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RESTITUTION AND CIVIL LIABILITY FOR INFRINGEMENT OF SUBJECTIVE RIGHTS *

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Abstract. *Transfer of assets between two or more parties may arise from a variety of distinctive facts, some of which are based on the parties' will (usually contractual will) while others are fully unrelated or even contrary to their will. In situations where this patrimonial transfer constitutes a loss for one party and an unjustified gain for another (either ill-founded or fully unjustified), the legal order demands that the enriched party shall return the unjustly acquired benefit and thus re-establish the prior state of affairs. The legal rules governing the re-establishment of patrimonial rights and interests constitute a legal institute called restitution. In this article, restitution is perceived as a specific instrument for the enforcement of civil liability and its sanction, in cases where both liability and sanction are a reaction to the unjustified shift of benefit from one party to another. The author examines the most common legal grounds for seeking restitution: unjustified (unjust) enrichment and the reversal of performances rendered under a void, voidable or unilaterally breached contract, but also points out that restitutionary rules can also be applied for recovering benefit acquired by infringement of one's absolute rights (instead of rules on damages). Although these legal relations pertain to different parts of the law of obligations, their common denominators are: the unjustified acquisition of benefit (unjust enrichment) and the duty of the enriched party to reverse the enrichment to the disadvantaged (impoverished) party who is entitled to it. The primary aim of all restitution claims is the reversal of unjustly acquired benefit and this goal is accomplished by applying the restitutionary rules. We think that adjusting these rules to the characteristics of a specific legal relation does not undermine the cohesion of restitution as a legal institute, which is ensured by its common purpose – restitutio in integrum.*

Key words: *restitution, civil liability and sanction, unjustified (unjust) enrichment, contract, damage, protection of absolute individual rights.*

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INTRODUCTION

Restitutio in integrum (re-establishing the original state of affairs in civil law relations) is a legal instrument for balancing the patrimonial positions of two or more parties, disturbed by an unjustified transfer of assets from one party to another. Hence, the restitution debtor is not entitled to acquire this benefit because it stems from or is aimed at the property of another party (restitution creditor), who is thus entitled to restitution. Unlike a contract, restitution is not a source of legal rights and duties but a complex mechanism aimed at repairing the disturbed patrimonial balance between two or more parties who may already (but need not necessarily) be involved in some legal relation.

Restitution is a legal mechanism for the enforcement of civil liability, in case it is perceived as a reaction to the unjustified transfer of benefits from one party to another party. The transfer is unjustified due to the lack of a valid legal ground and not approved by the legal order. Yet, the study of diverse restitution rules seems to be impractical without referring to the concepts of civil liability and its sanction, particularly given the fact that restitution is their direct legal consequence (just as the obligation to pay damages to the injured party is a legal consequence of tort liability whereas the annulment of a contract is a legal consequence of rendering the contract null and void or rescinding a voidable contract).

In this analysis, the author first explores the three most common legal grounds for instituting restitution in the law of obligations (unjustified enrichment, the reversal of performances rendered under a void, voidable or unilaterally breached contract, and the acquisition of benefit by infringing of one's individual subjective right) and elaborates on the multifaceted nature of restitution, which is regarded as a universal civil law institute (applicable in repairing any patrimonial imbalance in almost all civil law relations). The author also focuses on the concept of civil liability, its basic characteristics and purpose, and the sanction awarded in case of establishing civil liability. Further on, the author analyses the concept of restitution in some obligation law relations ensuing on the grounds of unjustified enrichment, contractual obligations and acquiring benefit by causing damage to absolute rights. This analysis substantiates the introductory remarks on the legal grounds for restitution. In the conclusion, the author summarizes the findings of this research.

1. THE CONCEPT AND THE LEGAL NATURE OF RESTITUTION

In legal terminology, restitution (lat. *restitutio*) denotes the establishment of a prior position or state of affairs *(restitutio in integrum)*[1] which may be a result of a number of circumstances, the most significant of which are: unjustified enrichment, termination of a void/voidable contract or unilateral termination of breached contract, wrongful acquisition of the owner/possessor's property, and causing damage to another.

Restitution is a legal consequence of civil liability for unjustified transfer of benefit between two or more parties. The restitutionary grounds (reasons) are numerous but the

[1] The verb "*restitute*" has a number of meanings: to execute a restitution of something; to re-establish; to restore; to return into the original state, position or form. The noun "*restitution*" has multiple meanings as well. In common usage, it means "establishment of a former state/position; restoration"; but, in legal terminology, it may denote "a return into the prior state/position; re-establishment of an infringed right; compensation for damage, reimbursement, paying non-pecuniary damages for sustained pain and suffering, insult, injury, etc. (Klajn, Šipka, 2008, p. 1161).

most significant ones are envisaged in the law as legal facts and legal institutes, which impose the duty on the parties concerned to restore the previous state of affairs.

1) Unjustified acquisition of benefit (unjustified/unjust enrichment) is one of the legal grounds for imposing a restitutionary measure, by means of which the benefit is to be returned to the person at whose expense it has been acquired (disadvantaged/impoverished party). In this case, restitution is based on the rule banning unjustified enrichment.[2] This group of facts also includes the unjustified acquisition of benefit based on a contract, which is subsequently rescinded or breached. In this case, restitution is a natural consequence of the retroactive effect of annulment (*i.e.* a sanction for making a contract null and void or rescinding a voidable contract) and a unilateral termination of a valid contract for its non-performance. The prohibition of unjust enrichment is usually a sufficient legal and jurisprudential ground for restitution in case of unjustified acquisition; however, in contractual relations it has to be amended or corrected by some rules stemming from the principle of individual autonomy. These rules are: *pacta sunt servanda*, good faith and fair dealing, contractual distribution of risk, and *venire contra factum proprium.*[3]

2) Another legal ground is the acquisition of benefit at the expense of another as a collateral or intended consequence of infringing the absolute subjective rights. Restitution is based on the principle which prohibits causing damage or harm to another (*neminem laedere*) as well as the rule banning unjustified enrichment by a detrimental act.

3) The third legal ground is the appropriation of assets from the owner or possessor. The obligation to re-establish the prior state of affairs is a consequence of the legal nature and effect of the violated right or legally protected position, their *erga omnes* legal effect and, for all third parties, the obligation to abstain from disturbing the title holder.

In Serbia and in many other countries, many of these legal facts are grounds for obligation relations, such as: unjustified enrichment and causing damage, where restitution is either the basic obligation of the debtor/enriched party (given the fact that restitution is a specific content of civil relation ensuing from the unjust enrichment) or the goal of performing the obligation (in which case the compensation of damage should remove the detrimental consequences and establish the prior state of affairs). On the other hand, in contractual relations, restitution is a consequence of the invalidity or termination of a performed contract.[4] Restitution is not a separate area of civil law (like property, contract or

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[2] The ethical foundation for the prohibition of unjustified enrichment is the proverbial saying of the Roman jurist Pomponius: "*Natura aequm est neminem cum alterius detrimento fieri locupletiorem*" (It is a fundamental principle of natural justice that no one ought unjustly to enrich himself at the expense of another), Pomp. D. 12, 6, 14 and D. 50, 17, 206.

[3] The common retroactive effect may not exist in some cases of annulment of forbidden contracts, by rejecting the claim of a dishonest contracting party to recover the performance rendered for the purpose of accomplishing illicit goals. Thus, *nemo auditur propriam turpitudinem allegans.* (No one whose claim is based on his own disgraceful behaviour can be heard, but shall be *punished*). Otherwise, restitution would be a reward for his immoral or illegal conduct which contradicts his own previous conduct *(venire contra factum propriam*). These ethical ideas inspired the rules on the dismissal of the restitution claim and the confiscation of the object of *prestacio* in favour of a third party. Certainly, these rules are a significant departure from the reparatory and restitutive purpose of civil law sanction, but sometimes they are useful in deterring parties from entering into unlawfull agreements. (For more, see: Gams, 1958, p. 206-210; Krulj, 1965, p. 151-179; Salma, 1981, p. 7-26. For comparative law, see: Klöhn, 2010, p. 804-836; Sabbath, 1959, p. 486-505 (Part I) and p. 689-706 (Part II)

[4] Restitution is also possible in some other legal relations, for example, in cases involving unauthorized management of another's affairs.

tort law). It is one of the consequences of the civil law sanction, and it is thus possible in any civil law relation where there are receipts of benefits not approved of by law which are to be repaired by re-establishing the prior state of affairs. Restitution rules are complex and their application is driven by diverse legal factors. In most cases, they pertain to obligation law relations: unjustified enrichment, causing damage and termination of a performed (void, avoided or breached) contract; however, restitution measures are also applied in property law relations, as a consequence of protecting the ownership right as the most significant individual right.[5]

Relying on the premise that restitution is one of the measures (instruments) for the enforcement of the civil law sanction, this analysis will be incomplete (if not impossible) without looking into the civil law liability and its respective sanction. Therefore, in the next section, we will look into the civil liability for the infringement of subjective rights and the civil law sanction aimed at protecting these rights.

2. Civil Liability and the Purpose of Civil Law Sanction

The multiplicity and diversity of possible legal grounds for re-establishing the former state of affairs and allowing a restitution claim bring us back to the initial premise that restitution should be analyzed as a legal mechanism or instrument for the protection of the disadvantaged party (restitution creditor) which is widely applied in all areas of civil law. On the one hand, the scope and outreach of restitution depend on the reasons (grounds) for seeking restitution as well as the type and characteristics of civil law relations where the prior state of affairs is to be re-established; on the other hand, they also depend on the nature and purpose of the civil law sanction which is embodied in the restitution.

Restitution is consequential in nature. It is a response to the disturbed patrimonial balance, and it is aimed at remedying the present state of affairs so that the assets of the parties concerned (the restitution creditor and the restitution debtor) would be returned into the previous position; in cases where the transfer of assets has been expected, restitution has to achieve this expected outcome. If the civil law sanction is an expression of civil liability, and if one of its goals is to re-establish the previous state of affairs (*restitutio in integrum),* restitution is the instrument for accomplishing this goal. Therefore, restitution is regarded as a measure for imposing civil liability rather than a civil law sanction.

In legal theory, there is a number of definitions on civil liability, which is believed to arise from a number of legal circumstances: a violation of a legal norm and disturbing the legal order; an infringement of subjective rights and legally protected interests; causing damage to another (Konstantinović, 1992; Petrović, 1992); an unjustified violation of personality rights and/or another's property causing a significant change in the position of assets which is substantially different from the position they would have in the regular circumstances (Nikolić, 1995, p. 97).

In colloquial terms, civil liability has become synonymous with the obligation to pay damages in order to compensate the injured party for the inflicted harm. In legal terminology, civil liability has been extended to include different shades of this principal

[5] *Actio rei vindicatio* claim is aimed at protecting the ownership right; it is restitutionary by its form of protection because ownership is protected by returning the asset to the rightful owner, i.e. by restoring the parties' former position.

meaning. Thus, civil liability also implies liability for wrongful acts which are not sanctioned by the obligation to compensate the injured party but by imposing some other measures, such as: the enforcement of a claim for the performance of a contractual obligation; the repudiation of an obligation; a performance claim for remedying deficiencies, etc. Civil liability may also arise from contractual obligations and result in the award of punitive damages, which may be awarded irrespective of the actual damage and whose amount may be significantly higher than the actual damage sustained (Cigoj, 1978, p. 399). Civil liability may also include the obligation to pay an interest rate and penalties, or a court order (injunction) to institute relevant measures to prevent some damage or disturbance, as well as the obligation to remove the source of danger or to refrain from activities which may constitute an infringement of another person's rights (Radišić, 2008, p. 183). We may therefore conclude that the concept of civil liability contains at least two components: the conduct which departs from the socially acceptable behavior (*Pflichtenprogramm*) and an appropriate sanction for such unlawful behaviour, which is established on the basis of the particular consequence.[6]

The civil liability is embodied in the civil law sanction, which is primarily monetary. The civil law sanction is aimed at the property of the responsible (liable) party because the protected objects are mostly property-related. These are individual property rights which may be expressed as monetary awards owing to their legal object, which is their common denominator. The protection of these rights is aimed at exerting an economic effect on the title holder's assets and ensuring respective performance so that the assets are returned into the original state of affairs (which would have existed if the infringement had not occurred). The infringed party is interested in reinstating the prior state of affairs, *i.e.* re-establishing the original legal position at the expense of the liable party by shifting his own loss on that person. Therefore, the civil law sanction is aimed at affecting the property rather than the personality of the liable party because "the debtor owes and his property is a guarantee for the payment of debt (Radišić, 2008, p, 45-46).[7] The amount needed for re-establishing the state of affairs (which would have ensued if the infringement had not occurred) should be taken from the property of the liable party.[8] This concept is known as the concept of progressive restitution (Nikolić, 1995, p. 143), which implies that the purpose of the civil law sanction is to bring the property and personal non-proprietary assets of the injured party into the position in which they would probably have been if they had not been endangered or violated by the conduct of another party (Nikolić, 1995, p. 143).

Such a reaction of the legal order is adjusted to the interests of the injured party, even if it involves a violation of a non-proprietary right. Namely, some consequences of the violation of non-proprietary rights (primarily personality rights), providing that they may be legally qualified as damage or benefit acquired without legal ground (unjustified en-

[6] "It would be incorrect to say that we are liable only when we do something unlawful; it would be more accurate to say that we are also liable in the course of exercising our rights: when we exercise them badly or when we abuse them." (Josserand, 1935, p. 328)

[7] The civil law sanction also contributed to distinguishing between debt and liability thus, debt retained its personal character but liability acquired a monetary character (Radišić, 2008, pp. 45-46).

[8] "The purpose of sanction in civil liability is to re-establish the disturbed balance between different assets." (Perić, 1937, p. 184)

richment), may also diminish the property of the injured party who is therefore protected by the civil law sanction (*i.e.* a restitutionary measure involving monetary compensation).[9]

3. Civil Law Institutes Protected by Means of Restitution Rules

The presence of restitution in the entire matter of civil law is explained by the nature of subjective rights, which are largely property-related and, as such, best protected by the civil law sanction (which largely implies monetary compensation). As aforesaid, the purpose of this sanction is to rectify the disturbed patrimonial positions in compliance with the principle of equivalence or to re-establish the prior state of affairs which has been changed without any legal ground or at least without a valid one.

As a measure or instrument for harmonizing the disturbed patrimonial positions of the parties concerned (by establishing a prior state of affairs), it is justifiable to claim restitution in any situation where a person is involved in a lawful or unlawful act for the purpose of: acquiring a benefit which belongs or is aimed at another (in unjust enrichment); unauthorised exercising an exclusive and absolute right of the title holder (in ownership right and other related real rights, personality right and intellectual property rights); infringing a right or a legally protected position (right or interest) of another by depriving him/her of the expected benefit for the given performance (in contractual law); and causing damage to another, the legal consequence of which is the restitution measure (in tort law).

Legally protected rights and legal interests may include: the ownership right and other proprietary rights *iura in re aliena*; personality rights; intellectual property rights; possession; performance; *fiducio* in the contract validity; the right not to sustain damage or some detrimental effect as a result of a wrongful act of another; usufruct right (implying that the benefit should be collected by the one who invested labour and finances into property); and the right to return benefits to the one who is entitled to receive them in case they are unjustifiably acquired by another. Bellow, the author focuses only on restitution of benefit acquired without proper legal ground - unjustified enrichment and termination of performed contract – but also explores possibility of protecting infringed absolute rights by way of restitution.

3.1. Unjustified enrichment and Restitution

The restitution claim is based on the idea that unjustly acquired benefit should not be retained by the person who unjustly acquired it but that it shall be returned to the disadvantaged party, who it is aimed at or on whose account it has been acquired (Larenz,

[9] For example, an injured party may be awarded monetary compensation (pecuniary damages) for medical costs and funeral expenses, loss of maintenance or regular allowances, permanent increase of daily needs, loss of earnings due to a full or partial inability to work, and material damage caused by death, bodily injury or endangering one's health (the Obligation Relations Act, *Official Gazette of SFRY,* N^{o}. *29/1978, 39/85, 45/89* and *57/89;* and *Official Gazette of SRY,* N^{o}. *31/93*, Art. 193-195). In addition, the injured party may be awarded monetary compensation (non-pecuniary damages) for the sustained physical or mental pain and fear (ORA, 1978, Art. 200). In the part of this article titled *Repairing damage caused by infringement of absolute subjective rights,* the author analyzes the protection of personality rights and other absolute rights against violations that cause damage to the title holder and bring benefit for the tortfeasor.

1977, p. 464). Therefore, restitution is based on the prohibition of unjustified enrichment, which is the legal ground for seeking restitution.[10]

The disadvantaged party (restitution creditor), whose property was unjustly diminished, is entitled to seek restitution: a return of the given assets or a monetary compensation for the benefit unjustly acquired by the enriched party (restitution debtor) whose property has been enlarged at the expense of the disadvantaged party. The institute of unjustified enrichment is based on the legal rules regulating the return of the given assets or monetary compensation for the unjustly acquired benefit. This institute is a separate source of obligation relations, and in Serbian legislation it is designated as "Acquisition without a legal ground" (The Obligation Relations Act, 1978, Art. 210-219).[11] These rules are applicable in cases of undue transfers (*condictio indebiti*), using the assets of another for personal interests, using one's own assets or another's assets for obtaining benefits for a third party, incurring expenses on behalf of another (these forms of unjustified enrichment are explicitly prescribed in this Act).

A common feature in all these rules is that the restitution creditor has performed the obligation on behalf of another person or has done something else that another person was obliged to do, thus diminishing his own property and increasing the property of another person without a legal ground. The only exception is the enrichment by unjustified use of another's assets for one's own benefit because it is not based on the action of the disadvantaged/impoverished party but on the action of the enriched person. This general restitution regime is amended by introducing provisions on some cases of unjustified enrichment even though they have not been designated as unjustified enrichment. These provisions primarily refer to establishing the prior state of affairs as a legal consequence of an unwinding of void and breached contracts, where the unjustified enrichment stems from the fact that the performances have been fulfilled on an invalid legal ground (void or voidable contract) or a subsequently terminated valid contract (due to its nonperformance). In these cases, the restitution obligation does not arise from the fact that the contracting parties are enriched by receiving the performance but from the fact that that there is no reason to keep the performance they received from each other (Tumbri, 1988, p. 1056).

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[10] Namely, the first restitution claims (dating back to the Roman law) were called *condictiones*, which were related to specific performances (in anticipation of a counter-performance which had not occurred), or person's reliance on the validity of a promise or performance of an obligation (whereas the debt turned out to be non-existent or invalid, or it proved to be another person's debt rather than the debt of the disadvantaged party).

[11] It is also a source of obligation relations in many other legislations, such as German legislation (the German Civil Code, 1900, *Federal Law Gazette, S. 195,* § § 812-822,) and Swiss legislation (the Law on Obligations Act, 1911, *BBl 1905 II 1, 1909 III 725, 1911 I 845,* Art. 62-67,). The Austrian legislator regulates the use of one's own assets in another's interest (the Austrian Civil Code, 1811, *JGS 946/1811, amended among others BGBl. I 40/2009 of 8 April 2009,* § § 1041-1043) and *condictio indebiti* (ABGB, 1811, § § 1431-1437), but they are not recognized as special forms of unjustified acquisition and, thus, they are not designated as unjustified enrichment. In the French Civil Code, *condictio indebiti* is regulated in the section dealing with non-contractual obligations (*Code civil*, 1804**,** *JO no. 71/2006, p. 4475, JO no. 141/2008, p. 9856,* Art. 1372-1375,**)**; all other restitution claims stemming from unjustified enrtichment are regulate by the rules created in the judicial practice and legal theory. In the Anglo-Saxon/American legislation, unjustified enrichment is a recent development in civil law relations; only in mid-20th century did it become a separate institution independent from contracts and torts on the basis of the precedent case *Fibrosa Spolka Akcyjna v. Farbairn Lawson Combe Barbom Ltd.* (1943 AC 32, 16), where is was explicitly given the status of a special source of obligation relations and designated as *unjust enrichment*.

The restitution obligation of the enriched party implies a reversal of the unjustly acquired assets, either by means of restitution in kind or by means of monetary restitution. In the legal relation stemming from unjustified enrichment, this is the primary consequence or the principal debtor's obligation (performance); apart from the duty to return the unjustly acquired benefit to the disadvantaged party, the enriched party has no other duty but to (probably) pay damages to compensate the injured party. As the acquisition of benefit is unjustified *ab initio*, the re-establishment of the position that existed before this event becomes the content of the legal relation stemming from unjustified enrichment. The restitution claim is the principal claim of the disadvantaged party and the restitution obligation is the principal performance owed by the enriched party. Prior to the unjustified transfer of assets, the parties were not involved in any other legal relation that would serve as the ground for defining their rights and duties; thus, their first legal encounter takes place at the moment of unjustified enrichment. In the context of unjustified enrichment, the creditor's (disadvantaged party's) right is to seek restitution of the unjustly acquired benefit and the debtor's (enriched party's) duty is to return it. Thus, restitution is regarded as the content of the obligation relation rather than the measure for instituting the prior state of affairs.[12] Hence, it may be more accurate to say that *restitutionary duty* is the *content* of the civil law relation stemming from unjustified enrichment as well as the *measure or instrument* for its enforcement by means of *restitution* (*i.e.* return of the unjustly acquired benefit).

Restitution claims which are subject to special rules (such as those on legal consequences of a void/voidable or unilaterally breached contract) are neither the original nor compulsory content of an obligation, but only a possible and subsidiary one. The restitutionary duty arises only afterwards - after the contract has been made null and void or terminated due to its non-performance (with a retroactive effect) and the parties had already performed their contractual obligations. Thus, a pre-contractual state of affairs (*i.e.* the restitutionary duty) is established as a substitute for initial obligations which have been deprived of a legal ground by the termination of the contract. Restitutionary rules in contractual relations are topic of the next part of this article.

3.2. Restitution in contractual relations

In contractual relations, restitution is justifiable only after the parties have entered into a contract and some additional requirements have been met (e.g., sanctioning the invalidity of the performed contract by means of annulment or sanctioning nonperformance of the valid contract by its termination), which are neither necessary nor present in the field of unjustified enrichment. In order to establish the pre-contractual state of affairs, one must terminate a contract which has been performed by both or at least one contracting party, or which has enabled both parties to acquire some additional benefits not included by the concept of performance.

The existence of a contract is an obstacle to restitution, which is aimed at establishing the prior position of parties' assets which has changed without a legal ground, or the state of affairs which is (in economic terms) most approximate to the prior state of affairs. As long as there is a contract (or an alleged contract), the exchange of performances is seen

[12] We agree with the opinion that the obligation to return the unjustly acquired assets is a special civil law measure, for which reason the restitution in a legal relation stemming from unjustified enrichment may not be regarded as a civil law sanction (Nikolić, 1995, p. 114).

as legally grounded. The transfer of assets will become unsustainable only if the legal ground proves to be invalid or is subsequently terminated. Retaining of *status quo* will also become unacceptable for the contracting parties due to the unjustified increase of assets of one party and concurrent decrease of assets of the other party; in that context, the restitutionary rules help them so that neither of them gets enriched at the expense of the other. Both of them will be returned what they have given in the course of performing their contract, given that it was acquired without a legal ground (which may be lacking *ab initio* if the contract is invalid, or subsequently terminated if a valid contract is breached).

Having in mind the purpose of restitution, it is clear why the existence of a contract is a legal obstacle to establishing the prior state of affairs. Thus, the contract (even an invalid one) is the legal ground for the resulting change of assets as well as the explanation why the restitution claim of one contracting party to another is considered unjustified. The application of restitutionary rules is justified by the lack of the legal ground for acquisition. Consequently, before applying the restitutionary rules, it is necessary to eliminate the legal ground for performance; thus, the contract has to be terminated in one of the ways prescribed by the law, which also implies the application of restitution rules: either general ones (which are derived from the institute of unjustified enrichment) or special ones (which are explicitly envisaged for a particular type of contract or a particular manner of terminating a contract).[13]

In Serbian legislation, a contract ceases to exist because it is invalid, has not been performed or has been frustrated. Certainly, we focused only on those legal grounds which have a restitutive effect. Thus, for one of these reasons, a contract may be terminated in one of the following ways: a) by proclaiming the void contract invalid and rescinding voidable contract (ORA, 1978, Art. 103, para. 1 and Art. 112, para. 1); b) by a unilateral termination of contract due to non-performance (ORA, 1978, Art. 124-132); c) by a termination of contract due to the impossibility of a contracting party to perform the obligation (ORA, 1978, Art. 137 and 138).[14] As these modes of termination have a retroactive effect, restitution is a compulsory legal consequence.[15]

Restitution is the most significant legal consequence of the unwinding of a contract by means of which the effect of the prohibition of unjustified enrichment is extended to contractual relations. In line with the maxim "*quod nullum est nullum producit effectum"*, restitution eliminates the effects of performed contract primarily pertaining to the contracting parties who are obliged to return each other what they have received on the basis of an invalid contract.

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[13] In the context of establishing the prior state of affairs, the termination of a contract is relevant only if the parties have performed all the contractual duties. The termination of a contract before its performance does not create a restitutionary duty because the transfer of assets for one party to another has not occurred, and neither party has legal reason to claim restitution. Such termination has an *ex nunc* effect: the contracting parties are no longer obliged to perform because the termination of the contract has a *pro futuro* effect. For more detail, see ORA, 1978, Art. 132, para. 1, which prescribes that the consensual termination of a nonperformed contract releases both parties of their contractual obligation, except for the duty to compensate damage.

[14] A contract may also be terminated by applying the rule of *rebus sic stantibus* (ORA, 1978, Art. 133-136) and due to the defective performance (ORA, 1978, Art. 488, para. 1, item 3, and Art. 510).

[15] The legislator allows the mutual agreement of contracting parties on the non-retroactive effect of rescinding a voidable contract and escaping restitution. The departure from the retroactive effect (within the limits of the public order and allowed contractual freedom) is justified by the specific characteristics of the reasons which make the contract voidable and the goals of its rescission (also in: Perović, 1981, p. 473)

The scope of restitution encompasses all the (principal and subsidiary) benefits stemming from the performance of a contract, given the fact that (after the termination of a contract) the benefits are unjustly acquired by the contracting party who performed. The annulment has a retroactive effect; the invalid contract is considered not to have been concluded (*i.e*. to be void *ab initio*) and contracting parties are deemed to be holding (without a legal ground) everything they acquired on the basis of the void/voidable contract. Thus, the increase of assets by the value of performances is regarded as unjustified enrichment (which is prohibited), for which reason the restitutionary duty is performed under the rules of acquisition without a legal ground (ORA, 1978, Art. 210-219).[16] Although the consequences of annulment are regulated by special rules[17], without referring to the application of the rules on unjustified enrichment, these rules seem to be inevitable. The statutory provisions on restitution in the matter of invalidity is not complete; the law only prescribes the duty to return the assets acquired on the basis of the invalid contract, without regulating a series of other factors which certainly have a considerable impact on the existence and scope of restitution obligation. It also applies to restitution after the termination of a valid contract with an *ex tunc* effect.[18] Yet, we should bear in mind that the return of assets stemming from the mutually and bilaterally performed contract (after the contract termination) is not quite identical with the restitution in case of unjustified enrichment. The performances are bound throughout the existence of a contract, including the stage of its termination. Hence, mutual or bilateral restitution is a general rule, which is executed simultaneously. In case the contracting party cannot return the received benefit by means of restitution in kind, it may be a reason for: a) modifying the method of re-establishing the prior state of affairs, by substituting the restitution in kind with monetary restitution (which equals the value of the object of performance), b) rejecting the restitution claim of the contracting party whose object of performance has fallen through, has been destroyed or rightfully appropriated by a third party (the consequence of which is that the object of his performance is being held by the other contracting party but without a valid legal ground); and c) rejecting the claim for the rescission of a contract.[19]

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[16] The parties are entitled to receive what they have performed or its monetary value; however, the parties are obliged to return all other benefits which are not include in the concept of performance but have been acquired on the basis of the invalid contract (such as: the earnest money which was not included in the final performances; pledged assets). Contracting parties also have a mutual obligation to return the benefits stemming from the object of performance which they are returning (such as: fruits, profits, interest rates, etc.) and they are obliged to compensate the benefit from the use of the received object.

[17] "Each contracting party is obliged to return to the other party everything that has been received on the basis of a void contract, and if it is not possible, the parties are obliged to pay relevant monetary value, which is estimated at the time of rendering the judicial decision on the issue" (ORA, 1978, Art. 104). The same consequence applies in case of rescission of voidable contracts (ORA, 1978, Art. 113).

[18] See ORA, 1978, Art. 132, para. 2 on the effect of contract termination. Long-term contractual relations are exempt from the general rules on re-establishing the prior state of affairs because their dissolution produces a *pro future* effect, which makes dissolution similar to cancellation.

[19] In most legislations based on the European-Continental legal tradition (including Serbia), the impossible restitution in kind will be subsituted by monetary resitution. Thus, neither contracting party will be allowed to be unjustly enriched; they will be obliged to return the received assets or pay relevant monetary value, and in return they will receive their performances. This rule is also provided in Principles of European Contract Law, 2000, Art. 4: 115 and in Draft Common Frame of Reference (DCFR), Principles, Definitions and Model Rules of European Private Law, 2008, Section III.-3:511(4), 3:513(a), VII.-5:101(3). In Anglo-Saxon/American legislation, the possibility to execute restitution is a condition for rescinding a contract. In case *restitutio in*

3.3. Application of restitutionary rules for repairing damage caused by infringement of absolute subjective rights

The obligation to compensate the injured party for the sustained damage is one of the expressions of civil liability. It could also be called a type of civil law sanction, in addition to annulment which is used in contract law as a sanction for entering into invalid (void and voidable) contracts. The liable person is obliged to compensate the injured party by paying damages or by specific performance for the purpose of correcting the position of the legally protected assets disturbed by the damage caused to the injured party (Radišić, 1969, p. 69). The correction is aimed at returning the injured person's property into the prior state of affairs, whereas the property of the liable person is diminished by the amount of the awarded compensatory damages. In that context, the expression "burdened with an obligation to pay damages" denotes that the economic loss is not erased but that it has been shifted from the injured party (who sustained it wrongfully and against his will) to the wrongdoer (who is obliged to compensate it).

The function of compensation for damage is reparatory, which clearly distinguishes it from restitution. Restitution is aimed at returning the benefit to the person it belongs to, *i.e*. the person who has been deprived of the benefit or at whose expense it has been acquired. There are no shifting of loss, but striping benefit from the one who unjustly acquired it and returning that benefit to the one who is entitled to it.[20]

Altough, the compensation for damage is a natural response to the wrongful act of causing damage to another, it is not the only reaction. Namely, some cases of causing damage to another which are accompanied by the tortfeasor's acquisition of benefit should better be sanctioned by a restitutive measure than by compensatory damages. These cases imply an unauthorized interference with another's absolute subjective rights, which may have been useful to the tortfeasor but he is still not entitled to keep the acquired benefit because it stems from the exclusive right of another and is acquired at his loss. Typical examples of such cases are unauthorized use of another's name or image (usually involving a celebrity) for commercial purposes[21], which implies an increase in profit for the restitution debtor, or acquisition of benefit by unauthorized use of a licenced product (trademark).

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integrum is not possible, the contract will not be rescinded but the (disadvantaged) contracting party that is entitled to claim restitution will be entitled to claim damages.

[20] Here are some other differences between restitution and compensation of damage. Basically, every damage should be compensated even if the loss ("minus") in the legally protected assets of the injured party is not expressed as a gain ("plus") in the tortfeasor's assets. On the other hand, restitutive duty arises only if one person's loss has turned into another's person's gain, *i.e.* if the tortfeasor's assets have been unjustly increased or his liabilities have been reduced by an unjustifiable transfer of benefit into his property (Radišić, 1969, p. 69-70). The amount of compensation is determined by damage sustained whereas restitutionary award should be equal to unjustly acquired benefit. The consequences of damage are removed at the expense of the responsible party (after she had paid damages, she becomes poorer); returning of unjustly acquired benefit equals both position of impoverished party as well as position of enriched party.

[21] For example, Princes Caroline of Monaco was a victim of imaginary interviews, false statements and photos taken without her permission which were published in a tabloid; consequently, the circulation of the tabloid was multiplied. As just satisfaction for the violation of her personality rights, the competent court awarded compensatory damages in the amount of profit that the magazine had acquired from the increased sale of the disputed magazine issues; (see: Schäfer, 2002, pp. 422-423; Schlechtriem, 2001, pp. 250-263).

In the given examples, the same set of facts may give rise to two special legal relations: a tort and an unjustified enrichment; as they are mutually competitive, the injured/disadvantaged party is entitled to select a more favourable one. Thus, the injured party may claim the return of the acquired benefit instead of compensatory damages, which is a rational option if the benefit is higher than the loss suffered, or if all the elements of tort liability are difficult to prove. The advantage of restitution governed by the rules of unjustified enrichment is particularly prominent if the title holder of the infringed right has not sustained any measurable or apparent damage, either because he did not intend to exercise his right or because the unauthorized use (by another) has not hindered him from exercising it.[22]

Such an enhanced protection of absolute subjective rights is a consequence of their exclusive nature. They ensure the title holder's sovereign right to freely decide on whether and how he will exercise the given prerogatives, whether he will prohibit the incursion of third parties and whether he will pass some authority (either in return for some reimbursement or free of charge). Any unauthorized exercise of these rights is unlawful and may give rise to a tort liability even if the title holder has not sustained any damage at all. In such a case, we are of the opinion that the damage should be perceived in broad terms, or even equaled with a wrongful act of unauthorized interference with another's exclusive rights, irrespective of the consequences, because the nature of the violated right calls for such a comprehensive legal protection. Each unauthorized exercise of another's absolute right gives rise to a situation which is quite contrary to their inherent legal nature: that no one but the title holder is entitled to exercise these rights.

The interference with the absolute subjective rights is not only prohibited but also detrimental, irrespective of whether the damage is apparent and measurable and whether the title holder has been deprived of or frustrated in exercising these rights. The key issue in determining the compensation amount is not the amount of loss (as it would be if we apply rules on tort law), as the injured party may not have sustained any loss, given the fact that he/she has not been prevented from exercising the right or has not intended to exercise the right. The major issue in establishing the compensation amount is the amount of benefit acquired by the tortfeasor (as it is under rules on unjustified enrichment), which may be either direct (if he increased his assets) or indirect (if he decreased his own liabilities by using or spending the assets of the injured party). By establishing the value of unjustly acquired benefit (which is equal to the damage caused by the wrongful act committed by another), we determine the amount which (under the rules on unjustified enrichment) the tortfeasor/enriched party shall compensate to the injured/disadvantaged party (who the assets legally belong to).

In Serbian legislation, the choice of restitutive rules on unjustified enrichment has at least two advantages for the injured party/restitution creditor. First of all, the restitution claim is subject to a general statute of limitations covering a period of 10 years as opposed to the 3-year time limit applicable to claim for the compensation of damage. The

[22] The intent to exercise the right, which is either prevented or aggravated by an unauthorized use of another acting either in good or in bad faith, is not a constituent part of restitutive obligation, nor may it set aside the obligation of the liable person. Only the title holder shall take benefit from the exercise of absolute (exclusive and exclusionary) rights; exceptionally, subject to his authorization, the benefit may pass on to another person. In all other circumstances, any unauthorized use of one's absolute individual rights is deemed to constitute unjustified enrichment, which is sanctioned by the obligation to restitute the unjustly acquired benefit.

second advantage is a more favourable position of the plaintiff/claimant, who is not obliged to prove the fault of the defendant (the enriched party/restitution debtor) but only to show that the defendant has acquired a benefit that he/she is not entitled to, given the fact that the benefit stems from and falls into the scope of the plaintiff's absolute rights which have been exercised without his authorization. The concept of benefit should be assumed to have the same meaning as in the field of unjustified enrichment, where benefit is defined as an increase in assets or some saving of reasonably expected expenses. Compensation has to be restitutive rather than compensatory for at least two reasons: a) it has been measured in view of the amount of acquired benefit rather than damage; (although compensation is quite unrelated to damage which certainly cannot be disregarded, the benefit will anyway be returned to the injured/disadvantaged party); b) restitution liability arises from the basic restitution rule on the prohibition of unjustified enrichment, whereas the tortfeasor has unjustly acquired a benefit which he is not entitled to. Given the fact that the benefit comes from a wrongful act, the rule on the prohibition of unjustified enrichment may be supplemented by another rule or legal principle stipulating that no one who has committed a wrongful and detrimental act shall benefit from such an act, which shall be used as the legal ground for his/her civil liability. In such cases, the duty to return the benefit seems to be an embodiment of the ancient rule that "malice never pays".

4. Conclusion

The principle that the acquisition of benefit which is attributable to another's disadvantage and is without a legal ground is contrary to the principle of equity originates from Roman law but, nowadays, it is known as the rule on the prohibition of unjustified (unjust) enrichment. It is the ground rule for deriving all specific rules on restoring the prior state of affairs by restitution, which are further modified or amended (where necessary) by other important legal principles which have priority in balancing the patrimonial interests of the parties concerned; (these principles include: the protection of the legal order, legal certainty/safety, *pacta sunt servanda, nemo auditur propriam turpitudinem allegans, neminem laedere*). In such cases, the unique nature of restitution has been preserved by its ultimate goal: the Aristotelian concept of corrective justice.

Relying on the Aristotelian concept of corrective justice (*ius correctiva*) which is put into effect by an equitable distribution of assets among individuals in line with the rule *suum cuique tribuere*, restitution is perceived as one of the instruments for exercising the goal of civil liability and its sanction, in case they are caused by an unjustifiable increase of assets (enrichment) of one party and a concurrent decrease of assets (impoverishment) of another. This goal is *inter alia* accomplished by taking the unjustly acquired benefit from the enriched party, who is not entitled to receive it, and delivering it to the impoverished party on whose account it has been acquired. No matter how appealing it may be, an unconditional return of benefits acquired at another's expense is not a legal principle, as compared to the legal principle *neminem laedere.* The prohibition of unjustified enrichment (which is the legal ground for any restitution claim) has a modest outreach; hence, its application has to be justified by some other (almost decisive) factors which have been designated here as restitutive grounds or reasons.

Restitutionary measures are a reaction to some reasons for disturbing the parties' patrimonial balance. These measures are aimed at repairing the imbalance by re-establishing the

prior state of affairs. The reasons for the patrimonial imbalance are numerous: acquisition of benefit without a legal ground, termination of a performed contract (by annulment or rescission), causing damage by the infringement of absolute rights accompanied by the tortfeasor's acquisition of benefit, dispossession of the owner/possessor, etc. Although all these restitution grounds fall into different areas of civil law (law of obligations and property law), the principal feature they all have in common is the legally unjustifiable transfer of assets from one person to another as well as the possibility of applying restitution rules in order to restore the prior state of affairs. Hence, restitution is a corrective legal measure. It is prescribed by the legal order if the benefit has been acquired without a legal ground; it is aimed at returning such benefit to the disadvantaged party (on whose account it has been acquired or who is more entitled to that benefit), and it is justified by the rule prohibiting unjustified enrichment.

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RESTITUCIJA I GRAĐANSKOPRAVNA ODGOVORNOST ZBOG POVREDE SUBJEKTIVNIH PRAVA

Promene u imovinama dvaju ili više lica mogu biti posledica više različitih činjenica, nekih nastalih voljom zainteresovanih subjekata, najčešće manifestovanoj u formi ugovora, nekih, pak, nastalih nezavisno od njihove volje ili čak protivno njoj. U slučajevima u kojima se promena iskazuje kao imovinski gubitak jednog lica praćen uvećanjem imovine drugog, ali bez valjanog ili ikakvog pravnog osnova, pravni poredak nalaže da se svakome vrati njegovo i uspostavi pređašnje stanje. Pravna pravila po kojima se ovo odvija obrazuju pravni institut restitucije. U radu se restituciji prišlo kao naročitom sredstvu realizacije građanskopravne odgovornosti i njene sankcije, i to ukoliko se njima reaguje na pravno neopravdano pomeranje koristi iz imovine jednog lica u imovinu drugog. Razmatrani su sticanje bez osnova i ispunjenje činidaba nevažećeg ili jednostrano raskinutog ugovora, ali i mogućnost da se, umesto pravilima o nadoknadi štete prouzrokovane apsolutnim pravima, ova zaštite restitutivnim pravilima, i to ukoliko je štetnik (pored prouzrokovanja štete) ostvario i neku korist. Navedenim pravnim institutima može se pridružiti i zaštita svojine reivindikacionom tužbom, koja je per excellence restitutivnog usmerenja. U radu ona nije razmatrana, već pomenuta kao dodatni argument o sveprisutnosti restitucije u građanskom pravu. Nabrojani pravni odnosi pripadaju različitim granama građanskog prava (obligacionom i stvarnom),ali povezuju ih neosnovano sticanje koristi i obaveza njenog vraćanja, koja se izvršava primenom pravila o restituciji. Prilagođavanje ovih pravila osobenostima konkretnog pravnog odnosa, smatramo, ne narušava jedinstvenost restitucije kao instituta, koja biva obezbeđena zajedničkim ciljem njene primene a on je uspostavljanje pređašnjeg stanja (restitutio in integrum).

Ključne reči: *restitucija, građanskoprana odgovornost i sankcija, neosnovano obogaćenje, ugovor, šteta, zaštita apsolutnih prava*.