

The Enriched Person's Behaviour, Condition of the Unjust Enrichment

Oana Cristina NIEMESCH, PhD.

Titu Maiorescu University, Bucharest, Romania
oananiemesch@yahoo.com

Abstract

To designate the enriched person's behaviour as regards his possible act that led to the increase of his own patrimony is more appropriate to relate to the concept of the enriched person's good faith. Thus, good faith is fully consistent and justifies inclusively the specific extension of the obligation of restitution of the enriched person "to the extent of the patrimonial loss suffered by the other person, but without being held beyond the limit of his own enrichment." On the other hand, non-imputability of the enrichment drives more to the idea of the enriched person's guilt and implicitly to the civil criminal liability, in which case the obligation to restitution it would be total, irrespective of the value of the enrichment. As the case is of a licit juridical act it is necessary a fair remedy of the legal and economic imbalance thus created between the two patrimonies, and not the sanction of a culpable conduct.

The enriched person's subjective behaviour must be dominated by the ignorance of the material act of his patrimony enrichment or by his intimate conviction that this added value is entitled, namely his own enrichment has a legitimate basis.

Keywords: *unjust enrichment, good faith, non-imputability*

"This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013"

The unjust enrichment as a legal institution had a difficult way from its recognition on the jurisprudence way under the Civil Code of 1864 until its express establishment as a source of obligations (art. 1165 in the Civil Code) and its regulation in the current Civil Code (art. 1345-1348).

1. The enriched person's behaviour under Civil Code of 1864

In a first phase, the conditions that had to be met for this institution were established by the doctrine and jurisprudence that stated by a majority that from the material viewpoint there had to be an enrichment and an impoverishment of different patrimonies, and between them a connection could be established, i.e. there was a necessary correlation between the two phenomena, and in terms of legal requirements it was asked the absence of a legitimate basis of the enrichment and the lack of any other legal means available to the impoverished person.

As regards a third juridical condition, namely of the good faith of the enriched person, more specifications are needed. First, under the Civil Code of 1864, in the absence of an express regulation of the institution, few authors [1] considered that the good faith of the enriched person represented a legal condition of the unjust enrichment, most of the doctrine not expressing any viewpoint either to its consideration as a condition or to its negation.

Emphasizing the essential difference between undue payment and unjust enrichment which consists of the fact that in the case of the advantages obtained without a legal ground there is no guilt of the party who gets benefits, so there is no bad faith of this party, it is considered [2] that a natural consequence of this lack of guilt is that the person who obtained benefits will have to return them within the limit of his gain, without any addition, such as the legal interest or the civil fruits, as in the case of undue payment. The foundation of the notion of "benefits without a legal ground" consists of the obligation with general and objective character of not becoming rich to the prejudice of another person. This moral duty involves the absence of any guilt from the part of the person whose patrimony was illegitimately enlarged, and *actio de in rem verso* will have as object the restitution only of what increased the defendant's patrimony to the prejudice of the claimant's.

Starting from the premise that life demonstrates that there are situations when the person who obtains benefits without a legal ground is guilty, in the sense that these advantages were gained in bad faith, it was considered that such a circumstance does not belong to the sphere of the general objective obligation of not becoming rich unjustly, but to the sphere of other general obligation, i.e. of not prejudicing another. Thus, is "the enriched person" is guilty and is going to pay integrally the damages, the action is neither for restitution and nor *de in rem verso*, but an action for the payment of the damages according to the principles of the civil criminal liability, damages which will add to the return of the objects in kind, and, in the case of their loss, to the restitution of their value.

It is considered [3] that good faith in this matter consists of the enriched person's belief that the increase of his assets and the decrease of his liabilities have a legitimate cause. He ignores the lack of the just clause, considering himself entitled to increase his

patrimony. In the situation when the enriched person is of bad faith, knowing that the value that increases its patrimony does not belong to him, it is not anymore the case of unjust enrichment, but of civil criminal liability. He breaks the general obligation of not prejudicing another person and committing thus a civil offense for which he will be punished. In this case the creditor has an action in civil criminal liability within which he will obtain the total repayment of the caused damages. He will receive the value of his impoverishment, even if the value of the defendant's enrichment is lower without being opposed the limits of the obligation of restitution within unjust enrichment.

2. The enriched person's behavior under the regulation of the current Civil Code

As a consequence of the express regulation of the institution, in the provisions of art. 1345 in the Civil Code it was stipulated that the obligation of repayment belongs to "the person who, non-imputably, unjustly got rich to the prejudice of another person...". From the perspective of the other party of the legal relationship of obligation, similar formulations can be found in art. 1346 lett. b and lett. c: "the injured", respectively in art. 1348 in the Civil Code "the prejudiced". Before the amendment by Law no. 71/2011 regarding the application of the Civil Code, the provisions regarding the restitution stipulated in para. 3 of art. 1347 that "despite all these, the person who unjustly got rich has to return the value according to the date of the enrichment."

It has to be mentioned the fact that the corresponding provisions in Québec in the Civil Code, i.e., art. 1493, which represented the source of inspiration of the Romanian law-maker, do not include any mention regarding the guilty character of the attitude of the enriched person.

In this regard, in the recent doctrine there have been two fluctuating trends between identifying this condition as "enrichment should not be imputable to the defendant" [4] or that "the enriched person should be of good faith" .[5]

Thus, even if under the Civil Code of 1864 it was analyzed [6] the good faith of the enriched person as a legal condition of the institution, currently the same author speaks about the circumstance that the enrichment should not be imputable to the defendant, but in his argumentation retains that the grounds of the action de in rem

verso consists of the general obligation of any person of not getting rich unjustly to the prejudice of another person and not of a culpable behavior of the defendant. The respective moral duty involves the absence of any guilt of the enriched person, who has to return, as the final part of art. 1345 stipulates, only the value of his enrichment, even if the claimant's impoverishment is higher.

It was stated [7] that the unjust enrichment is a subsidiary source of obligations, so that, anytime the increase of a patrimony takes place as a consequence of an imputable act of his owner, it will be subject to a special sanction, in relation to the nature of the act through which the enrichment took place. It was also noticed that the unjust enrichment raises questions only about the legal ground of the enrichment (the cause of the obligation) and not the imputability of increasing the own patrimony. Consequently, the condition imposed by law so that the enrichment takes place "non-imputably" does not account for the mentioned definition.

Later, the same author [8] states that a text analysis of art. 1345 of the Civil Code highlights the fact that unlike the undue payment, defined from the perspective of the person who receives it, the unjust enrichment appears as a sanction of the person who got rich to the prejudice of another person; the same conception can be found in art. 1493 of Québec Civil Code. Therefore, the reality which is the starting point is the enrichment, not the impoverishment. It is the reflex of the same classical conception about the aim of the civil criminal liability, which starts from the reality of the act of the person who has to be sanctioned, not from the prejudice suffered by the claimant, which has to be repaired. It was also expressed the opinion that the unjust enrichment has to be analyzed as a remedy that aims at the amelioration of the unjust situation of the impoverished person, which makes the premise of any unjust enrichment be examined from the perspective of the effect it produces.

On the other hand, for the argumentation of the opinions [9] which require that the enriched person be of good faith exactly the same arguments were presented, regarding the general duty of not getting rich to the prejudice of another person and the absence of any culpable behaviour of the enriched person, the contrary consequence being the activation of the civil criminal liability.

If the enriched person was of bad faith it is not the case of unjust enrichment [10], but of an illicit and prejudicial act for the impoverished, act that can lead to the implication of the civil criminal liability of the enriched person, in the conditions stipulated by art. 1357-1359.

It was also stated that the non-imputability of the enrichment equals in fact to the good faith of the enriched person. [11]

According to another opinion [12], the analysis of the good faith of the enriched person should not be mistaken for the guilt of any party to the occurrence of the legal act that led the enrichment and the correlative impoverishment without a cause.

Considering that the equal sign cannot be put between the non-imputability of the enrichment and the good faith of the enriched person, some specifications are necessary.

The good faith is an exclusively legal concept with moral fundament.[13]

As regards the good faith, we mention the provisions of art. 14 para. 2 of the Civil Code according to which the assumption of good faith is made until the contrary evidence. Hence, the impoverished person will not have to make the evidence of the good faith of the enriched person, as this is legally assumed. Even if apparently the enriched defendant has the possibility to make the contrary evidence, so that to prove his bad faith, this is not necessarily in his favour (we take into account the extension of the obligation of restitution), only if the possible action in civil criminal liability could not be promoted because of a juridical obstacle, such as for instance the extinctive prescription, in which sense the action de in rem verso would not be also admissible as the impoverished person made use of another juridical means to recover his impoverishment.

We emphasize the fact that the unjust enrichment is a licit legal act whose initial fundament was equity, an institution regulated as such in the chapter dedicated to this source of obligations. That is why using terms such as "the person who, non-imputably, got rich", "the injured" or "the prejudiced" which belong to a civil liability for an illicit act appears unjustified.

An argument in the favour of imposing the good faith as a juridical, subjective condition of the unjust enrichment can consist of the corroboration of the modality of

establishment the extension of the obligation of restitution with the removal by the law-maker by Law no. 71/2011 of the stipulations of para. 3 of art. 1347 regarding the moment of establishment of the extension of the obligation of restitution in the hypothesis of a bad faith enriched person.

In the case of civil criminal liability based on guilt, the recovery of the prejudice has to be integral, but in the case of the unjust enrichment the law-maker took into account the double limitation of the extension of the duty of restitution given by "the measure of the patrimonial loss suffered by the other person, without having to make the restitution beyond the limit of his own enrichment". It is thus revealed how the character of the unjust enrichment was established to be a legal remedy for a licit act that created a relationship of obligation, and not a sanction of an illicit act.

As regards the relationship between the good faith and the civil criminal liability, taking into account the general opinion according to which the civil criminal liability cannot be influenced in its extension by the author's good faith as it is subject to the principle of integral restitution and the principle of non-proportionality to culpability and predictability, it was considered [14] that the good faith is inoperative. The application of that principle makes the good faith inoperative, but also what belongs to the essence of the liability, namely the existence of guilt under all its forms (offense committed on purpose or intentional offense or offense committed negligently).

On the other hand, retaining the fact that the notions of guilt and bad faith are not equivalent, we consider that the renunciation of the law-maker to the regulation of the moment in relation to which it is established the extension of the obligation of restitution in the hypothesis in which the enriched person was of bad faith, a solution established by Law no. 71/2011, confirms the opinion according to which the legal figure of the unjust enrichment was legislatively consecrated in relation to the good faith of the enriched person, which justifies the special character of his obligation of restitution.

Conclusions

We consider that for designating the behaviour of the enriched person in relation to his act that determined the augmentation of his own patrimony it is more appropriate to relate to the notion of good faith of the enriched person. Thus, the good faith is in fully agreement with and justifies inclusively the specific extension of the enriched person's

obligation of restitution "to the extent of the patrimonial loss suffered by the other person, but without having to make the restitution beyond the limit of his own enrichment". On the other hand, non-imputability of the enrichment leads more to the idea of guilt of the enriched person and implicitly to the civil criminal liability, in which case the obligation of restitution is integral, regardless of the value of his enrichment.

As we discuss about a licit legal act it is necessary an equitable remedy of the economic and juridical unbalance thus created between the two patrimonies, and not the sanction of a culpable behaviour. Hence, considering the action de in rem verso as a remedy, not as a sanction of the unjust enrichment corresponds both to the appreciation of the enriched person's behaviour from the viewpoint of his good faith and to the specific modality of establishing the extension of the enriched person's obligation of restitution.

We also consider that the external manifestations that belong to the structure of the good faith and that accompany the legal relationship of obligation generated by the unjust enrichment will have a totally different configuration than those that characterize the notion of good faith in the case of the legal acts, being particularized by the exigencies of the duty of not getting rich to the prejudice of another person. Thus, the subjective behaviour of the enriched person has to be dominated by ignoring the material act of the enrichment of his patrimony or by his intimate conviction that this added value is entitled, respectively that his own enrichment is based on a legitimate ground.

As regards the current regulation of the institution, we consider de lege ferenda that it should be eliminated the use of the expressions "the person who, non-imputably, got rich", "the injured" and "the prejudiced", expressly stipulating the good faith of the enriched person as a condition of the unjust enrichment. We do not consider a problem the use of the traditionally consecrated terms in the juridical language "the enriched person" and "the impoverished persons" even if they apparently lack the legal character, especially because other European legal systems also use them.

Bibliography

- Adam, I., Drept civil. Teoria generală a obligațiilor (Civil Law. The General Theory of Obligations), C.H. Beck Publishing House, Bucharest, 2004;
Adam, I., Drept civil. Obligații. Faptul juridic - în reglementarea NCC (Civil Law. Obligations. The Juridical Act – In the Regulation of the New Civil Code), C.H. Beck Publishing House, Bucharest, 2013;

- Bodoaşcă, T., Nour, S. O., Puie, I., Teoria generală a obligațiilor (The General Theory of Obligations), Universul Juridic Publishing House, Bucharest, 2010;
- Dogaru (coord.), I., Drept civil român. Idei producătoare de efecte juridice (Romanian Civil Law. Ideas Producing Legal Effects), All Beck Publishing House, Bucharest, 2002;
- Dogaru, I., Drăghici, P., Drept civil. Teoria generală a obligațiilor (Civil Law. The General Theory of Obligations), second edition revised, C.H. Beck Publishing House, Bucharest, 2014;
- Georgescu-Banc, A. in Atanasiu, A.-G., Dimitriu, A.-P., Dobre, A.-F. (col.), Noul Cod civil: note, corelații, explicații (The New Civil Code: Notes, Correlations, Explanations), C.H. Beck Publishing House, Bucharest, 2011;
- Gherasim, D., Buna-credință în raporturile juridice civile (Good Faith in the Civil Legal Relationships), The Publishing House of the Romanian Academy, Bucharest, 1981;
- Jugastru, C., Faptele juridice licite - surse de obligații (The Licit Juridical Acts - Sources of Obligations) in Studia Universitatis Babeș-Bolyai Iurisprudentia no. 4/2013, www.studia.law.ubbcluj.ro, last accessed on 07.05.2015;
- Jugastru, C., Dreptul persoanelor. Dreptul obligațiilor - secvențe în actualitatea Codului civil (The Law of Persons. The Law of Obligations – Sequences under the Current Civil Code), Hamangiu Publishing House, Bucharest, 2013;
- Neculaescu, S., Izvoarele obligațiilor în Codul civil. art. 1164-1395. Analiză critică și comparativă a noilor texte normative (The Sources of Obligations in the Civil Code art. 1164-1395, Critical and Comparative Analysis of the New Normative Texts), C.H. Beck Publishing House, Bucharest, 2013;
- Neculaescu, S., Îmbogățirea fără justă cauză (Unjust Enrichment) in M. Uliescu (coord.), Noul Cod civil. Studii și Comentarii, vol. III. Partea I, Cartea a V-a Despre Obligații (art. 1164-1649) (The New Civil Code. Studies and Comments, vol. III. Part I, Book V On Obligations), Universul Juridic Publishing House, Bucharest, 2014;
- Păun, C., Îmbogățirea fără justă cauză. Studiu comparativ în dreptul german și român (Unjust Enrichment. Comparative Study between the German and the Romanian Law), Wolters Kluwer Publishing House, Bucharest, 2008;
- Pop, L., Drept civil. Teoria generală a obligațiilor. Tratat (ediție revizuită) (Civil Law. General Theory of Obligations. Treatise – revised edition), "Chemarea" Foundation Publishing House, Iași, 1994;
- Pop, L., Îmbogățirea fără justă cauză în reglementarea Noului Cod civil (Unjust Enrichment in the Regulation of the New Civil Code) in Dreptul no. 7/2013, Universul Juridic Publishing House, Bucharest;
- Pop, L., Popa, I.-F., Vidu, S. I., Tratat de drept elementar civil. Obligațiile (Elementary Treatise of Civil Law. Obligations), Universul Juridic Publishing House, Bucharest, 2012;
- Turcu, I., Noul Cod Civil. Legea nr. 287/2009. Cartea a V-a. Despre obligații (art. 1164-1649). Comentarii și explicații (The New Civil Code. Law no. 287/2009. Book V On Obligations), C.H. Beck Publishing House, Bucharest, 2011;
- Uliescu, M., Buna-credință în Noul Cod Civil (Good Faith in the New Civil Code) in Uliescu (coord.), M., Noul Cod civil. Studii și comentarii, vol. I, Cartea I și Cartea a II-a (art. 1-534) (The New Civil Code. Studies and Comments, vol. I, Book I and Book II), Universul Juridic Publishing House, Bucharest, 2012;
- Vasilescu, P., Drept civil. Obligații (Civil Law. Obligations), Hamangiu Publishing House, Bucharest, 2012.

References:

- [1] Pop, L. Drept civil. Teoria generală a obligațiilor. Tratat (ediție revizuită) (Civil Law. General Theory of Obligations. Treatise – revised edition), "Chemarea" Foundation Publishing House, Iași, 1994, p.140. In the same regard, I. Dogaru (coord.), Drept civil român. Idei producătoare de efecte juridice (Romanian Civil Law. Ideas Producing Legal Effects), All Beck Publishing House, Bucharest, 2002, pp.85-86; I. Adam, Drept civil. Teoria generală a obligațiilor (Civil Law. The General Theory of Obligations), C.H. Beck Publishing House, Bucharest, 2004, p. 221; T. Bodoaşcă, S. O. Nour, I. Puie, Teoria generală a obligațiilor (The General Theory of Obligations), Universul Juridic Publishing House, Bucharest, 2010, p. 150.
- [2] Gherasim D., Buna-credință în raporturile juridice civile (Good Faith in the Civil Legal Relationships), The Publishing House of the Romanian Academy, Bucharest, 1981, pp. 194-195. See also L. Pop, op.cit., p.140. In the same regard, I. Adam, op.cit., p. 221; T. Bodoaşcă, S. O. Nour, I. Puie, op.cit., p. 150 – these authors consider that the solution is imposed by the constitutional principle of good faith in exercising the rights and freedoms (art. 57), but also by the principle of equity, which is supposed to characterize also the civil legal relationships.
- [3] Dogaru I. (coord.), op. cit., p. 85.

- [4] Pop L., Îmbogățirea fără justă cauză în reglementarea Noului Cod civil (Unjust Enrichment in the Regulation of the New Civil Code) in *Dreptul* no. 7/2013, Universul Juridic Publishing House, Bucharest, p.31; P. Vasilescu, *Drept civil. Obligații (Civil Law. Obligations)*, Hamangiu Publishing House, Bucharest, 2012, p. 220; S. Neculaescu, *Izvoarele obligațiilor în Codul civil. art. 1164-1395. Analiză critică și comparativă a noilor texte normative (The Sources of Obligations in the Civil Code art. 1164-1395, Critical and Comparative Analysis of the New Normative Texts)*, C.H. Beck Publishing House, Bucharest, 2013, p. 589; A. Georgescu-Banc in Atanasiu, A.-G., Dimitriu, A.-P., Dobre, A.-F. (col.), *Noul Cod civil: note, corelații, explicații (The New Civil Code: Notes, Correlations, Explanations)*, C.H. Beck Publishing House, Bucharest, 2011, p. 501.
- [5] Adam I., *Drept civil. Obligații. Faptul juridic - în reglementarea NCC (Civil Law. Obligations. The Juridical Act – In the Regulation of the New Civil Code)*, C.H. Beck Publishing House, Bucharest, 2013, p. 104; L. Pop, I.-F. Popa, S. I. Vidu, *Tratat de drept elementar civil. Obligațiile (Elementary Treatise of Civil Law. Obligations)*, Universul Juridic Publishing House, Bucharest, 2012, p. 373; I. Dogaru, P. Drăghici, *Drept civil. Teoria generală a obligațiilor (Civil Law. The General Theory of Obligations)*, second edition revised, C.H. Beck Publishing House, Bucharest, 2014, p. 281; C. Jugastru, *Faptele juridice licite-surse de obligații (The Licit Juridical Acts - Sources of Obligations)* in *Studia Universitatis Babeș-Bolyai Iurisprudentia* no. 4/2013, www.studia.law.ubbcluj.ro, last accessed on 07.05.2015; C. Jugastru, *Dreptul persoanelor. Dreptul obligațiilor- secvențe în actualitatea Codului civil (The Law of Persons. The Law of Obligations – Sequences under the Current Civil Code)*, Hamangiu Publishing House, Bucharest, 2013, p. 276.
- [6] Pop L., *Drept civil. Teoria generală a obligațiilor. Tratat (ediție revizuită)*, Ed. Fundației "Chemarea", Iași, 1994, p.140; L. Pop, Îmbogățirea fără justă cauză în reglementarea Noului Cod civil (Unjust Enrichment in the Regulation of the New Civil Code) in *Dreptul* no. 7/2013, Universul Juridic Publishing House, Bucharest, p.31.
- [7] Neculaescu S., op. cit., p. 589 și 591.
- [8] . Neculaescu S, Îmbogățirea fără justă cauză (Unjust Enrichment) in M. Uliescu (coord.), *Noul Cod civil. Studii și Comentarii, vol. III. Partea I, Cartea a V-a Despre Obligații (art. 1164-1649) (The New Civil Code. Studies and Comments, vol. III. Part I, Book V On Obligations)*, Universul Juridic Publishing House, Bucharest, 2014, p. 400.
- [9] Adam I., op.cit., p. 104; L. Pop, I.-F. Popa, S. I. Vidu, op. cit., p. 373; I. Dogaru, P. Drăghici, op.cit., p. 281; C. Jugastru, *Faptele juridice licite - surse de obligații (The Licit Juridical Acts - Sources of Obligations)* in *Studia Universitatis Babeș-Bolyai Iurisprudentia* no. 4/2013, www.studia.law.ubbcluj.ro, last accessed on 07.05.2015; C. Jugastru, *Dreptul persoanelor. Dreptul obligațiilor - secvențe în actualitatea Codului civil (The Law of Persons. The Law of Obligations – Sequences under the Current Civil Code)*, Hamangiu Publishing House, Bucharest, 2013, p. 276.
- [10] We also mention the isolated opinion in the literature, expressed most probably before the modification of the Civil Code by Law no. 71/2011 and the removal of the provisions of para. 3 in art. 1347 in the Civil Code, according to which even if the enriched person was of bad faith, he returns the amount of the enrichment at the date of receiving the act of enrichment, thus being practically admitted the existence of the unjust enrichment also in the hypothesis in which the enriched person was of bad faith. In this regards see, I. Turcu, *Noul Cod Civil. Legea nr. 287/2009. Cartea a V-a. Despre obligații (art. 1164-1649). Comentarii și explicații (The New Civil Code. Law no. 287/2009. Book V On Obligations)*, C.H. Beck Publishing House, Bucharest, 2011, p. 405.
- [11] Pop L., Popa I.-F., S. I. Vidu, op. cit., p. 373.
- [12] Păun C., *Îmbogățirea fără justă cauză. Studiu comparativ în dreptul german și român (Unjust Enrichment. Comparative Study between the German and the Romanian Law)*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 143.
- [13] Gherasim D., op. cit., p. 16.
- [14] Uliescu M., *Buna-credință în Noul Cod Civil (Good Faith in the New Civil Code)* in Uliescu (coord.), M., *Noul Cod civil. Studii și comentarii, vol. I, Cartea I și Cartea a II-a (art. 1-534) (The New Civil Code. Studies and Comments, vol. I, Book I and Book II)*, Universul Juridic Publishing House, Bucharest, 2012, p. 98.