichment occurs.

In former CZECHOSLOVAKIA the expression used in the Civil Code is "Civil legal responsibility for a legally groundless acquisition of a property benefit" (CC § 451). Here again the emphasis is on the dynamic moment of transfer, whose legal, rather than moral, sufficiency determines the position of the party enriched thereby. It is distinctive that "responsibility" for the enrichment is imposed: "responsibility" in former CZECHOSLOVAKIAN law has a broad and objective meaning, with little emphasis on subjective factors. The former CZECHOSLOVAKIAN Economic Code spoke only of undue payment (§ 123), but the Code of International Trade spoke of unjust enrichment (§ 703–715), using the traditional concept better known abroad.

In conclusion, the terminology used to describe unjust enrichment is determined by two factors: first, the desire to purge the institution of the "ethical pathos" which implies that the enrichment in question is "unjust" in a moral sense (*infra* s. 35), and secondly, the desire to stress that in ordaining restitution the legislator is discountenancing not only the enrichment but also the manner in which the property was transferred.

ii. *Analysis by Countries*

a. Bulgaria

6. Unjust enrichment is regulated in the Law on Obligations and Contracts (LOC) art. 55–59.[5] These articles are in the division on the sources of obligations. The institution is clearly and systematically segregated from *negotiorum gestio*, which forms a distinct source of obligations, regulated in the general part of the Law on Obligations and Contracts, but separately from mandate. Unjust enrichment did not figure in the previous Law of 1893; the institution is the work of writers and courts, influenced to some extent by FRENCH and ITALIAN scholars.[6]

The BULGARIAN Law on Obligations and Contracts divides the institution of unjust enrichment into two blocs. The first, art. 55–58, singles out six situations: (1) undue performance with no legal ground (art. 55 par. 1 sent. 1); (2) undue performance, the ground for which has failed to materialize (*idem* sent. 2); (3) undue performance, the ground for which has ceased to exist (*ibidem*); (4) erroneous payment of another's debt (art. 56); (5) receipt of a specific thing without legal ground (art. 57); (6) receipt of anything from a person without capacity to enter legal transactions (art. 58).

The second bloc, consisting of LOC art. 59, concerns unjust enrichment at another's expense arising in cases not covered by art. 55–58. By its wording this provision is subsidiary to any other provision as to the rights of the impoverished party as regards the interest infringed; it is also subsidiary to LOC art. 55–58.

BULGARIAN writers have no doubt that these two blocs are the product of a single legislative thought[7] and so form a single institution, with LOC art. 55–58 forming the "special part" of the law of unjust enrichment. Indeed it is this common idea, the common policy assumption, which forms the main link between the two blocs, for there are considerable differences between them in terms of the prerequisites of the obligation as well as its content.

When an invalid contract has been performed, the rules as to forfeiture to the state are laid down outside the framework of unjust enrichment (LOC art. 34). Although LOC art. 34 differs as to its effects from art. 55–58, it may be regarded as complementary to the regime of unjust enrichment in cases of performance tainted with turpitude. On forfeiture in favour of the state, see *infra* s. 169–174.

b. Former Czechoslovakia

7. *General characteristics.* – Former CZECHOSLOVAKIA had three separate codes which were applicable to relations in civil law, depending on the subject-matter: the Civil Code, the Economic Code (EC), and the Code of International Trade.[8] Unjust enrichment, or something like

[4] *Pflicht zur Rückgabe von unberechtigt erlangten Leistungen* (CC part V ch. 3).

[5] *Zakon za zadŭlzheniĭata i dogovorite* of 14 Nov. 1950, DV no. 275 of 22 Nov. 1950.

[6] *Goleminov* 24.

[7] *Idem* 26; *Vasilev* 569.

[8] Economic Code – EC (*Hospodářský zákoník*) of 17 June 1964, Sb. 1964 no. 47 pos. 109, consolidated Sb. 1971 no. 11 pos. 37, amended up to 1991, repealed by Comm.C § 772 no. 2.

Code of International Trade – C.I.T. (*Zákon o právních vztazích v mezinarodním obchodním styku (zákoník mezinárodního obchodu)*) of 4 Dec. 1963, Sb. 1963 no. 57 pos. 101, repealed by Comm.C § 772 no. 2.

it, is to be found in all three. The most detailed rules are in the Civil Code, where § 451–459 speak of "liability for groundless material gain". These provisions were amended and complemented in 1982 (*infra* s. 8, 201). The Economic Code referred in § 123 to the duty to restore undue payments and undue material gains acquired in any other way. The Code of International Trade dealt with a host of problems connected with unjust enrichment in § 703–715, though the use of property for another's benefit, which the Civil Code treats as a case of groundless enrichment, fell outside these provisions (§ 716–718).

As regards structure and scope, the rules in the Civil Code are the most important. CZECHOSLOVAKIAN writers base themselves on these provisions and their interpretation.[9] This does not, however, mean that these provisions of the Civil Code may be applied, even in a subsidiary manner, to situations envisaged in EC § 123 (as would have happened in former EAST GERMANY, see *infra* s. 9). In former CZECHOSLOVAKIA such application is possible only if a relevant legal provision so indicates expressly, which is not the case here. The Code of International Trade was also autonomous in its regulation of unjust enrichment, as the concept of that enactment makes clear. Other enactments, *e.g.* the Labour Code and other special laws, have rules closely analogous to unjust enrichment, but they are not in practice treated as instances of unjust enrichment.

While its predecessor of 1950 used the traditional name "unjustified enrichment", the Civil Code of 1964 speaks of liability for groundless material gain,[10] and it is now accepted by most writers that the theory of the institution as one of liability for groundless material gain is an improvement.[11]

The provisions governing groundless material gain in the Civil Code are placed in the chapter on liability for damage, essentially tort, and some provisions are common to the two institutions. For this reason writers treat our institution as a form of non-contractual liability not based on fault. However, in the Economic Code unjust enrichment appeared in § 123, in the chapter concerned with general problems of economic obligations within the principles of economic cooperation. In the Code of International Trade the connection between unjust enrichment and liability for damage was less strong than in the Civil Code, because unjust enrichment appeared in the general part of the law of obligations after the rules on conducting another's business without authority and before the rules on the use of property for the benefit of another (*negotiorum gestio*).

The preventive function of law, emphasized in various ways in former CZECHOSLOVAKIA, especially in the Civil Code and the former Economic Code, has an effect on liability for groundless material gain. Indeed, the entire institution is regarded as an elaboration of CC art. VII, that no one may use his rights contrary to the interests of society or of his fellow-citizens and that no one may enrich himself at the expense of society or is fellow-citizens. EC § 123 was regarded as a particularization of EC art. II (the principle of economic planning) and art. X (the principle of the priority of all social interests over individual interests).

General prevention is also thought to underlie CC § 415 and 416 common to tortious liability and groundless material gain. They envisage a general duty to prevent groundless material gains and to take active steps to counteract their threatening occurrence. Although these are *leges imperfectae*,[12] their ideological and educative value is clearly important, and it is emphasized that the presence of these provisions in the law furthers the principles of conduct appropriate to socialist relations in transactions governed by civil law. This emphasis on the preventive aspect of law is taken as evidence of the very progressive stance of the legislator in former CZECHOSLOVAKIA as compared with other EASTERN EUROPEAN countries.[13]

8. *Special cases.* – The Civil Code has a general clause, § 451, prescribing the restitution of groundless enrichment as the sanction of the general prohibition of enrichment expressed in § 452, 453 a, 454 and 457. Unfortunately, there appears within the framework of groundless enrichment a provision concerning lost property (§ 453), providing that it be returned to the owner or, if he cannot be found, forfeited to the state. This provision constitutes a foreign body within the institution of groundless enrichment, and the intrusion grew when the Civil Code was amended on 9 Nov. 1982, with the addition

[9] *Ovečková and Steiner* 214–230.

[10] CC § 451. See also *Knapp* 469; *Korecká* 35.

[11] *Švestka* 145–146; *contra, Knap and Zdobinský* 5–6 and *Klapáč* 39–40, 63. For a comparison of the Civil Code of 1950 with the Civil Code of 1964, *Plecitý* 252.

[12] *Švestka* 141–144.

[13] *Ovečková and Steiner* 215.

of § 453 a, providing for forfeiture to the state of property permanently abandoned by the owner guilty of illegal conduct.[14]

Writers and courts are not at one regarding the relationship of the general formula of § 451 to the specific factual situations in which enrichment is said to be groundless. Some writers,[15] supported by case law,[16] contend that the casuistic situations exhaust all the possibilities. On this basis *Knapp* doubts whether any particular case can be decided solely under CC § 451 or the former C.I.T. § 714; he is of the view that one must find elsewhere in those laws a *specific* instance of groundless enrichment.[17] Others are of the contrary view that restitution of a benefit acquired without ground may be ordered on the basis of the general formula of CC § 451 even in a case not explicitly mentioned in the Law.[18] Some support for this latter view can be found in the fact that former CZECHOSLOVAKIAN law contains a clear and general rule forbidding the groundless acquisition of benefits. The practical difference between the two points of view is, however, negligible because the courts[19] give a very broad interpretation to the three special cases of CC § 452 (performance without legal ground, performance of invalid transactions, and gains made from an illicit source).

The Economic Code utilized one generalized formula, namely undue payment and other sources of groundless gain not further specified. This has been criticized by writers.[20] The Code of International Trade readopted the general duty of restitution of gains made without legal ground; it also embraced the situation traditionally described as *causa finita* and had detailed rules on transformation (*specificatio*), commingling and confusion of things, a matter not included in the groundless enrichment provisions of the Civil Code.

The types of situation specified in the Civil Code as involving groundless material gain are: (1) performance without legal ground[21] which covers not only the absence of legal ground *ab initio* but also the case where the legal ground ceases to exist or fails to eventuate; (2) performance of an invalid transaction,[22] where a legal ground apparently existed; (3) acquisition of gain from an illicit source;[23] (4) material gain acquired by appropriating lost property (§ 453 par. 1); (5) material gain from the appropriation or use of abandoned or hidden property (§ 453 par. 2); (6) gain arising from performance of one's own obligation by a third party (§ 454). No further cases of groundless acquisition of gain are introduced by § 456 and 457.

The following are expressly stated not to be groundless enrichment: payment of a time-barred debt;[24] performance of a legal transaction invalid only for want of prescribed form;[25] performance of natural obligations;[26] repayment of money borrowed for gaming and wagers.[27] The range of exclusions in the Code of International Trade was wider: neither intentional performance in order to attain an impossible or forbidden object, nor the performance of natural obligations was regarded as unjust (§ 708–709). The Economic Code, as already noted, contained only a general principle (§ 123) but in practice the special cases mentioned above were within its scope.

c. Former German Democratic Republic

9. *General characteristics.* – Since former EAST GERMANY, like former CZECHOSLOVAKIA, had rejected the principle of the unity of civil law, the rules regulating the unjust enrichment presented a rather complex picture.

Until 1976, when the EAST GERMAN Civil Code of 1975 entered into force, the GERMAN Civil Code of 1896 was in force except as to socialized economic transactions. Since the provisions governing these transactions contained no general rules on unjust enrichment, there was no doubt that the relevant rules of the old Civil Code remained applicable.

Former EAST GERMANY was like former CZECHOSLOVAKIA and unlike the other EASTERN EUROPEAN countries in having three different enactments which governed relations qualified

[14] See *Dzúrik*, Vývin právneho inštitútu neoprávnený majetkový prospech: P.O. 1984, 251–255 with summaries in English and Russian; *Fiala and Švestka* 10–17.

[15] *Ovečková and Steiner* 226; *Ondráček* 44–45.

[16] S.Ct. 28 March 1975, Zb.soud.rozh. 1975, 252 pos. 26, 257; *Korecká* 69.

[17] *Knapp* 471.

[18] *Švestka* 150.

[19] *Idem* 150 n. 6.

[20] *Svitavský (– Čapek)* § 123 p. 328–337; *Korecká* 51–54; *Plecitý* 252; *Klapáč* 36.

[21] CC § 452 first alternative.

[22] *Ibidem* second alternative.

[23] *Ibidem* third alternative.

[24] CC § 455 par. 1 first alternative.

[25] *Ibidem* par. 1 second alternative.

[26] Gaming and wagers, CC § 455 par. 2 first alternative.

[27] CC § 455 par. 2 second alternative.

elsewhere as civil. In principle the Civil Code governed relations between individual citizens as well as relations between individuals and units of the socialized economy; the Law on contracts (VG) of 1982,[28] like its predecessors of 1965 and 1957, concerned contracts between units of the socialized economy. And the Law on economic contracts in international trade (GIW) of 1976[29] covered contracts between state enterprises and foreign parties which were subject to EAST GERMAN law.

The Civil Code of 1975 devoted two provisions to groundless enrichment (§ 356–357), but the other two enactments had no rules on the subject. In order to fill this gap, the rules of the Civil Code were applied both in the socialized economy and to foreign trade contracts. This was possible because the scope of the Civil Code was wider than its subject-matter: in former EAST GERMANY, unlike former CZECHOSLOVAKIA, the Civil Code applied in these other fields as a subsidiary source of law in the absence of specific rules. This general principle facilitated the application of law and was accepted in former EAST GERMANY as implicit in the principles of the unity of the socialist legal order.

It was clearly settled that CC § 356–357 applied to relations between units of the socialized economy. This was laid down with respect to the Law on contracts of 1965 by a Directive, issued by the State Contract Court, on the application of the Civil Code to relations of economic law. This Directive had been replaced by Directive no. 2/1983 with the same title and issued by the same authority.[30] This Directive provided (no. 3.3.1), as did its predecessor, for the application of CC § 356–357 to relations within the socialized economy, except in cases of excessive prices (no. 3.3.2). Limitation of actions was subject in part to the relevant rules of the Law on contracts, in part to those of the Civil Code (no. 3.3.5).

The Civil Code could also be applied to foreign trade relations, in the absence of specific provisions in the Law on economic contracts in international trade (*cf.* § 2 par. 2). GIW § 311 expressly regulated the mutual duties of the parties to return performances in the event of rescission of the contract by one party (par. 1–4) or nullity of the contract[31] or agreed retroactive termination of the contract.[32] Here the Civil Code's provisions on groundless enrichment were ousted. In other instances of groundless enrichment, however, the relevant rules of the Civil Code could be applied even in international trade relations, *e.g.* if performance was rendered by mistake to the wrong creditor or obligee.[33]

In other fields also, *e.g.* labour and social security law, the provisions of the Civil Code could be applicable in the absence of specific rules.[34]

10. *Particular cases.* – If a contract governed by the Civil Code was void, the mutual duties of restitution of performance were, as a rule, governed by the provisions on groundless enrichment: CC § 356–357 were expressly invoked by § 69 par. 1.

Directive no. 2/1983 (no. 3.3.1) extended this rule to relations between units of the socialized economy where the contract was void. But where a contract was modified or terminated by agreement, the Law on contracts (*supra* n. 28) had special rules (§ 79–80) and the Civil Code was excluded.

If the parties had agreed upon an illegally excessive price, the recipient was required by law to refund the excess, and such restitution was regarded as meeting the payer's claim for groundless enrichment. If, however, the recipient was a unit of the socialized economy, it was obliged to pay the excess to the state, and if it had done so, it was no longer enriched; to this extent, therefore, the unit was no longer under any duty to repay the other party.[35]

The acquisition (and loss) of ownership through commingling and specification of things, including their implications for the compensation of gains, were regulated outside the scope of groundless enrichment.[36] With re-

[28] *Gesetz über das Vertragssystem in der sozialistischen Wirtschaft – Vertragsgesetz* (VG) of 25 March 1982, GBl. I 293.

[29] *Gesetz über internationale Wirtschaftsverträge* (GIW) of 5 Feb. 1976, GBl. I 61.

[30] Directive no. 2/1983 on the application of the provisions of the Civil Code to relations of economic law (*Grundsätzliche Feststellung no. 2/1983 über die Anwendung von Bestimmungen des Zivilgesetzbuches auf Wirtschaftsrechtsverhältnisse*) of 16 May 1983, Verfügungen und Mitteilungen des Staatlichen Vertragsgerichts 1983 no. 3, 13, repr.: *Staatliches Vertragsgericht* (ed.), Vertragsgesetz. Textausgabe (Berlin, East 1987) 99.

[31] See GIW § 11, 12, 15, 22, 36–38 and following note.

[32] For the last two cases, GIW § 311 par. 5 and § 312 par. 2 refer to § 311 par. 1–4.

[33] *Maskow and Wagner* (ed.), Introduction no. 6.8.2 (1978).

[34] *Göhring and Posch (– Posch)* II 230; a more detailed survey by *Göhring* 376.

[35] Directive no. 2/1983 (*supra* n. 30) no. 3.3.3.

[36] *Göhring and Posch (– Klinkert)* I 161.

spect to the legal consequences of such acquisition and loss, however, the provisions of the Civil Code on groundless enrichment applied as a supplementary source of law.[37]

11. *Systematic classification and delimitation.* – Former EAST GERMAN law treated groundless enrichment generally as a single comprehensive factual situation. The terminology employed ("*performance* received without justification", § 356) and the prerequisites laid down (*infra* s. 90) made clear that an enrichment resulted from a performance. Such "performance" needed not, of course, be performance in the technical sense; CC § 356 was certainly much broader than the classical *solutio indebiti*. But even so the terms of the general formula suggested unjust performance rather than groundless enrichment in general.

Groundless enrichment was characterized by the absence of subjective elements such as fault or breach of duty on the part of the party enriched.[38]

Groundless enrichment was an independent source of non-contractual obligation. It was, however, akin to management of another's affair without authority (*negotiorum gestio*), in that both sources of obligation were non-contractual[39] and that reimbursement by the principal of the gestor's expenses was subject to the rules on groundless enrichment.[40]

The function of groundless enrichment was, however, different from that of *negotiorum gestio*. This was already suggested by their differing locations in the Civil Code. The provisions on *negotiorum gestio* were placed at the end of the part dealing with contracts, under the title of "mutual assistance"; they were thus intended to promote assistance and solidarity among citizens. By contrast, the provisions on groundless enrichment were placed in the fifth part of the Code, dealing *inter alia* with the protection of property – the exact function of groundless enrichment.

d. Hungary

12. – Unjust enrichment is regulated in CC § 361–364 and forms the last chapter within the second title, comprising liability *ex delicto* and unjust enrichment. Provision is made elsewhere in the Civil Code (§ 237) for the adjustments necessary after the performance of an invalid contract.

The statutory texts are very terse. Besides the principle of restitution itself, a list is given of situations in which restitution is excluded, including forfeiture to the state of offensive gains. For other matters reference is made to CC § 195, which governs the relationship between owner and illegal possessor of property, and to the rules on reparation of harm. Note that the reference is to reparation of harm, not to liability in tort, thus to the sanction, not to the reprobated conduct. The provision should therefore not be taken to suggest any affinity between *condictio* and liability in tort.[41]

The reference to reparation of harm nevertheless called for elucidation. Thus the court in Budapest once had to rule that in a claim for restitution of gain arising from unjust enrichment it was the requirements of CC § 361 par. 1 which must be met and not those of § 339, the general formula of tortious liability for one's own act.[42] It also explained that only in residual cases of enrichment does CC § 364 render the rules on reparation of harm applicable, *i.e.* only when the given problem is not adequately regulated in the chapter on unjust enrichment (Ch. XXXII). Since the prerequisites of unjust enrichment are there laid down, no recourse to CC § 339, the general rule on the reparation of harm *ex delicto*, is possible.

As to the other rules on reparation of harm, CC § 356–360 concerned with the form of reparation have been said to be applicable. However, CC § 356–358 deal with periodical payments as a method of reparation, so their application to unjust enrichment seems doubtful, as does that of CC § 341–344 on actions to prevent damage, contractual limitations of liability for intentional fault and gross negligence, and the excuse of necessary defence.[43] CC § 355 on the reparation of harm by restitution or damages is clearly inapplicable to unjust enrichment in view of the rule in CC § 363. In the result, the only provisions on the reparation of harm which can really be applied to unjust enrichment are CC § 339 par. 2, giving the courts a *jus moderandi* as to the extent of the debtor's obligation, and CC § 344 on the joint and several liability of co-debtors.

[37] *Idem* I 1665; *Maskow and Wagner* (ed.), Introduction no. 6.8.3.

[38] *Göhring and Posch (– Posch)* II 230.

[39] *Idem (– Göhring)* II 160.

[40] *Ministerium der Justiz* (ed.) 329 on § 277.

[41] *Eörsi* 323–324.

[42] Ct. Budapest 25 June 1969 – 43 Pf. 22276/1968 – 1969 no. 1498.

[43] *Eörsi and Gellért (– Eörsi)* II § 364 p. 1690.

Writers[44] explain the patchiness of unjust enrichment as an institution on the ground that it is of limited importance, since much of its role has been pre-empted by other rules, such as those on the relations of owner and possessor, the position of the unauthorized agent, the relations between joint and several debtors, the adjustment of accounts between parties to an invalid contract, and the person who has maintained another without any obligation to do so. All these situations are expressly regulated, and none of them is treated as an instance of unjust enrichment.

Unjust enrichment is formulated in HUNGARY as a single general concept.[45] There is no list of particular cases such as is characteristic of POLISH, BULGARIAN or former YUGOSLAVIAN law. The legislator has not specified any cases of undue performance. This is because most of the subject-matter is covered by – and, because the *condictio* is regarded as subsidiary in HUNGARIAN law (*infra* s. 26), exclusively by – the separate rules on the effects of invalid contracts. Furthermore, like other socialist systems, HUNGARY has rejected the concept of the abstract transaction in commerce.

Apart from the case of enrichment arising from the performance of an invalid contract, the general formula of CC § 361 undoubtedly embraces situations which other legal systems treat as instances of unjust enrichment due to undue performance. Other matters are regulated separately as independent institutions, *e.g.* benefiting from another's property, using another's property, commingling, confusion and transformation, the duty to return a gift when the reason for it no longer exists, and *negotiorum gestio*. The Code itself sometimes refers to the provisions on unjust enrichment in order to regulate certain aspects of these matters, but that does not turn them into instances of unjust enrichment *sensu stricto*, for one can treat cases alike without making them alike.

CC § 361 does, however, embrace enrichment coincident with damage to another, if the rules of tort are inapplicable by reason of the absence of fault, as may happen if property being used is accidentally destroyed.

In HUNGARIAN law unjust enrichment is a source of obligation which is independent and general. It is neither systematically nor conceptually connected with the group of quasi-contracts, in particular not with the conduct of another's business without authority. It is, however, true that in practice[46] grave difficulties have been encountered in deciding whether a particular case is or is not one of unjust enrichment or of *negotiorum gestio*.

e. Poland

13. – Groundless enrichment is regulated in CC art. 405–411, art. 410 par. 2 governing undue performance. These provisions constitute a distinct title in the book devoted to obligations, coming before the provisions on torts. Groundless enrichment in the system of the Civil Code thus forms a separate source of non-contractual obligations.

The systematic link between groundless enrichment and undue performance is more evident in the Civil Code of 1964 than it was in the Code of Obligations of 1933;[47] for this reason earlier doubts about the structural and conceptual identity of the institutions are no longer voiced, though undue performance is sometimes allowed to have characteristics of its own.[48]

The rules in POLAND are relatively broad. The general formula (art. 405) is complemented by specific cases of undue performance. CC art. 410 par. 2 provides that

> "Performance is undue if the person who has performed was not bound at all to perform, or was not bound towards the person to whom he performed, or if the legal basis of performance has ceased to exist or the intended objective has not been attained, or if the legal act underlying the performance was invalid and has not subsequently become valid."

Other texts regulate the duty to restore the enrichment (art. 406, 408, 409), the liability of the third party as gratuitous transferee of the enrichment (art. 407), the case where there is no obligation of restitution (art. 411, 413), the forfeiture to the state of enrichment acquired through offensive performance (art. 412), and the cumulation of compensatory claims with claims based on groundless enrichment (art. 414). Commingling, confusion and transformation are regulated separately, but that does not, according to CC art. 194, exclude adjustment on the basis of groundless enrichment. The same is true of adjustment consequent upon the rescission of a synallagmatic contract (art. 495), where there is a reference to the pro-

[44] *E.g., Vékás* 243.
[45] *Eörsi* 222.
[46] *Vékás* 252 n. 28.
[47] *Ohanowicz*, Bezpodstawne 477–478.
[48] *Czachórski*, Prawo 221.

visions governing groundless enrichment. We should add that these rules also apply where the contract is invalid, since the POLISH Code has no special provisions on that topic. The Civil Code also provides that the rules on groundless enrichment are applicable to determine the quantum of recovery as between owner and possessor of property, as well as when a gift is revoked (art. 898).

It is to be noted, however, that the cases where the law renders the rules on groundless enrichment applicable to determine accounts between the parties are not all treated as cases of groundless enrichment in the legal and technical sense. Thus *negotiorum gestio* is regulated separately, not as one of the non-contractual sources of obligations, as was the case under the Code of Obligations of 1933, but within the framework of the law of contracts.

f. Rumania

14. *General description.* – RUMANIAN law differs from that of the other EASTERN EUROPEAN countries in that, although its civil law is codified, it does not conceive of the institution of unjust enrichment as a general one.

The Civil Code of RUMANIA dates from 1864, a time when the modern concept of our institution was only beginning to form; moreover the influence of FRANCE was strong[49] and unjust enrichment does not figure in the FRENCH Civil Code as a general independent institution. The RUMANIAN Civil Code does, however, regulate in some detail the institution of undue performance (art. 992–997) placing it together with *negotiorum gestio* as a quasi-contract, after the texts on contracts.

The provisions on undue performance are an almost literal equivalent of FRENCH CC art. 1376–1382. In addition to stating the general principles and the scope of undue performance (art. 994–997), they regulate two factual situations corresponding to the *condictio indebiti*: art. 992 lays down a general duty to restore undue performance, whilst art. 993 envisages payment of a debt by a person mistakenly supposing himself to be the debtor. Here the right to restitution comes to an end if the creditor who receives the payment in good faith destroys the title of the obligation as a result, and art. 993 then gives the paying party a recourse claim against the true debtor.

In addition, there is CC art. 1092, which corresponds to FRENCH CC art. 1235. This is placed among the provisions governing the extinction of obligations, the first method of extinction being that of performance. It lays down that the existence of an obligation may be presumed from the fact of performance, but that, if performance is undue, it gives rise to restitution, except in the case of natural obligations voluntarily performed. The rules as to the conditional *condictio causa finita* and the *causa data causa non secuta* are analogous to those developed from the FRENCH Civil Code.

Opinions differ among RUMANIAN writers on the question whether or not undue performance falls within unjust enrichment.[50] Some writers regard undue performance as a case of unjust enrichment only where the recipient was in good faith because only then does the principle of restitution work smoothly; this is to say that before a situation can be treated as an instance of unjust enrichment it must not only satisfy the prerequisites of that institution but also have the same consequences (*supra* s. 4). Others regard all cases of undue performance as unjust enrichment.[51]

As in FRANCE, the institution of generalized unjust enrichment was developed outside the Code, by courts and scholars who extrapolated from various situations where the law imposed a duty of restitution of the acquired gain to cases where no other claim existed. A consensus emerged that all the various situations where the *actio de in rem verso* in the FRENCH sense lay were instances of unjust enrichment.

Thus in RUMANIA the institution results from a doctrinal and theoretical generalization of the principle implicit in the rules providing for the restitution of enrichment in specified cases. Those provisions include, in addition to those on undue performance, the texts concerning the adjustments arising from commingling, confusion and transformation of property, acquisition of profits,[52] reimbursement for expenses incurred in keeping a thing (art. 997), deposit (art. 1618), and also performance by, or deposit with, a person with no capacity to enter into legal transactions.[53] Also relevant[54] are art. 776 and 1730 par. 4 on liabilities arising from gifts

[49] *Cărpenaru* 36.
[50] *Popescu and Anca* 156.
[51] *Stătescu and Bîrsan* 128 and authors cited therein.
[52] CC art. 484, 492–494, 508, 509, 515.
[53] CC art. 1098, 1164, 1598; *Popescu and Anca* 156.
[54] *Ursa* 55.

made on account of succession and the privileged debts which arise from expenditure made upon property.

It is "from the background" of such specific rules of law that unjust enrichment in RUMANIA is considered to arise as a distinctive type of obligation. Such a concept of unjust enrichment as a generalized "type of obligation" (*infra* s. 60) is met with in some other legal systems, including some which have rules making unjust enrichment a separate source of obligation. These systems, however, make a clear distinction between the general notion of unjust enrichment and the unjust enrichment *sensu stricto* which gives rise to obligations as a matter of positive law. In RUMANIA, the legislative position is such that we meet only unjust enrichment *sensu largo*.

Management of the business of another without his authority is not recognized as a case of unjust enrichment because of the extra element, on the part of the manager, the party eventually impoverished, of activity in the interest of another.

15. *An "extra-normative" institution.* – Several consequences flow from the fact, characteristic of RUMANIAN law, that unjust enrichment is an institution without texts.

In the first place it comprises a wider range of situations than in systems where the rules are laid down. In the RUMANIAN system unjust enrichment is merely a part of the conceptual structure, a feature of situations independently regulated in other respects by the law. In consequence, the actual decision that a case is or is not one of unjust enrichment does not result from the usual process of subsuming it under a rule of law. In applying the various rules of law already mentioned to concrete situations the courts consider whether or not the premises of the theoretical construct of unjust enrichment common to all the situations of this type are met. Here case law is more important than in legal systems where there are express texts on unjust enrichment, for the courts may look for, and find, unjust enrichment even in cases which fall outside the Civil Code or even outside private law altogether. This shows the vigour and utility of the institution.[55]

At present the frontiers of unjust enrichment are not clearly defined. To judge by the draft Civil Code now under consideration, this is going to change. The change will be useful in unifying the practice of the courts,[56] for in regulating unjust enrichment modern texts can reduce the present disparity between theory and rule as to its scope.

What is proposed by the drafts of the RUMANIAN Civil Code is a general formula requiring the restitution of enrichment acquired without a legal ground; a particular case would be made of undue performance, which is the commonest instance of unjust enrichment, and whose rules, presently distinct, have been extended, doubtless *faute de mieux*,[57] to other cases of unjust enrichment. The drafts suggest that unjust enrichment will be systematically segregated from both quasi-contracts and *negotiorum gestio* and made a source of obligation *sui generis*. The emancipation of unjust enrichment has hitherto been the work of scholars, and it has not been easy work.

g. Former Soviet Union

16. – "Obligations arising from groundless acquisition or retention of property" form the 42nd and last chapter of the RSFSR Civil Code of 1964, coming right at the end of the law of obligations. Groundless enrichment is here treated as a distinct source of obligations. The Fundamentals of Civil Legislation of the Soviet Union and the Union Republics of 1961 contain nothing on the subject, but the Civil Codes of the other SOVIET republics follow the RSFSR Civil Code of 1964, which SOVIET writers regard as a model of codification. They differ from it only in details of phrasing, except in two respects: first, certain republics[58] deny restitution of money paid as compensation for bodily harm or death (RSFSR CC art. 473 par. 4), and secondly, the LATVIAN Civil Code alone regulates the indemnity due to the party who incurred expenditure for another.

The RSFSR Civil Code of 1964 differs from the Civil Code of 1922 in several respects. First, the traditional terminology of "unjust enrichment" has been abandoned (*supra* s. 5). Secondly, the effects of the invalidity of a contract are now expressly excluded from the provisions on groundless enrichment, whereas in the Code of 1922 they were included. The two institutions are now distinct, though based on the same legislative thought (*infra* s. 27). Other changes affect the quantum of recovery, illicit performances, and the cases where the duty of restitution is excluded.

[55] *Idem* 55–61.
[56] *Idem* 61–62; *Popescu and Anca* 156.
[57] *Cărpenaru* 36–43.
[58] MOLDAVIA, TADZHIKISTAN, UZBEKISTAN, ARMENIA, KAZAKHSTAN.

The enactment of separate rules for the effects of invalid contracts (art. 48 ss.) and groundless enrichment does not mean that SOVIET law has adopted the distinction between undue performance and other sources of groundless enrichment. The distinction is a different one, and SOVIET writers rightly say that undue performance[59] is an instance, indeed the commonest instance, of groundless enrichment. While it is true that the rules on invalid contracts apply to certain performances traditionally embraced in the concept of *condictio causa finita* and some performances *sine causa*, other performances (some *condictiones indebiti*, *condictiones causa finita*, *ob causam datorum* and cases of offensive performance) fall within the general formula of groundless enrichment of RSFSR CC art. 473.

Despite the occasional unsubstantiated view that enrichment acquired through "performance" is something qualitatively different from enrichment arising otherwise,[60] and the occasional suggestion that undue performance is a special kind of acquisition,[61] SOVIET literature and practice adhere to the view that groundless enrichment is a unitary concept and should be formulated as such, without distinguishing between undue performance and other cases of groundless enrichment, either as to their prerequisites or as to their effects. This can be confirmed by the range of cases which, according to SOVIET writers, fall under RSFSR CC art. 473: the list includes performance to the wrong party, error as to the subject-matter and extent of performance,[62] performance based on an administrative act subsequently set aside, including *e.g.* the fixing of a price or the judgement of a court later reversed, and performance whose purpose has failed (*e.g.* payment of compensation for lost property subsequently found), or payment, even with knowledge, of another's debt.[63] The drafting of art. 473 is such that it can embrace cases of interference with another's property by commingling, confusion or transformation,[64] and cases which are classified elsewhere as "improper *negotiorum gestio*", *negotiorum gestio* itself not being generally recognized in SOVIET law.

Writers and courts in the SOVIET UNION, where the case law is copious, agree that the legal obligation to restore an enrichment acquired without legal ground may be found in other branches of the law, such as family law, labour law and finance law.[65] RSFSR CC art. 473 is not applied to these other cases of groundless enrichment *sensu largo* because they are covered by special provisions,[66] just as the rules on the effects of an invalid contract are special, though based on the same principles as the obligation from groundless enrichment. In these cases the factual situations differ but the legal sanction is the same: the question is how far there is an affinity between the institutions in question.

The existence of an identical obligation of restitution of enrichment in different branches of the law suggests[67] that it might be right to see groundless enrichment as an institution transcending the different branches of law, or at least to place its provisions in the general[68] part of the Civil Code. One can see here a similarity between this emergent obligation and a generalized recourse-like claim.[69]

h. Former Yugoslavia

17. *General picture.* – In former YUGOSLAVIA the institution of groundless enrichment is regulated in the Code of Obligations (CO) of 1978 (art. 210–219).[70] These rules are placed in the first part of the Code, the general part of obligations (The Principles of the Law of Obligations), and in the second chapter thereof (The Source of Obligations). Groundless enrichment is here conceived as an autonomous source of obligation alongside contract, causing harm, management of another's business without authority and unilateral declaration of will.

This system reflects the theory that groundless enrichment is a separate autonomous source of obligation,[71] and scholars in former YUGOSLAVIA agree in treating groundless enrichment as a unitary institution embracing both groundless enrichment *sensu stricto* and undue performance.[72]

[59] *Fleĭshitš* 212.

[60] *Gribanov and Korneev (– Belĭakova)* II 388.

[61] *Chernyshev*, Obĭazatelstva 5.6; but *communis opinio* is different.

[62] *Rĭasentsev*, Grazhdanskoe pravo 404, 411.

[63] *Gribanov and Korneev (– Belĭakova)* II 389; *Orlovskiĭ and Korneev (– Belĭakova)* II 448.

[64] *Bratus and Sadikov (– Khan)* 555.

[65] *Chernyshev*, Znachenie 49.

[66] *Bratus and Sadikov (– Khan)* 557.

[67] *Chernyshev*, Znachenie 49.

[68] *Shamshov*, Pravootnosheniĭa 20; *Sedugin* 20.

[69] *Pogosĭan* 16–17.

[70] Law of 30 March 1978, Sl.l.Y. no. 29/1978 pos. 462.

[71] *Blagojević and Krulj (– Cigoj)* art. 209 p. 553–554; *Danilović* 424.

[72] *Danilović* 403–404; *Cigoj*, Kondikcije in verzije de iure condendo: Zbornik Fak.Ljubljana 27 (1958) 17–58 with summary in French.