Essays

The Historical Background to Unjust Enrichment in Italy and in Europe

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Abstract

In Europe, restitution rules are the result of a circulation of models. Historical-comparative investigation can help to trace the order lines of restitution and examine contamination and influences around the three great juridical models of the contemporary age: the Roman-French one, the Roman-German one and the English one.

I. A European Problem

The difficulties in harmonizing the national rules of the Member States of the European Union are particularly evident when discussing a future 'European' basis of the restorative principles.

In Italy, the enrichment action was the subject of three important monographic studies around the 1960s,[1] but subsequent legal literature, with rare and brilliant exceptions,[2] has not always fully understood the potential of the principle.[3]

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[1] R. Sacco, *L'arricchimento ottenuto mediante fatto ingiusto* (Torino: UTET, 1959); P. Trimarchi, *L'arricchimento senza causa* (Milano: Giuffrè, 1962); L. Barbiera, *L'ingiustificato arricchimento* (Napoli: Jovene, 1964).

[2] P. Gallo, L'arricchimento senza causa (Padova: CEDAM, 1990); Id, Arricchimento senza causa e quasi contratti (i rimedi restitutori) (Torino: UTET, 2nd ed, 2008).

[3] However, in more recent times the topic has been at the center of renewed interest, as demonstrated by the monographs of D. Carusi, *Le obbligazioni nascenti dalla legge* (Napoli: Edizioni Scientifiche Italiane, 2004); A. Nicolussi, *La lesione del potere di disposizione e l'arricchimento* (Milano: Giuffrè, 1998); P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento: Università degli Studi di Trento, 2005). Furthermore, the authors have delved into the study of the relationship between unjust enrichment and damages action: D. Carusi, 'Il concorso dei rimedi restitutori con quello risarcitorio (e il problema dell'arricchimento ottenuto mediante fatto ingiusto)' *Rivista critica del diritto privato*, 67 (2008); P. Pardolesi, 'Arricchimento da fatto illecito: dalle sortite giurisprudenziali ai tormentati slanci del legislatore' *Rivista critica del diritto privato*, 523 (2006); P. Sirena, 'Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa' *Rivista di diritto civile*, 531 (2006); A. Albanese, 'Il rapporto tra restituzioni e arricchimento ingiustificato dall'esperienza italiana a quella europea' *Contratto e impresa/Europa*, 922 (2006); Id, 'Arricchimento senza causa: azione e principio' *Studium Iuris*, 1114 (2006). For contributions in the field of industrial law: C. Castronovo, 'La violazione della proprietà come lesione del potere di disposizione. Dal danno all'arricchimento' *Il diritto industriale*, 7 (2003); A. Plaia, *Proprietà intellettuale e risarcimento del danno* (Torino: Giappichelli, 2003), 103; P. Sirena, 'La restituzione del profitto ingiustificato (nel diritto industriale italiano)' *Rivista di diritto civile*, 305 (2006); P.

Going through centuries-old normative and doctrinal construction, historical-comparative investigation can lead to tracing the order lines of such a complex matter, and to examining, albeit for subtle hints, relations, contamination and influences existing in the three great juridical models of the contemporary age, the Roman-French one, the Roman-German one and the English one.

In Europe, restitution laws are the result of the circulation of models. They, perhaps, represent the most uncertain product of the long historical evolution of legal thought; they played a fundamental role among the Romans; in modern times, they have long felt the pre-eminence of contract and tort; they awakened a growing interest in common law jurists and in German doctrine in the final decades of the last century. Finally, they have become an important part of the study of French-derived systems.

This phenomenon of 'homogenization' is not new in the modern era. The Soviet restitution system was inspired, for example, by the BGB model; the Russian system was then imitated by the Polish code and by the Hungarian one. The influence of the BGB is also evident in the Japanese and Chinese codes and in the 2003 Brazilian code. The influence of the common law is clear in the Indian system. Again, the Italian-French draft of the code of obligations of 1927, which, in Art 73, outlined how action brought on grounds of unjust enrichment was an important basis for the Albanian codification of 1927, for the Romanian one of 1934 and for the Greek one of 1940.

Some systems of French origin have instead deviated from their model and have expressly regulated the action of unjust enrichment; cf Arts 6 ff. of the Moroccan code of 1913; Arts 71 and 72 of the Tunisian code of obligations and contracts of 1906; Arts 140-142 of the Lebanese code of 1932.

The vitality of the principle of unjust enrichment is, therefore, confirmed by its validity in positive law (or, as in France, in caselaw application), both in Western and Eastern legal systems.[4]

In the context of systems of Roman origin, the Roman-French model is characterized by the lack of codification of the action of unjust enrichment; the French code, the Spanish code and the Italian code of 1865 exclusively regulate the two traditional legal concepts of almost-contract ('quasi contratti'), ie the payment of the undue payment and the *negotiorum gestio*. The Roman-Germanic model, on the contrary, is characterized by the absence of the quasi-contract category and by the strong presence of a general enrichment clause; for the German code of 1900, in § 812, para 1, BGB; for the Swiss code of obligations of 1911, in Art 61, para 1, OR. This confirms the incompatibility of unjust enrichment with the category of quasi-contracts. This is supported by Italian law, wherein the advent of the 1942 code led to the suppression of the quasi-contract and, concurrently,

Pardolesi, 'Un'innovazione in cerca d'identità: il nuovo art. 125 CPI' *Corriere giuridico*, 1605 (2006).

[4] For Muslim law, see P. Arminjon et al, *Traite de droit comparé* (Paris: Paris L.G.D.J., 1952), III, 364; for the South American one, see J. Fabrega Ponce, *El enriquecimiento sin causa* (Santafe de Bogotà: Plaza y Janés, 1996). See also, D. Johnston and R. Zimmermann, *Unjustified Enrichment. Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002).

the introduction of the general enrichment clause (Art 2041).

The principle prohibiting unjust enrichment at the expense of others spread first in Prussian law and in the Austrian civil code and later in the German civil code (§ 812), and in the Swiss law of obligations (Art 62). More recently, it was introduced in the Italian civil code of 1942 (Arts 2041, 2042) and in the Portuguese civil code of 1966 (Arts 473-482). The most recent codification of the enrichment action can be found in Arts 884-886 of the new Brazilian civil code.

The current Spanish code and French code still offer no remedy as an autonomous figure, but both in Spain and in France unjust enrichment is elevated, thanks to doctrine and jurisprudence,[5] to a general principle which operates as an autonomous source of obligation.

As for Italy, the very codification of a general principle of enrichment was strongly opposed by some and, in the years immediately following its advent, was harshly criticized; when the code of 1865 was in force, the action of enrichment lived an (uncertain) existence only in doctrine and jurisprudence. In accordance with a tradition dating back to Justinian's Roman law, the frequent recourse to reasons of a meta-legal nature and, in particular, to the principles of equity and justice, had aroused strong fears regarding the generalization of rules such as those pertaining to undue payments, accessions, expenses on other people's property and others that embodied specific hypotheses of unjust enrichment.

The same concerns could be found among French jurists. In France, the action of enrichment does not find approval in the texts of the law but, in 1892, a judgement of the Chamber of Appeals of the Court of Cassation gave definitive access to the remedy, as a general institution of French law (see § 2).

Unlike the French code, the current Italian civil code gives an affirmative answer to the question of whether or not it is appropriate to establish a general principle of enrichment. However, the real issue of restitutive remedies still remains to be resolved, notably, what to include within the codified general principle or, in other words, what is the benefit of such a generalization, in the face of individual rules which are not only more minutely dictated, but which often differ substantially from the regulation of general action.

This is a doubt which unites continental law jurists and common law jurists; even in countries such as Germany and England, where the enrichment action has greater scope than in Italy, scholars wonder

[5] Spanish jurisprudence openly proclaims that it has the merit of elaborating the figure in Spanish law: 'el enriquecimiento injusto es institución no mencionada expresamente entre los cuasi contratos que regula el Código civil, de principal elaboración de este Tribunal Supremo, con cierto arraigo en la legislación anterior' (S. 17 May 1957).

It should be noted that the principle of unjust enrichment, in Spanish law, has subsequently received approval also in legislative texts: the expression '*acción de enriquecimiento sin causa*' is used by Art 10.0 of the reformed Spanish code (see *Título Preliminar, De las normas juridicas, su aplicación y fuentes*, introduced by law no 3 of 1973, which, in Chapter IV, regulates the rules of private international law) and by Art 65 of the Cambiaria law. As to jurisprudential introduction of the enrichment action in French law, see § 2.

> 'whether the reaction against enrichment without cause constitutes a truly unitary institution or if it is not rather a question of a series of individually differentiated means of protection'.[6]

As a first approximation, the separation between the legal systems that refer to a double system (ie, comprising two distinct restitution claims) and those that have accepted a unitary system, could be outlined as follows: among the first, the French, the Italian, the Dutch and the Austrian; among others, the German, Swiss and, partially, Greek.[7] Furthermore, in the English system, one might wonder if it is truly appropriate to speak, technically, of a general principle that prohibits unjust enrichment, when the House of Lords itself, as a rule, prefers to base restitution on a plurality of typical remedies. But if we were to study, in depth, the evolution that the restorative remedies have had in these systems, all certainty vanishes. This is because the German doctrine, for example,

> 'strives to identify a typology of case of enrichment, which concretizes the too abstract legislative formulation, in the Common Law the opposite occurs, to the extent that an effort is made to enucleate from the minute cases a principle or criterion of orientation ... which acts as a guide for the interpreter'.[8]

The study of the different European legal systems presents a surprise and a confirmation. The surprise is to discover that, on the classic tripartition just exposed, it is possible to superimpose, in matters of restitution, a bipartition; on the one hand, the French system, on the other, the Anglo-German system. The confirmation is that even for refunds, it is possible to comprehend, at an embryonic level, a gradual process of approximation between the different models.

The theme is that of the relationship between individual means of restitution and the theory of unjustified enrichment. However, it is clear that some of the most profound profiles of the restitution system and the entire subject of obligations intersect in it. Think of the Italian influences, even on the French and German systems, with regard to the irrelevance of the error, and of the contribution offered by the *Saldotheorie* of German doctrinal matrix. Consider the different reflection of the French consensual principle and of the Germanic principle of abstraction of the cause. On the contractual side we have the theories of the efficient breach and the problem of the justice of the contract. Finally, consider the problem, highlighted to us once again by the comparative experience, of the allocation of the wealth produced in the absence of damage. A problem that could be reduced roughly to the following question: is there a liability without damage? More specifically, if it

[6] E. Moscati, 'Fonti legali e fonti *«private»* delle obbligazioni', in C. Angelici et al eds, *Quaderni romani di diritto privato* (Padova: CEDAM, 2000), 254.

[7] B. Kupisch, 'Ripetizione dell'indebito e azione generale di arricchimento. Riflessioni in tema di armonizzazione delle legislazioni' *Europa e diritto privato*, 858 (2003), where also a historical explanation of this separation.

[8] A. Di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 345.

exists, is it a compensatory or restitutive liability? More questions may arise; can we really speak of a 'responsible' subject, with regard to accipiens or enriched subject? If there is a 'restitutive responsibility', can it disregard guilt? Again, if a sort of objective liability could also be established in the matter in question, would it be fair to consider the defendant obligated to indemnify the plaintiff to an extent that is independent of the subjective state of the former? Finally, from these elementary questions, a more refined spectrum of problems related to the economic analysis of law unravels (assuming that such a liability is fair, is it also economically convenient?), from which a surprisingly elegant theme arises.

Here, however, it is appropriate to highlight the asymmetries of our system with respect to the other national laws of the Old Continent and, above all, with respect to what appears to be a general European trend.

II. The Influence of the French System

The results achieved by authors in the phase immediately preceding the new civil code and clearly incorporated by the codifier of 1942, were strongly influenced, when not translated, by the conclusions reached from the French experience. Indeed, after long-ignoring the problem, or, at most, after deciding to resolve it in the light of an adaptation of the traditional remedies, *condictio*, *actio de in rem verso* and *negotiorum gestio*, the transalpine courts were forced to address the question more seriously.[9]

The breaking point is represented by the famous judgement of the Chamber of Appeals of the Court of Cassation,[10] known as *arrêt Boudier* or *affaire des engrais*, which, despite the absence of an explicit rule, established the action of enrichment as general institution founded directly on equity, definitively freeing it from *negotiorum gestio*.[11]

The dispute concerned the sale of a load of fertilizer, by a merchant, to the lessee of an estate. At the end of the lease, the seller of the fertilizer, which, in the meantime, had been spread on the land, had not yet received payment from the

[9] P. Gallo, n 2 above, 121.

[10] Chanbre de Requetes, June 15, 1892 (in Dalloz, 1892, I, 596, in Sirey, 1893, I, 381, with note by Labbé). Moreover, the Court adopted the conclusions already announced in the doctrine by C. Aubry and C. Rau, *Cours de droit civil francais* (Paris: Marchal et Godde, 1920), IX, 354, who were the first to accept a configuration of the reform as an autonomous figure. The ideas of the same authors also had an evident influence on the maxims mentioned below in the text, which limited the boundaries of action. The two authors cited had, in turn, followed the conclusions formulated for the first time in French law by a German jurist: Zachariae, *Lehrbuch des franzosischen Zivilrechts*, 1808 (French edition under the title: *Droit civil théorique francais* (Bruxelles: Imprimeurs èditeurs, 1842) 337), who was the first to conceive an independent action from *negotiorum gestio*, calling it *actio de in rem verso*.

[11] Verbatim: 'attendu que cette action derivant du principe d'equité qui defend de s'enrichir au detrissement d'autrui et n'ayant été réglementée pas aucun texte de nos lois, son exercice n'est soumis a aucune condition déterminée'.

tenant, who later proved to be insolvent. The seller then took action against the owner of the land, since the latter, having finally benefitted from the supply of fertilizers, had, according to him, received an unjustified enrichment; the Court agreed with him. Moreover, the decision, with a motivation whose emphasis and abstractness went well beyond the modest case submitted to its attention, pushing itself to the formulation of a principle which, since it is based on natural equity, could only be understood in the broadest and most flexible sense. In its disruptive innovative ardor, it failed to define the conditions for the operation of such an action. On the contrary, it solemnly sanctioned that the principle on the basis of which whoever is enriched to the detriment of others is required to return the stolen goods, is not subject to any predetermined condition. It is sufficient for purposes of accepting the request, that the plaintiff demonstrates that he has procured an enrichment with his own sacrifice or that done to the person against whom he acts.

The judgement, rather than closing the debate, rekindled it. It was now necessary to fill a potentially unlimited principle with content, to reconstruct the conditions for the effectiveness of a remedy which was received with concern among scholars, so much so, that it was compared to a Trojan horse introduced into the citadel of law written as '*une sorte de brulot susceptible de faire sauter tout l'edifice juridique*'.[12] Within this debate, still open and partially influenced by that original fear that the reform was capable of undermining the law, two judgements should be noted, one from 1914,[13] the other from the year following,[14] which completed the reconstruction of the institution started by the *arrêt Boudier*, adding to enrichment, damage and correlation between damage and enrichment, the other two presuppositions forming the modern action of enrichment, lack of just cause and subsidiarity of the remedy.[15]

The events beyond the Alps had an evident echo in the Italian legal reality, in which the enrichment action was recognized, although not mentioned by the 1865 code. From the examination of various provisions scattered in the codes (Arts 445, 449, 450, 468, 470, 490, 1018, 1148, 1150, 1237, 1243, 1307, 1528, 1728, 1842, 1010 of the civil code; Arts 56 and 326 of the commercial code), the existence of a general principle was deduced, which forbade unjustly enriching oneself to the detriment of others.[16] The obligation to repay was, therefore, already enshrined

[12] P. Drakidis, 'La subsidiarité, caractère spécifique et international de l'action d'enrichissement sans cause' *Revue trimestrielle de droit civil*, 580 (1961). The fear induced by the appeal to fairness, which has long infected Italian jurists as well, characterized French scientific production throughout the twentieth century. In 1956, for example, it was written that '*on a tenté de préciser le domaine de l'action de in rem verso en disant que l'enrichissement doit etre injuste. Mais l'expression est dangereuse: elle est susceptible de faire naitre l'idée que l'action est donnée lorsque l'enrichissement est contraire a l'équité*' (H. J. and L. Mazeaud, *Leçons de droit civil*, Paris: Montchrestien, 1956, II, 640).

[13] Cour de Cassation 12 May 1914, *Sirey*, I, 41 (1918).

[14] Cour de Cassation 2 March 1915, *Dalloz*, I, 102 (1920).

[15] P. Gallo, n 2 above, 128.

[16] In this regard, critically: A. Ascoli, 'Arricchimento (azione di)' *Nuovo Digesto Italiano*, I, 755-

in the old code, albeit by means of individual provisions of law (the aforementioned Art 326 of the commercial code, as well as Arts 67 and 94 of the royal decree of 14 December 1933, no 1669).[17]

However, unlike what happened in France, in Italy the disputes around the convenience and usefulness of codifying the principle that prohibits unjustified enrichment, ended with an affirmative solution, on the basis of other European bodies of legislation, as the Swiss and the German one. On the other hand, the prohibition of unjustified enrichment had already been enshrined as an institution of a general nature in the Italian-French Project for a code of obligations and contracts[18] (Art 73), whose Explanatory Report reiterated the opportunity of enunciating a general principle.

The voices in favor of that formulation arose more and more and when, after being reaffirmed in the Preliminary Project (Arts 820-821) and in the Final Project (Arts 766-767), it found definitive confirmation in the civil code of 1942, and the Report to the Code did not hesitate to underline how the solution enjoyed the support of 'a very broad current of doctrine and jurisprudence'.[19]

Since then, however, an ancient and current question has been handed down to the interpreter; what is the relationship between enrichment, on the one hand and undue payment, negotiorum gestio and individual restitution actions on the other? For the moment, it is possible to ascertain that in the legal system on which the Italian legislator has drawn the most, ie the French one, the regulation of undue payments is not conceived as a remedy against unjust enrichment. This is demonstrated by the elaboration of a non-codified institution, the action of enrichment, to solve problems to which it would otherwise have been possible to apply the rules of the unlawful act.[20]

III. The Influence of the Germanic System

Following the codification of the enrichment action and the new arrangement of undue payment in the Italian code of 1942, the opinion, prevailing under the rule of the repealed code, which wants the second included in the first, is denied by imposition of the two reforms that would evidently be irreconcilable with that vision. If this were the case, in fact, the legislator, emulating the models of the Germanic

759 (1937). For the idea that the Arts 445 and 490 of the civil code 1865 find an explanation in concepts extraneous to the idea of unjustified enrichment, C. Burzio, 'Il campo d'applicazione dell'*actio de in rem verso*' *Giurusprudenza italiana*, 129 (1897). For a similar consideration regarding Art 1728 of the civil code 1865, F. Leone, *L'azione di arricchimento in diritto moderno* (Napoli: Jovene, 1915), 145, where also the attempt to reconstruct a general theory of unjust locupletation through the examination of the individual provisions of the old code.

[17] Cf G. Castellano, La responsabilità cambiaria nei limiti dell'arricchimento (Padova: CEDAM, 1970).

[18] Progetto di codice delle obbligazioni e dei contratti, Roma, 1928, § 14, LXXXVIII.

[19] Relazione al Codice. Libro delle Obbligazioni, Roma, 1941, no 262.

[20] A. Di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 1987), 255.

area, would first have had to sanction the general prohibition of unjustified enrichment, and only after its individual applications, such as undue payment and, perhaps, *negotiorum gestio*. On the contrary, our legal system clearly detaches itself from the German, Austrian and Swiss models, by relegating unjust enrichment only at the end (Title VIII), to underline the autonomy of the two concepts.

In the opposite sense, it was decided to draw upon the choices adopted by the legislators of the German area, who literally constructed the payment of the undue amount as one of the most important concepts in which the general prohibition of unjust enrichment is articulated.

The BGB (§ 812) stipulates that

> 'anyone who obtains something through the performance of others or in any other way without a legal cause at the expense of another, is obligated towards him to restitution. This obligation also exists if the legal cause subsequently ceases to exist or if the intended result of the performance does not occur, according to the content of the legal transaction'.

Traditionally, two distinct cases are found in the law. The first is characterized by the fact that someone has obtained goods or a benefit 'through the performance of another' and this is not justified in their relationship (so-called *Leistungskondiktion*). The second is characterized by the fact that the advantage or enrichment does not follow from the service performed by the impoverished subject, but is a result that occurred 'in another way' (so-called *Nichtleistungs kondiktionen*).

The *Nichtleistungs kondiktionen* include the *Eingriffskondiktion*, the *Verwendungskondiktion* and the *Rückgriffskondiktion*. The *Verwendungskondiktion* relates to expenses made for the benefit of others; the *Rückgriffskondiktion* has as its object the payment of the debt of others. But the case of *Bereicherung in sonstiger Weise* (ie enrichment obtained 'in another way') which is, by far, of greater importance is the *Eingriffskondiktion*, pertaining to hypotheses of alienation, enjoyment or unauthorized consumption of another person's property or right. We will return extensively to this in § 6.

Going back to the Italian perspective, the *Leistungskondiktion* can be traced back, with precaution imposed by the different circulation laws operating in the two systems, to our repetition of undue payment, the *Eingriffskondiktion* to unjust enrichment. All the cases, as we have seen, however, are unified by the subsumption within a single principle expressed in § 812. The fundamental teaching of Savigny),[21] which had begun from the reunification of the various Roman *condictiones* then to come to a general principle, and once the principle had been outlined, it had examined the individual *condictiones*, was therefore embedded in the BGB. The BGB first enunciates the general principle that informs the whole matter (§ 812)

[21] F.K. Savigny, *System del heutigen römischen Rechts*, V, italian translation by V. Scialoja (Torino: UTET, 1986-1989), 507.

and then defines in detail the individual traditional *condictiones*, such as the *condictio indebiti* (§ 813-814), the *condictio causa data, causa non secuta* and *ob causam finalizam* (§ 815), the *condictio ob turpem vel injiustam causam* (§ 817). ((Para 816, in turn, expressly provides that if a person disposes of another person's property without authorization, he is required to return to the owner the consideration received. If it is a free transfer, on the other hand, it is the third-party purchaser who is required to make restitution, but within the limits of his own enrichment. This last rule is characterized, within the system of §§ 812-818 BGB (which normally imposes the restitution within the limits of the value of the enrichment), because it obliges the enriched person to return the entire profit obtained from the alienation of another person's property, even if the said profit is higher than its market value)).

However, even in Italy, the subsequent evolution of the matter does not favor the thesis that would seek to bring the repetition of unlawful enrichments within the prohibition of unjust enrichment. In reality, surviving German law immediately departed from the line of the code. It was precisely the search for the constituent elements of the general case that gave rise to the need to isolate some individual hypotheses (such as that of the undue invasion of the other's patrimonial sphere) being not entirely attributable to the provision of § 812, I, BGB.

In fact,

> 'the «unitary» concept was definitively thrown into crisis, when the emphasis (W. Wilburg, E. von Caemmerer) was placed on the diversity of the functions performed, respectively, by the action to repeat the undue performance (*Leistungkondiktion*) and from other forms of restitution not attributable to an obligatory relationship to be invalid, already extinguished or simply presumed to be so (*Nichtleistungs kondiktionen*), with respect to the action against the entry into another's sphere (*Eingriffskondition*)'.[22]

By the work of numerous scholars,[23] and, in particular, thanks to the classification traced by von Caemmerer, the German legal school, therefore, formulated a system based on the distinction between undue payment and unjust enrichment, and on the ramification of these categories into various sub-species. This ensured that from the general principle that Savigny had drawn from the synthesis of the various *condictiones* and accepted then from the codex, we return to the enunciation of the single typical concepts.

The same argument adduced by the supporters of the attribution of the undue amount to the prohibition of unjust enrichment, therefore, ends up turning against

[22] P. Schlechtriem, 'Osservazioni sulla disciplina dell'arricchimento senza causa nel diritto tedesco' *Rivista critica del diritto privato*, 357 (1984).

[23] Cf F. Schultz, 'System der Rechte auf dem Eingriffserwerb' 105 *AcP*, 1 (1909); W. Wilburg, *Die Lehre von der ungerechtfertigten Bereicherubg nach österreicischen und deutschen Recht* (Graz: Leuschner & Lubensky, 1934); H. Kötter, 'Zur Rechtsnatur der Leistungkondiktion' 152 *AcP*, 193 (1954); E. Von Caemmerer, 'Bereicherung und unerlaubte Handlung' *FS Rabel*, 333 (1954).

them. Even in systems in which the textual datum endorses that interpretation, the need has been felt for a clear distinction between embezzlement and enrichment.

IV. The Influence of the Common Law

It is known that our legal system generally favors restitution in kind, while restitution by monetary equivalent, again in general, is permitted only on a residual basis. In Common law systems, on the contrary, the rule is of restitution by equivalence even when it comes to services to give (quantum valebat). However, we must consider that, in some hypotheses, the plaintiff may have a prevailing interest in the recovery of the thing; the restitution by equivalence takes place, in fact, in the case of unique goods or of particular value or artistic value.[24]

Despite this basic difference, even with regard to the restitution, however, it is possible to discover significant elements of contamination.

The organization and simplification of restitutive remedies have also been particularly complex in the juridical systems that have wanted to take charge of them. In fact, in England and the United States, where restitution is now considered an area neither smaller nor more limited than contracts, torts or trusts, for a long time, restitution cases, still immature, had been dispersed and dissolved within other subjects, or cataloged under ambiguous guises that did not capture their real essence; quasi-contract, money had and received, subrogation, constructive trusts, etc.

At first, in order to protect the impoverished and suppress the phenomenon of unjust enrichment, common contractual actions were used, such as the action in debt, which, in addition to achieving payment of sums of money, also aims at achieving repayment if there has been a failure of consideration in the contract.

Subsequently, the action of assumpsit was used, as a general action based on the fiction that there had been a promise to pay the debt (indebitatus assumpsit, a term which implied that 'as a debtor, I confirm that I owe a sum of money'). This action gradually began to be preferred, thanks to the diminution of the burden of proof that it entailed,[25] to that of debt, starting from Slade's Case, of 1602, in which it was established for the first time that the assumpsit, ie the confirmation of the debt, could simply be presumed in all cases of debt arising from a sale.[26]

The best-known formula of assumpsit was the one aimed at returning 'money had and received'. The money had and received action can be considered the equivalent of our recovery action, although it only allows the recovery of

[24] P. Gallo, 'Ripetizione dell'indebito. L'arricchimento che deriva da una prestazione altrui' *Digesto delle Discipline privatistiche. Sezione civile* (Torino: UTET, 1998), XVIII, § 3).

[25] In fact, it was sufficient for the plaintiff to demonstrate the existence of the debt. This evidence carried a legal presumption that the defendant had promised to pay off that debt (even if, in fact, the defendant had promised nothing).

[26] *Slade's Case* (1602) 4 Co. Rep. 91°, 67 E.R. 1072.

undue payments involving sums of money (for the recovery of which, prior to the introduction of this remedy, there was no possibility). The expression 'money had and received' is nothing more than the current abbreviation of the original name of the action 'money had and received for the use of the owner'. In fact, it was assumed that the defendant, once he had received the money due to an error by the solvens, had tacitly undertaken to return to the latter what was unduly received, or rather to allocate that money exclusively in the interest of the plaintiff (for the use of the owner).

Instead, for the recovery of any other performance, it was necessary to refer to the remedies, quantum valebat (performance of giving) and quantum meruit (performance of doing).

Only in 1760, thanks to the dictum with which Lord Mansfield decided the case *Moses* v *Macferlan*,[27] it was finally possible to overcome the improbable explanation based on tacit commitments, for the first time reducing the obligation of restitution to natural justice,

> 'If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract'.

However, this principle, today referred to as 'the passage which formalized the connection between indebitatus assumpsit and enrichment',[28] remained isolated until almost the mid-1900s, when it was resurrected, in 1943, by Lord Wright in the case of *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd.*, in which, for the first time, the prohibition of being enriched without cause at the expense of others was clearly expressed, and thus the first seeds were sown, from which the unitary tendencies of reconstruction of the restitution hypotheses would germinate.[29]

The effort aimed at bringing all restitutions back to the prohibition of unjustified enrichment has obviously placed the common law interpreter before a new and no less onerous task, essentially consisting of perfecting the circumstances which make profit unjust, in finding of the typology of 'unjust factors'.[30]

[27] *Moses* v *Macferlan* (1760) 2 Burr., 1005; 97 *English Reports*, 676. Mr. Moses had paid a sum of money in execution of a judgement, which became final, but was later found to be incorrect on the basis of elements of fact that had arisen. Giving reparation to the plaintiff, at that time, would have been abstractly possible only with the action *money had and received*; but how could, in this particular case, appeal to the fictitious promise and argue that whoever had received the money had done so with the implicit intention of returning it?

[28] F. Giglio, 'Esiste un «Law of unjust enrichment» nel diritto inglese?' *Contratto e impresa*, 153 (2000).

[29] *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd*, in *Appeal Cases*, 1943, 32. The prohibition of unjustified enrichment was then expressed again by the House of Lords, with much greater clarity, in 1991, in *Lipkin Gorman* v *Karpnale*, in *Appeal Cases*, 1991, 548: see F. Giglio, n 28 above, 159.

[30] One of the leading experts on the subject has identified eleven assumptions of factors that can be defined as unfair: *mistake*, *ignorance*, *duress*, *exploitation*, *legal compulsion*, *necessity*, *failure of*

The evolution of the English jurisprudence goes hand-in-hand with that of the doctrine; the legal literature of the common law had always studied the restitutive remedies by fragmenting them into a vast case study that cannot be traced back to a single principle. In the second half of the last century, however, a fundamental work in English law introduced a unitary reconstruction of restitutive remedies, which would reconsolidate around the principle whereby 'every advantage, obtained at the expense of others, must be returned'. This is equivalent to saying, in fact, that the individual actions would all refer to unjust enrichment.[31]

Even more explicit in this direction is US law, which in § 1 of the Restatement of the law of restitution of 1937 (by Professors Seavey and Scott) expressly states the basic principle that 'a person, who has been unjustly enriched at the expense of another, is required to make restitution'.

However, these unitary tendencies do not seem to have serious concrete implications. To understand fully the phenomenon, it is necessary to reflect on the fact that in the years in which the thesis took hold and developed (the 1960s and 1970s), the main objective of scholars of restitution was to establish the very existence of the prohibition of unjustified enrichment and to legitimize it as an autonomous legal concept, so that it began to be considered seriously. It was essential to give refunds a structure based on solid and simple foundations.

After this first goal was achieved, in the 1980s and 1990s, attempts were made to reduce the level of abstraction through the formulation of the elements that form the case.[32]

In these two phases, the conceptual reunification of all restorative remedies and all possible situations around the single principle of unjust enrichment was of great use and seemed to be the easiest way to go, in order to organize and explain the restorative phenomenon.

In recent years, having overcome those original difficulties, and setting aside the need to achieve recognition of the law of restitution, many have highlighted that the correlation between restitution and unjustified enrichment is not it what was initially supposed to be.[33] Thus, there is a tendency to underline the multi-

consideration, incapacity, illegality, ultra vires and retention of property belonging to another (A.S. Burrows, *The Law of Restitution* (London, Dublin, Edinburgh: Butterworths, 1993), passim. See also P. Birks and R.N. Chambers, *The Restitution Research Resource* (Oxford: Mansfield Press, 1997, 3)).

[31] R. Goff and G. Jones, *The Law of Restitution (*London: Sweet and Maxwell, 1966) (one of the two authors, Lord Goff of Chieveley, was also one of the judges of the House of Lords, who decided on the Lipkin Gorman case). Another fundamental contribution to the foundation of a theory of unjust enrichment is that of P. Birks, *An introduction to the Law of Restitution* (Oxford: Oxford University Press, 1985). See also J. Dawson, *Unjust enrichment* (Boston: Little, Brown & Co, 1951); G.B. Klippert, *Unjust enrichment* (Toronto: Butterworths, 1983).

[32] They are: a) an enrichment of the defendant; b) which is at the expense of the plaintiff; c) which enrichment is unjust.

[33] See for example G. Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 1999), preface and 6 (at 7, in which the author openly states that the traditional interpretation is too simplistic and does not accurately reflect the reality of the restorative phenomenon); S. Hedley, 'Unjust Enrichment' *Cambridge Law Journal*, 578 (1995); Id, 'Unjust Erichment as the Basis of

causality of the restitution obligation, of which unjust enrichment can be an important, but not the only, causative event.

Unjust enrichment and restitution are therefore not synonymous. On balance, the principle of unjust enrichment failed to clarify the boundaries of restitution obligations.[34]

Finally, it should be noted that a characteristic of common law systems is the separation between the enrichment due to the initiative of the impoverished person (from or by the act of the plaintiff) and those obtained as a result of the same activity of the enriched person (by his own wrongful conduct). But, on closer inspection, the formulation of 'historical' codes already implied a similar bipartition. Consider the principle codified in the Prussian code (Allgemeines Landrecht, § 13) (and in the Austrian one: § 1041 A BGB): 'Anyone who has used or put to use utilities owed to others, is required to indemnify the impoverished subject'. Furthermore, we have already cited § 812 BGB and the separation between *Leistungskondiktion* and *Eingriffskondiktion* of German law.

Here, then, is a truly remarkable example of the circulation of models and of the primordial globalization of European law, a solution that started with the Germanic system, crossed over to the English one and ended its journey in the Italian one, where it is by now common knowledge among our most recent scholars.

In any case, it is, therefore, to the Anglo-German system that we are tributaries of the observation of the distinction of unjustified enrichment in two types of cases depending on whether the subject to whose activity the asset transfer is attributed is the enriched, or the impoverished himself.[35]

V. The Italian System: Mixture and Complementarity of Restitution Obligations

The peculiarities of the Italian system all argue against a unitary concept. Apart from the element already cited, of the placement of Art 2041 in the Civil Code, the law dictates two different regulations for *condictio indebiti* and enrichment, therefore objecting to their unitary reconstruction.

Restitution – An Overworked Concept' *Legal studies,* V, 56 (1985); J. Dietrich, *Restitution: A New Perspective* (Sydney: Federation Press, 1998); I.M. Jackman, *Varieties of Restitution* (Sydney: Federation Press, 1998). P. Birks, n 31 above, 18, who had initially proclaimed that between restitution and unjust enrichment there is a '*perfect quadration*' (see also M. McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadration Thesis' *Restitution Law Review*, 118 (1999), had to acknowledge the erroneousness of that setting: P. Birks, 'Property and Unjust Enrichment: Categorical Truths' *New Zealand Law Review,* 623 (1997); Id, 'The Law of Unjust Enrichment: A Millennial Resolution' *Singapore Journal of Legal Studies,* 318 (1999).

[34] See R. Grantham and C. Rickett, *Enrichment and Restitutions in New Zealand* (Oxford - Portland Oregon: Bloomsbury Academic, 2000), passim: the authors propose the substitution of the concept of unjust enrichment with that of 'restorable enrichment', as well as per the preface by Goff.

[35] L. Ennecerus and H. Lehmann, *Recht der Schuldverhaltnisse* (Tübingen: J.C.B. Mohr, 15th ed, 1958), II, 2, § 222.

First, only the enrichment action is of a subsidiary nature. Furthermore, the object of the restitution obligation pursuant to Art 2041 of the civil code is the payment of an indemnity, which coincides with what was unduly received, only in the hypothesis of the return of a specific thing (Art 2041, para 2, of the civil code). Conversely, the undue payment favors the restitution in kind of the *eadem res* or *tantundem*, and only when this is not possible does it refer to the value of the service rendered.

Again, and above all, the regulation of the recovery action disregards, in principle, any assessment of the defendant's achieved enrichment and therefore it does not seek to operate that concrete mix between mutual prejudices and patrimonial advantages, which instead characterizes the matter of enrichment. The increase of the assets of the *accipiens* is considered only when he is incompetent (Art 2039 of the civil code).

Finally, in the enrichment action, the subjective state of the enriched person is not given prominence; on the contrary, in the undue payment, the good and bad faith of the *accipiens*, although irrelevant for purposes of the restitution obligation, are, however, decisive for purposes of its quantification.

The case of restitution of a specific thing can lead to the temptation of unitary reconstructions. Indeed, it is possible for the object of the restitution obligation to be the same. Although the undue payment tends to recover 'the thing' while the *actio de in rem verso* tends to pay compensation, if the defendant has enriched himself by acquiring a specific asset to his patrimony, the *petitum* will be always the return of that single asset (since the 2nd para of Art 2041 of the Italian Civil Code provides for the return of the thing when the enrichment has as its object a specific thing). However, the circumstance is purely coincidental, and can be explained by the fact that, in this hypothesis, there is a coincidence between enrichment and impoverishment, on the one hand, and the thing on the other.

The object of the two remedies is different even in the case of restitution of a determined thing. It clearly emerges from decisions of the Supreme Court in the matter of unjust enrichment, which clarified that in the hypothesis governed by para 2 of Art 2041 of the civil code

> 'if the restitution of the thing itself does not exhaust the enrichment and the correlative patrimonial decrease envisaged by the rule contained in para 1º, the indemnity envisaged by this last rule is due, for the residual part'.[36]

Once the distinction between the various restitution actions has been recognised, it is necessary to acknowledge that if, on the one hand, it is useful to bring them together around a single common denominator, on the other, this must be recognised in something broader than the general prohibition of unjust enrichment. What is certain is that a basic rationale resides in Art 1173 of the Civil Code;

[36] Corte di Cassazione 30 May 2000 no 7194, *Foro italiano*, I, 570 (2001).

obligations must be kept under control by law; the system of sources is atypical but, within it, the law also controls everything that does not arise from contract or tort. The reference to the general prohibition, on the other hand, can be accepted in purely descriptive terms and, provided that it is addressed, at most, to the principle and never to the action of enrichment.

Essential to the understanding of the reform is, in fact, the study of the relationship between action and principle, which is, however, characterized by an ambivalence; Art 2041 of the civil code presents itself as an open case, thus suggesting itself as a general clause and as an analytical case, to which single restitution concepts present broadly in the legal system, are commonly traced. The value as an open case represents the essence of the institution; the scope of the analytical case, on the other hand, imposes on verification pertaining to the reconciliation of typical restitutive remedies with the general clause and risks transforming Art 2041 of the civil code into a mere summary rule of hypotheses already envisaged, eliminating its character as a general clause and reducing the practical scope of the action to a minimum.

It is of little use to invoke a mere phenomenological affinity in an attempt to elevate Art 2041 of the civil code as an interpretative criterion for all the individual hypotheses of restitution obligations; on the contrary, having to bring to light an authentic identity of ratio which, on closer inspection, is lacking both with respect to individual restitutional actions widely available in the system, and with regard to the *condictio* and *negotiorum gestio*:

a) as regards the first point, the single rules[37] dictated on the matter of expenses disbursed for the benefit of the good of others (improvements, additions, repairs, etc) cannot be brought together within the principle of unjustified enrichment, which seems to touch only on a subject regulated on the assumption of other assessments, mainly of an economic nature. The relief granted to those who carry out the expenses is always filtered through the legislative assessment of the single activity in relation to the single asset. Social utility is first assessed, so that the subject who enjoys the property of others is stimulated to carry out the activity, and the intensity of the protection of his individual interest is graduated, so as not to suffer the full cost. Hence, individual actions are not intended solely for the protection of interested parties but have their own specific purpose of functional orientation, *viz*, the protection of activities suitable to increase the efficiency of productive goods. Also, the analysis of typical restitutional actions in matters of accession, union, admixture, specification and avulsion leads to similar results. Modern studies, precisely with reference to Art 936 of the Civil Code, which had been made a key provision of the general principle, allow the connection with Art 2041 of the Civil Code as follows: it is a reference

> 'correct but generic, both for the subsidiary nature explicitly attributed

[37] Cf A. Albanese, 'I miglioramenti nel codice civile' *Contratto e impresa,* 910 (2003).

to this action, and because it does not in any case exclude a specific rule on individual points'.[38]

b) As for the second aspect, the emerging of two truly distinct fundamental 'models' within the law of restitution is clear. While the basic idea of unjust enrichment is that it is necessary to prevent someone from enriching himself unjustifiably at the expense of others (so that the restitution obligation meets the limit of enrichment), the inspiring principle of the undue payment consists in the requirement that every transfer of assets, regardless of any impoverishment/ enrichment it produces, has its own cause worthy of protection.

Even more convincing is the discrepancy between the prohibition of enrichment and the *negotiorum gestio*; a judge seized with a request for compensation for unjust enrichment cannot accept the request as *negotiorum gestio*, since the unjust enrichment action differs from the latter

> 'both for the *petitum* – consisting of the indemnity for the loss of assets suffered – and for the *causa petendi*, ie for the juridical facts placed at its foundation'.[39]

Italian doctrine concludes that the *negotiorum gestio*

> '*si distacca dall' azione generale di arricchimento senza causa e si accosta invece, conformemente alle sue origini storiche, al diritto del mandatario a essere rimborsato delle anticipazioni fatte per lo svolgimento dell' incarico conferitogli dal mandante*'.[40]

However, there is an undeniable fact; Italian refunds are characterized by their complementarity. The confirmation of this complementarity is found in the disciplinary mingling among the various reforms; think of the relationship between a 'real' and 'patrimonial' concept; undue payments[41] is undoubtedly inspired by the first. However, in the current system of the *condictio,* the exceptions are so important as to suggest a reversal of trend in favor of the second; consider Art 2037, para 3, of the Italian Civil Code; Art 2038, first para of the Italian Civil Code; Art 2039 of the civil code. These are all hypotheses in which restitution does not have, as its object, the objective economic value of the service but the patrimonial increase actually produced for the benefit of the recipient. But, on closer inspection, this happens not because the *condictio* betrays its own nature and function but because

[38] M. Paradiso, 'L'accessione al suolo. Artt. 934-938', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1994), 223.

[39] Corte di Cassazione 6 October 1994 no 8184, *Giustizia civile - Massimario annotato della Cassazione*, 1197 (1994).

[40] P. Sirena, La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto (Torino: Giappichelli, 1999), 33.

[41] E. Moscati, 'Concezione «reale» e concezione «patrimoniale» dell'arricchimento nel sistema degli artt. 2037- 2038 del c.c.', in *Studi in memoria di D. Pettiti* (Milano: Giuffrè, 1973), II, 991.

circumstances arise which, from a systematic point of view, are external to the undue payment and make the overlapping of restitutive remedies useful from a legislative point of view which, considered individually, would have another nature and function.

Take, for example, Art 2037 of the Civil Code, relating to the destruction of the undue *res*. Repetition of the undue payment requires, in principle, the restoration between the parties of the relationship of the original patrimonial situation; if the thing has perished, this is not possible. Return is possible only for the equivalent of the value. But the criterion of *aestimatio rei* and that of *in rem verso* are applied by the legislator in a dynamic way; if the restitution of the thing has become impossible, the principles of undue or enrichment will be valid, depending on whether the *accipiens* is, respectively, in bad faith or in good faith. The result is the overlapping of the two fundamental restorative models, since Art 2037 of the civil code proportions the restitution obligation to the objective value of the thing in the case of bad faith of the *accipiens* but imposes the limit of enrichment in the case of good faith.

Art 2038 of the civil code, then, in the case of alienation of the undue *res* to third parties, contemplates the faculty of the *solvens*, lacking other protective instruments, to act with a real action of unjust enrichment against the sub-purchaser. The third party, held towards the *solvens* within the limits of his own enrichment, does not occur in the passive side of the obligatory relationship, as demonstrated by the fact that he does not take over the same debt position as the *accipiens indebiti*.

In other cases, the mixture of restitutive remedies is between undue and special restitution actions; consider Art 2040 of the civil code, which refers to the regulation of possession with regard to undue expenses and improvements made by the *accipiens* and therefore, among other things, to the third para of Art 1150 of the Civil Code. In this provision, the extent of the reimbursement of expenses varies according to the subjective states of the *accipiens* and is, therefore, graduated according to a principle which is unrelated to that of unjust enrichment.

The complementarity, emerging from concrete experience, is an inevitable consequence of the same conceptual differences between the individual remedies; to recover the undue payment, not only it is necessary to provide proof of either the enrichment[42] or the impoverishment[43] but, above all, the juridical system prepares a reaction against the unjust enrichment, even if a valid *causa solvendi* is the background to it, or, more generally, a formal justification, which if it is suitable to give a cause for the transfer of assets, does not make an enrichment just. Likewise, a reaction is set up against transfers without suitable formal justification, even if the economic consequences are perfectly just and desired by the parties, as is the case of a contract that is void due to a procedural defect.

Enrichment probably exists in most cases of undue payment but the dogmatic

[42] Cf Corte di Cassazione 9 February 1987 no 1334, Giustizia civile - Massimario annotato della Cassazione (1987).

[43] Cf Corte di Cassazione 23 January 1987 no 634, *Giustizia civile - Massimario annotato della Cassazione* (1987).

coincidence between the perception of debt and the achievement of profit cannot be deduced from a mere statistical survey. Surely, however, there is never enrichment in a kind of undue payment, one provided for by Art 2036 of the Civil Code, of undue subjective *ex latere solventis*. In fact, here the *accipiens* does not enrich himself (unjustly) with anything, since he limits himself to receiving what is due to him. Nor can he subsequently be 'enriched' since the extinguishing effect of the payment made by the *solvens indebiti* precludes him from obtaining the same payment from the actual debtor.

Finally, complementarity does not result only from the law but also from the effective application of the right of restitution by the judges. Consider the example of the *de facto* lease, when, following the execution of the relationship, the lease contract is declared void. The Supreme Court denies anyone who has used the property the right to a refund of the amount paid as consideration.[44] The undue payment would here impose full restitution of sums collected by the lessor and restitution of 'the enjoyment' of the counterparty; but the second restitution is obviously impossible, so that only the first would be due by law. Yet, if the lessee could recover the sums paid, an unjust enrichment in his favor would undoubtedly result. Here, the overlapping of the two remedies, and therefore the complementarity of the principle of enrichment with respect to that of the repeatability of the undue services, allows the judges to deny the handler a restitution.

VI. Subsidiarity

Finally, complementarity does not result only from the law but also from the effective application of the right of restitution by the judges. Consider the example of the *de facto* lease, when, following the execution of the relationship, the lease contract is declared void. The Supreme Court denies anyone who has used the property the right to a refund of the amount paid as consideration.[45] The undue payment would here impose full restitution of sums collected by the lessor and restitution of 'the enjoyment' of the counterparty; but the second restitution is obviously impossible, so that only the first would be due by law. Yet, if the lessee could recover the sums paid, an unjust enrichment in his favor would undoubtedly result. Here, the overlapping of the two remedies, and therefore the complementarity of the principle of enrichment with respect to that of the repeatability of the undue services, allows the judges to deny the handler a restitution.

The theme cannot be fully addressed here,[46] but the complementarity between

[44] Corte di Cassazione 3 May 1991 no 4849, Archivio delle locazioni e del condominio, 504 (1991), Giurisprudenza italiana, I, 1314 (1991); Corte di Cassazione 6 May 1966 no 1168, Massimario del Foro italiano - Raccolta delle massime delle sentenze della cassazione civile, 408 (1966); Corte di Cassazione 30 January 1990 no 368, Giurisprudenza agraria italiana, I, 550 (1990); Corte di Cassazione 23 May 1987 no 4681, Foro italiano, 2372 (1987).

[45] ibid

[46] Cf A. Albanese, Ingiustizia del profitto e arricchimento senza causa (Padova: CEDAM, 2005),

the different restitution remedies could provide the effective explanation of the subsidiary nature of the enrichment action. Subsidiarity, in this context, should be read precisely with regard to repetition and other restitution actions, so that the remedy pursuant to Art 2041 of the civil code comes into play (or rather, by way of aid) not only in the very rare cases in which there is no other remedy abstractly, but also in those in which the exercise of the aforementioned remedial remedies has not proved suitable for indemnifying the plaintiff for the damage suffered (according to the formula of Art 2042 of the civil code) and still remaining, for the defendant, a portion of the profit unjustly achieved. The institution of the *condictio indebiti*, precisely because it does not target the recovery of an unjust enrichment, can, in concrete terms, be unsuitable for the return of the profit.

The application of Art 2042 of the Civil Code, therefore, should be limited to enrichments due to the initiative of the impoverished person, and instead excluded for enrichments obtained through an unjust deed. In fact, the assumption of incompatibility between liability for compensation and restitutive responsibility is erroneous, which, in addition to having different content, are placed on two different levels, so that it makes no sense to speak of subsidiarity of the latter in relation to the former. The protection offered to the impoverished by tort law action has a different nature than what he seeks, with the enrichment action, in the case of illegitimate interference in his own juridical sphere. While, in this case, he demands that the profit built on the exploitation of his wealth, acting with the criminal action, would seek reparation for the damage suffered; this action is unsuitable for the plaintiff to obtain what he claimed with the *actio de in rem* verso, the return of the profit unrelated to the extent of the damage. It follows that there is no reason to deny the combination of the two remedies; what is not covered by the repair of the damage will be covered by the return of the profit.

In these terms, precisely, Art 2042 of the civil code makes sense only if applied with reference to actions aimed at obtaining the same indemnity[47] to which the enrichment action applied to a specific category of enrichments gives rise, viz, those that occurred in the absence of abusive interference.

In Italy, however, the general propensity of Italian legal science for a restrictive interpretation of the requirements of the enrichment action, finds its most fertile ground, on the one hand, in the 'patrimonial decrease' required by Art 2041 of the Civil Code and on the other, precisely in the subsidiarity required by Art 2042. The concept of 'abstract subsidiarity' prevails; recourse to the enrichment action is possible only in the presence of 'damage' and only when there is no other remedy,

178.

[47] This solution had been indicated by the Supreme Court in a decision that remained isolated (Corte di Cassazione 13 December 1969 no 3941): 'Art 2042 of the civil code when it establishes that the action for enrichment is not feasible when the injured party can take another action to obtain compensation for the damage suffered, he refers to another action that has such compensation directly as its object (e.g. in the cases of art. 1185, para. cc)'.

even if only abstractly available for the purpose of obtaining compensation.[48] The direct consequence is the clearly superior practical relevance that the principle of enrichment has assumed in the legal systems of the countries cited, compared to the Italian one, which risks being marginalized by increasingly topical discussion in the international arena. Especially since, in Italy, the prevailing concept of subsidiarity is in some ways even more restrictive than the French one, transalpine jurisprudence has in fact adopted the distinction between legal obstacle (such as limitation or forfeiture) and factual obstacle (such as bankruptcy of the defendant); only if the main action could not be exercised due to a legal obstacle, the practicability of the actio de in rem verso is precluded.[49]

In any case, the rigorous exegesis carried out in Italy regarding the subsidiary nature, and through it the substantial elimination of the action of enrichment from the legal system, is once again confirmed only in the French system. But in France, where distrust of the institute has been such as to even avoid an express standardization of it, the jurisprudence that applies to it has to deal with a less flexible system than the one placed before Italian interpreters. Moreover, even French scholars are beginning to speak of the subsidiarité as a useless and embarrassing principle.[50]

The potential of the general enrichment clause should be developed, above all, in cases of illegitimate interference by third parties in interests worthy of protection. To extend the effectiveness of the remedy to all these cases, it would be sufficient to recognize that the expression 'to damage' contained in the Art 2041 of the Civil Code, in reality, is not dissimilar to that 'at the expense' of the Anglo-German system, and accepts in an interpretative way, in other respects, a concept of subsidiarity free from the prejudices that atavistically characterize the institution. Neither the requirement of capital reduction nor that of subsidiarity constitute insurmountable obstacles.[51]

[48] Only some authors prefer the opposite concept of 'subsidiarity in concrete', according to which Art 2042 Civil Code has the meaning of excluding the exercise of the action of enrichment only for the time in which the offer of other defenses exists: see eg P. Sirena, n 40 above; A. Albanese, n 46 above.

[49] Furthermore, the French Court of Cassation is also beginning to indicate an erosion of subsidiarity, starting from a sentence that caused astonishment in doctrine: Cour de Cassation 3 June 1997, *Juris-Classeur périodique*, 1157 (1998).

[50] P. Remy, 'Le principe de subsidiarité de l'action de in rem verso en droit francais' *L'arricchimento senza causa* (Torino: V. Mannino, 2005), 71.

[51] This is a supplementary competition; if the impoverished person has already obtained the restitution of the enrichment, he will only be able to obtain additional compensation for any further damage, after having provided proof pursuant to Art 1223 Civil Code. P. Sirena, n 40 above, 149, observes that 'dal punto di vista economico, il soggetto tutelato, nel caso in cui sussistano contemporaneamente i presupposti dei rimedi considerati, potrà ottenere la somma più elevata fra il valore del danno risarcibile, l'ammontare del profitto netto lucrato dal soggetto agente e l'astratto valore del bene ovvero del servizio che questi ha utilizzato senza giusta causa'. Moderate openness to more flexible solutions seems closer today: see Corte di Cassazione 15 May 2023 no 13203; Corte di Cassazione-Sezioni unite 5 December 2023 no 33954.

VII. The Requirements of the Enrichment Action in the Anglo-German Model

With regard to the structure of the general enrichment action, the model that is increasingly gaining ground at an international level is that of common law systems[52] and of Germany, which, unlike the Franco-Italian model, which requires the simultaneous presence of five requisites for acting in enrichment (enrichment, damage, correlation between enrichment and damage, lack of just cause, subsidiarity), does not claim proof of the damage and the correlation link, nor does it attribute a subsidiary nature to the remedy; it is based, simply, on the evidence of enrichment unjustly achieved at the expense of others.

This opens, in those countries, prospects for restorative remedies which are instead denied by our interpreters, who see an insurmountable obstacle in the letter of our law.

In Germany, for example, the problem of damage perpetrated in the absence of a transfer of assets, such as in cases of simple use of another person's property or the exploitation of intangible assets, is solved thanks to the concept of *Zuweisungsgehalt*, that everyone has an exclusive right on the utilization and exploitation of utilities falling within its protected situation. The German doctrine[53] attributes to the return of the profit the function of reinstating the property right (*Fortbildung*), thus implementing the complete protection of this right from the interference of third parties.

In the Anglo-German system, the illegitimate interference with the rights held by another person is, in itself, an 'unjust factor',[54] as the common lawyers would say, regardless of proof of a diminution of assets.

The future of restitution seems to go, then, in the opposite direction to that of our legal tradition, which has fallen into a fundamental contradiction, that of believing that 'the action is given, rather than against unjust enrichment, to avoid enrichment to the detriment of others',[55] thus shifting the center of gravity of the remedy from the person of the enriched to that of the 'damaged', and ending up betraying the spirit of unjust enrichment in compliance with that of *neminem laedere*.

But the enduring value of this approach is denied by foreign legal systems:

a) the reference to damage does not appear in the BGB, where the concept of '*auf dessen Kosten*' applies. During the codification, the expression was preferred to that of '*aus dessen Vermögen*' precisely so that it was clear that the presence

[52] On the remedy of disgorgement, see the monograph by P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento: Università degli Studi di Trento, 2005), 83, where also the invitation 'to consider with renewed attention the solution adopted in common law systems'.

[53] W. Wilburg, n 23 above, 27.

[54] Cf A.S. Burrows, n 30 above, passim (and in particular chapter 13 with respect to interference with the plaintiff's property rights).

[55] A. Trabucchi, 'Arricchimento (Azione di) (Diritto Civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1959), III, 68.

of damage or of transfer of assets was unnecessary, and to highlight, instead, the mere presence of a profit realized through the abusive exploitation of other resources. The solution had its definitive approval in the decision of the Supreme Court of 1971 (*Flugreiseentscheidung*): BGHZ 55, 128. Precisely on the assumption that the proof of damage and correlation is not co-essential to the birth of restitution obligations, the judges sentenced a minor, who had traveled without a ticket by plane from Hamburg to New York, to pay the price for the flight; in this case, neither contractual liability came into play (the passenger had not concluded any contract with the airline), nor the Aquilian one, since no damage was found. However, the minor had saved an expense, and therefore the remedy of unjust enrichment was configurable.

The pivot on which the *Eingriffskondiktion* is based is not given by the illegality of the behavior of the enriched person (as in the now outdated elaboration of the *Rechtswidrigkeitstheorie*), but by a rule which is autonomous from the illegal and instead typical of enrichment (in accordance with the *Zuweisungstheorie*); the profit attributable to the abusive exploitation of the benefit of others must be returned, because the related benefits, even if only potential, belong exclusively to the owner.

The Swiss Federal Code of 1911, in Art 62 (70), follows the expression of the BGB. Even today in Switzerland, despite the traditional doctrine, such as the Italian one, adopting the criterion of the 'smaller sum', the currently prevailing trend is in the sense that restitution should not be limited by the value of the capital decrease suffered by the impoverished; the remedy does not seek to repair the damage, but to obtain the return of the profits achieved at the expense of the plaintiff. Art 64 limits the restitution to the enrichment still existing in the hands of the defendant at the time of the filing of the action; moreover, the expenses incurred by the enriched person must be taken into account (all expenses if he acted good faith, only those useful if in bad faith).[56]

b) The Portuguese code (Art 473, no 1) uses the expression 'custa de outrem', which identifies the need for the profit to have occurred thanks to goods or utilities belonging to another person.[57] The Brazilian civil code, like the Portuguese one, and following the approach of the BGB, does not mention the requirement of damage and is satisfied with the existence of a profit obtained by invading the legal sphere of others.[58] In the same vein, is the Japanese code of 1898, which in

[56] Cf Chappins, *La restitution des profits illegittimes* (Helbig, Liechtenstein: Faculté de Droit de Geneve, 1991), 8.

[57] Cf M.J. De Almeida Costa, *Noções de direito civil* (Coimbra: Almedina, 1991), 76; L. Cunha Goncalves, 'Tratado de direito civil', in *Comentário ao Código civil português* (Coimbra: Coimbra editora, 1931), IV, concerning the old Portuguese civil code of 1867 (which, like the French code, did not embed the principle, but recognized it both in doctrine and in jurisprudence); D. Leite de Campos, *A subsidiariedade da obrigação de restituir o enriquecimento* (Coimbra: Almedina, 1974); Id, 'Enriquecimento sem causa, responsabilidade civil e nulidade' *Revistas dos Tribunais*, no 560, 262 (1982).

[58] See Arts 884-886. For the previous situation, see Negreiros, 'Enriquecimento sem causa –

Art 704, prefers the concept of enrichment obtained at the expense of others, to the expression 'correlative patrimonial decrease'.[59]

c) Recent Spanish doctrine, contrasting the more traditional convictions of the Courts, has admitted the return of enrichment even beyond the limit of impoverishment, holding that the center of gravity of the action must be located exclusively in the enrichment. It is therefore noted[60] that the indemnity is not due for the use, in itself, of the thing or utility of others; the value of the use is not returned, but the gain deriving from the possession of the property of others. In the event of bad faith by the enriched person, he would have to return all profits made, and even those that could have been made. When speaking of the requisites of the action, it is necessary to abandon the perspective of depleted assets, and reference must be made solely to the existence of unjust enrichment, acknowledging that, in some cases, the restitution of the enrichment is independent of the existence of a correlative equity decrease.

d) The 1937 American Restatement of Restitution does not mention damage but uses the expression 'at the expense of'; also in Scotland, the 'draft rules on unjustified enrichment' have adopted the expression 'at the expense of another person';[61] in all common law systems, in general, this is the accepted and unanimously meaning recognized among practitioners and theorists.

In summary, in all systems that do not refer to the French model (but also in others that have simply distanced themselves on the point), proof of actual damage and of a correlation between benefit and loss of assets is not necessary. What we call 'damage', is elsewhere identified in the use of property, in the enjoyment of the right, in interference with alien patrimonial positions, in interference, ultimately, in the juridical sphere of another subject and in the exploitation of its resources.[62]

aspectos de sua aplicaçao no Brasil como un princípio geral de direito' *Revista da Ordem dos Advogados*, 55-III, 798 (1995).

[59] Cf *Civil code of Japan*, English translation by Becker (London: Butterworth & Co., 1909).

[60] Cf J.A. Alvarez Caperochipi, 'El enriquecimiento sin causa en la jurisprudencia del Tribunal Supremo' *RDP*, 872 (1977); Id, 'El enriquecimiento sin causa en el derecho civil español' *Revista General de Legislación y Jurisprudencia*, t. 236, 415, 495 (1974); Id, *El enriquecimiento sin causa* (Granada: Comares, 1989), 126. The necessity of pecuniary injury as a requirement of enrichment action has also been denied with force and depth of investigation by X. Basozabal Arrue, *Enriquecimiento injustificado por intromision en derecho ajeno* (Madrid: Editorial Cívitas, 1998), 38. Other fundamental studies are: L. Díez Picazo and M. De La Cámara, *Dos estudios sobre el enriquecimiento sin causa* (Madrid: Editorial Civitas, 1988); L. Díez Picazo, *La doctrina del enriquecimiento injustificado* (*discurso de ingreso en la Real Academia de Jurisprudencia y Legislación contestado por De la Cámara*) (Madrid: Editorial Cívitas, 1987); J.L. Lacruz Berdejo, 'Notas sobre el enriquecimiento sin causa' *RCDI*, 569 (1969); R. Nuñez Lagos, *El enriquecimiento sin causa en el Derecho español* (Madrid: Reus, 1934).

[61] Scot. Law Com. D.P. No. 99, *Appendix,* in F.D. Rose, *Blackstone's Statutes on Contract, Tort & Restitution*, 2000/2001 (London: Blackstone Press, 2000), IX, 523. N. 1 states the general principle: '*a person who has been enriched at the expense of another person is bound, if the enrichment is unjustified, to redress the enrichment*'.

[62] G. Palmer, *The Law of Restitution* (Boston-Toronto: Little, Brown and Company, 1978), 133, about the expression 'at the plaintiff's expense' writes: 'the general requirement … does not mean that

Another decisive difference between the German-Anglo-American model and the French-Italian one is that the restitution remedy, in the former, has no subsidiary character.

In common law systems, the principle of unjustified enrichment is based on only three assumptions: a) an enrichment of the defendant; b) which is at the expense of the plaintiff; c) the injustice of enrichment. The American Restatement of Restitution (1937), in its 215 paras, makes no mention of the requirement of subsidiarity. In the United States and in England, the plaintiff has the possibility of choosing, between the two remedies, the more suitable for the protection of his interest, and will prefer to act in enrichment, for example, if the action for damages has expired, or if he deems it convenient to obtain, rather than compensation for the damage suffered, the entire devolution of the profits earned by the defendant (so-called accounting of profits).[63]

In the German system, § 812 BGB, after enunciating the well-known rule according to which a person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so, is under a duty to make restitution to him; it continues by specifying that this duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur

> ('*Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg nicht eintritt*').

§ 852 BGB states that if, by commission of a tort, the person liable to pay compensation obtains something at the cost of the injured person, then even after the claim to compensation for the damage arising from a tort is statute-barred, he is obliged to make restitution under the provisions on the return of unjust enrichment

> ('*Hat der Ersatzpflichtige durch eine unerlaubte Handlung auf Kosten des Verletzten etwas erlangt, so ist er auch nach Eintritt der Verjährung des Anspruchs auf Ersatz des aus einer unerlaubten Handlung entstandenen*

the gain to the defendant need to be equated to the loss to the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded'.

In his two-volume study on the validity of the remedy in both civil law and common law systems, J. Fabrega Ponce, n 4 above, 284, 288, acknowledges that the new doctrinal trends on a global scale converge towards the abandonment of the idea of the indispensability of impoverishment, in favor of the sufficiency of an intrusion or invasion into the rights of others. This is the solution that the author himself considers the fairest and most suitable for the protection of juridical positions.

[63] D. Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' 80 *Columbia Law Review*, 504 (1980); S. Hedley, 'The Myth of Waiver of Tort' 100 *Law Quarterly Review*, 653 (1984).

Schadens zur Herausgabe nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung verpflichtet').

The usefulness of this provision is provided by the fact that, while the action for compensation for damages is statute-barred according to the ordinary term, and therefore in three years (§ 195 BGB), the restitution claim for unjustified enrichment is statute-barred ten years after it arises, or, notwithstanding the date on which it arises, thirty years after the date on which the act causing the injury was committed or after the other event that triggered the loss

(§ 852 BGB: '*Dieser Anspruch verjährt in zehn Jahren von seiner Entstehung an, ohne Rücksicht auf die Entstehung in 30 Jahren von der Begehung der Verletzungshandlung oder dem sonstigen, den Schaden auslösenden Ereignis an*').

Therefore, the German code lacks any reference to subsidiarity. The concurrence of remedies exists not only with the tort action, but also with proprietary claims. The doctrine was initially divided, in the absence of a specific norm, between an extreme thesis that claimed an absolute subsidiarity and a more elastic thesis about a relative subsidiarity (ie, such as to prevent competition only with regard to some of the typical exercisable actions). At the end, it was agreed that the element of the lack of legal foundation' ('*ohne rechtlichen Grund*') is already a sufficient one to delimit the field of action of the remedy. Furthermore, in cases where there is a special regulation, it is clear that it must prevail over the general regulation referred to in § 812, without having to resort to the concept in question.

It is no coincidence that the Principles of European Unjustified Enrichment Law, which are intended to constitute a synthesis of the prevailing solutions in national legal systems, do not refer to 'subsidiarity', but to 'justification' (Art 2: 101). This means that the operational ambit of unjust enrichment must be delimited, but that for this purpose an adequate check on the presence or absence of a just cause is sufficient. Art 7:102 of the Principles, entitled Concurrent Obligations, in admitting the possibility of accumulation between civil liability and unjust enrichment, states that when the impoverished person also has 'a claim for reparation for disadvantage', then 'the satisfaction of one of the claims reduces the other claim by the same amount'. The keystone of the acceptance of a unitary concept at the European level, then, presents its fulcrum in the absence of just cause.