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CHANGE OF POSITION AS A DEFENCE IN  
UNJUST(IFIED) ENRICHMENT: SLOVENIAN LAW  
IN A COMPARATIVE PERSPECTIVE\*\*

*If one person is enriched at the expense of another and there is no legal ground for retaining this enrichment, the law imposes an obligation of restitution upon the unjustly enriched recipient, which is subject to various defences. One of them is the defence that the defendant is no longer enriched (change of position). The Slovenian Code of Obligations does not contain an express general defence of change of position. However, there is a special provision, which allows a bona fide recipient of compensation for personal injury to rely on disenrichment if it subsequently turns out that the compensation was without valid legal basis. The paper examines whether disenrichment is inherent to the law of unjustified enrichment as a way of measuring liability, and consequently should the change of position defence be generally recognised, even though there is no provision allowing it in the Code or settled case law on this matter.*

Key words: *Unjustified enrichment. – Restitution. – Change of position. – Disenrichment.*

## 1. INTRODUCTION

The law of unjust(ified) enrichment creates liability in cases when one person is enriched at the expense of another and there is no legal

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ground for retaining this enrichment. It is a separate source of obligation, distinguishable from contract and tort, and as such recognised in most modern legal systems. In general, for cause of action the claimant must prove that the defendant has been enriched at the claimant's expense and that this enrichment was unjust(ified). In defining enrichment as unjust(ified), two approaches have been adopted in comparative perspective.<sup>1</sup> In the first (civilian) approach, enrichment is unjustified if it lacks a valid legal basis, e.g. a contract or a statute (the "absence of basis" approach). For example, if a sum of money was paid in a mistaken belief that it was owed, it should be returned if no debt had existed or if it had already been paid off. As there was no legal ground for the payment, the enrichment is considered to be *unjustified*. In the second (common law) approach, the claimant must prove a positive reason to render the enrichment *unjust*, e.g. a mistake, duress or undue influence (the "unjust factors" approach). Such reasons are inherent to the law of unjust enrichment and were developed through case law.<sup>2</sup> According to this view, in the situation illustrated above, the enrichment is considered to be unjust due to the fact that money was paid by mistake,<sup>3</sup> which is one of the unjust factors. Since this paper deals predominantly with civil law, the term "unjustified" enrichment will be used hereinafter as it better reflects the "absence of basis" approach.<sup>4</sup>

The law of unjustified enrichment imposes an obligation of restitution upon the unjustly enriched recipient and is subject to various defences. Among them is the defence that the defendant is no longer enriched (the change of position or disenrichment defence). It aims to

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<sup>1</sup> B. Häcker, *Consequences of Impaired Consent Transfers*, Mohr Siebeck, Tübingen 2009, 25–31; D. Visser, "Unjustified Enrichment in Comparative Perspective", *The Oxford Handbook of Comparative Law* (M. Reimann, R. Zimmermann eds.), Oxford University Press, Oxford 2008, 971; A. Dyson, J. Goudkamp, F. Wilmot-Smith, "Defences in Unjust Enrichment: Questions and Themes", *Defences in Unjust Enrichment* (A. Dyson, J. Goudkamp, F. Wilmot-Smith eds.), Hart Publishing, Oxford, Portland, Oregon 2016, 6; D. Klimchuk, "What Kind of Defence is Change of Position?", *Defences in Unjust Enrichment* (A. Dyson, J. Goudkamp, F. Wilmot-Smith eds.), Hart Publishing, Oxford, Portland, Oregon 2016, 74; R. Goff, G. H. Jones, *The Law of Unjust Enrichment*, Sweet & Maxwell, Thomson Reuters, London 2011, 8, paras. 1–11 and 1–12, 1–18 – 1–22.

<sup>2</sup> It has been emphasized in English case law that claims of unjust enrichment must refer to an established unjust factor or factual recovery situation, although the categories of unjust enrichment are not yet finalized. See: *Uren v. First National Home Finance Ltd.* [2005] EWHC 2529 (Ch.) at [16]–[18] per Mann J.; *Wasada Pty Limited v. State Rail Authority of New South Wales (No.2)* [2003] NSWSC 987 at [16]; *C.T.N. Cash and Carry Ltd v. Gallaher Ltd.* [1994] 4 All E.R. 714 at 720 per Nicholls V.C.

<sup>3</sup> See, e.g. *Barclays Bank Ltd v. W J Simms* [1980] QB 677 (QB) 695.

<sup>4</sup> R. Zimmermann, J. du Plessis, "Basic Features of the German Law of Unjustified Enrichment", *Restitution Law Review* 1994, 14–43; R. Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach", *Oxford Journal of Legal Studies*, Vol. 15, No. 3, 1995, 403–429.

exclude the obligation to make restitution to the extent that the recipient has ceased to be enriched. Limiting the defendant's liability to the actual enrichment at the time of *litis pendentia* is considered among German scholars to be a characteristic “weakness” of unjustified enrichment claims.<sup>5</sup>

Historically, there was no general rule limiting the defendant's liability to the actual enrichment at the time of *litis pendentia*. In Roman law, the recipient, liable under *condictio*, was obliged to return the object received or to restore its value, notwithstanding the fact they might have ceased to be enriched.<sup>6</sup> There were, however, certain exceptions to this rule. If the defendant received an individual object (*species*) that was subsequently destroyed, they were, as a rule, released from their obligation as it had become objectively impossible to return it.<sup>7</sup> Two further instances of such weak liability were the liability of a pupil who concluded a contract without the consent of the tutor and the liability of spouses for the restitution of gifts they had given to each other. In both cases, the restitution was limited to the amount of the benefit that remained at the time of *litis contestatio*.<sup>8</sup> Furthermore, the value of the remaining enrichment was a regular measure of liability under *action de in rem verso*, which was limited to cases of third-party enrichments in Rome. However, its scope was subsequently broadened and in the 18<sup>th</sup> century it came to be used as a general enrichment action.<sup>9</sup> Medieval scholasticism and natural law doctrine favoured limiting the defendant's enrichment liability by taking into account subsequent disenrichment.<sup>10</sup> Yet it was the Pandectists of the 19<sup>th</sup> century who established disenrichment (Ger. “*Bereicherungswegfall*”) as a general measure of enrichment liability.<sup>11</sup>

<sup>5</sup> A. Flessner, *Wegfall der Bereicherung, Rechtsvergleichung und Kritik*, de Gruyter, Mohr, Tübingen 1970, 2; R. Zimmermann (1996), Clarendon Press, Oxford 1996, 897.

<sup>6</sup> F. L. Schäfer, *Historisch-kritischer Kommentar zum BGB* (J. Rückert, et al. eds.), §§ 812–822, Mohr Siebeck, Tübingen 2013, 2678, para. 172; R. Zimmermann, J. du Plessis, 38. See also: V. Cvetković-Đorđević, “Kondikciona odgovornost u Rimskom pravu”, *Anali Pravnog fakulteta u Beogradu*, 2/2014, 229–243.

<sup>7</sup> R. Zimmermann (1996), 897; F. L. Schäfer, 2678, para. 172.

<sup>8</sup> M. Kaser, R. Knütel, *Römisches Privatrecht*, Beck, Munich 2014, 289, 291, paras. 18, 28; W. Flume, *Studien zur Lehre von der ungerechtfertigten Bereicherung*, Mohr Siebeck, Tübingen 2003, 3; R. Zimmermann (1996), 896.

<sup>9</sup> R. Zimmermann (1996), 882.

<sup>10</sup> F. L. Schäfer, 2678, paras. 173 and 174; J. P. Dawson, “Erasable Enrichment in German Law”, *Boston University Law Review*, Vol. 61, No. 2, 1981, 273 and 274.

<sup>11</sup> B. Kupisch, *Ungerechtfertigte Bereicherung, Geschichtliche Entwicklungen*, R. V. Decker & C. F. Müller, Heidelberg 1987, 37; J. Gordley, “Restitution without enrichment? Change of position and Wegfall der Bereicherung”, *Unjustified Enrichment: Key Issues in Comparative Perspective* (D. Johnston, R. Zimmermann eds.), Cambridge University Press, Cambridge 2002, 227.

Following the pandectist doctrine, a special provision on loss of enrichment (Ger. *Wegfall der Bereicherung*) was introduced into the German Civil Code in 1900, which provides that restitution is not owed “to the extent that the recipient is no longer enriched.”<sup>12</sup> A similar provision can be found in the Swiss Code of Obligations<sup>13</sup> and should in essence remain unchanged also after the proposed reform of the Code (OR 2020).<sup>14</sup> The change of position defence is also recognised in American law<sup>15</sup> and English law.<sup>16</sup> In English law, the defence was recognised in *Lipkin Gorman*<sup>17</sup> and since then case law has carved out its scope and key features. However, comparative analyses show that there is no consensus within the European legal systems on adopting a general principle of disenrichment.<sup>18</sup> Nonetheless, model rules of European private law, such as the Draft Common Frame of Reference (DCFR) and Principles of European Law of Unjustified Enrichment (PEL Unj. Enr.), recommend implementing disenrichment as a general defence in national legislations.<sup>19</sup>

The Slovenian Code of Obligations<sup>20</sup> does not contain an express general defence for change of position. However, there is a special provision that allows a *bona fide* recipient of compensation for personal injury to rely on disenrichment should it subsequently turn out that the compensation was without valid legal basis. Given the trends in European private law, the question inevitably arises whether disenrichment is inherent to the law of unjustified enrichment as a method of measuring liability and whether the change of position defence should therefore be generally recognised, even though there is no provision allowing for it in either the code or in settled case law related to this matter.

This paper deals with disenrichment as a way of measuring liability. By analysing its philosophy and examining select European legal systems, it seeks to determine whether a doctrine of disenrichment should be generally applied in Slovenian law, and if so, whether as a rule or rather as a defence. The Slovenian Code of Obligations is almost

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<sup>12</sup> § 818 (3) BGB.

<sup>13</sup> § 64 OR.

<sup>14</sup> See: § 65 (2) OR 2020.

<sup>15</sup> Restatement of the Law Third, Restitution and Unjust Enrichment, § 65.

<sup>16</sup> Restatement of the English Law of Unjust Enrichment, § 23.

<sup>17</sup> *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 AC 548.

<sup>18</sup> See: A. Flessner, 37 sqq.; P. Schlechtriem, “Restitution und Bereicherungsausgleich in Europa”, *Eine rechtsvergleichende Darstellung*, Vol. 1, Mohr Siebeck, Tübingen 2000, 400, para. 566; R. Zimmermann (1995), 412.

<sup>19</sup> § 6:101 PEL. Unj. Enr. and VII – 6:101 DCFR.

<sup>20</sup> Obligacijski zakonik, *Official Gazette of Slovenia*, No. 83/2001, most recent amendment No. 20/2018.

entirely based on the former Yugoslav Act on Obligations<sup>21</sup> (1978). The situation is similar in Croatia and Macedonia, while the Yugoslav Act is still in force in Serbia and in Bosnia and Herzegovina. Therefore, this issue might be relevant not only for Slovenian law but also for the laws of some other countries in Southeast Europe.

## 2. PHILOSOPHY OF THE CHANGE OF POSITION DEFENCE AND ITS BASIC FEATURES

Today, it is widely accepted that Aristotle's corrective justice is the philosophical foundation of the law of unjust(ified) enrichment.<sup>22</sup> It aims to correct unjustified transfers of value between two parties by requiring the restoration of enrichment. Restitution as a response<sup>23</sup> to an act of unjustified enrichment is "a tool of corrective justice"<sup>24</sup> that strives to bring the parties back to their pre-transfer positions (*status quo ante*). Pomponius' statement should also be referred to when considering the philosophical foundations of unjustified enrichment, as it asserts that it is in accordance with the law of nature that no one should be enriched to the detriment of another [*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiozem*].<sup>25</sup> Although it was originally not meant to serve as a rule of positive law, it has with some modifications become a general enrichment clause in several countries.<sup>26</sup>

Since the doctrine of corrective justice promotes equality between private individuals and emphasizes that the relationship between them should be based on fundamental respect for each other's rights,<sup>27</sup> one of the main principles of restitution for unjustified enrichment is that it should never make defendants worse off.<sup>28</sup> This aim is achieved by allowing

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<sup>21</sup> Zakon o obligacijskih razmerjih, *Official Gazette of Slovenia*, No. 29/1978 with amendments.

<sup>22</sup> E. J. Weinrib, Correctively Unjust Enrichment, *Philosophical Foundations of the Law of Unjust Enrichment* (R. Chambers, C. Mitchell, J. Penner eds.), Oxford University Press, Oxford 2009, 31; R. Zimmermann (1995), 403.

<sup>23</sup> P. Birks, *Unjust Enrichment*, Oxford University Press, Oxford 2014, 11.

<sup>24</sup> Kingstreet Investments Ltd, v, New Brunswick [2007] 1 SCR 3, para. 32.

<sup>25</sup> D 12, 6, 14. Translation borrowed from: R. Zimmermann, J. du Plessis, 16.

<sup>26</sup> This is for instance the case in German, Swiss, Greek, Hungarian, Polish, Dutch, English, Slovenian, Croatian, and Serbian law. See: C. von Bar, S. Swann, *Principles of European Law: Unjustified Enrichment*, Sellier, Munich 2010, 188–197.

<sup>27</sup> E. J. Weinrib, 31; R. Zimmermann (1995), 403.

<sup>28</sup> See, e.g. D. Klimchuk, 72.

On the other hand, after making restitution, the defendant should also neither profit at the expense of the claimant nor be in a better position than they would have been in had there been no unjustified transfer of value in the first place. In German law, both aspects

the defendant to rely on the change of position defence. The underlying philosophy of this defence is to prevent the defendant from incurring a loss as a result of being obliged to make restitution. In other words, relying on the disenrichment defence prevents *bona fide* defendants from “reaching into their own pockets” in order to make restitution, as it has been illustratively described by German scholars.<sup>29</sup> Similarly, common law considers change of position to be underpinned by the “no worse off” rationale, according to which defendants should not be unjustifiably left worse off than they were prior to their receipt.<sup>30</sup>

In line with this rationale, the defence applies to both reliance-based and non-reliance-based changes of position. In common law, this is considered to be a “wide view” of the change of position defence.<sup>31</sup> Reliance-based change of position refers to subsequent losses that occur due to the fact that the recipient believed they was entitled to the object received and used or disposed of it accordingly, in good faith. On the other hand, non-reliance-based change of position occurs independent of the recipient’s reliance on their acquisition, such as when the object is destroyed or stolen. Thus, by using the change of position defence the defendant can shift the loss of enrichment to the claimant. It is therefore the claimant who bears the risk of subsequent changes to the received benefit. Since such a broad interpretation of the change of position defence is disproportionately in favour of the defendant and could threaten a proper balance between the interests of the parties, it should be interpreted restrictively, taking into consideration all the relevant circumstances of the individual case.<sup>32</sup>

The change of position defence furthermore aims to protect the recipients’ reliance on the validity and the finality of their acquisition.<sup>33</sup> If they reasonably assumed that the received benefit would remain theirs and took various economic decisions in that belief, their interest

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are included in the principle of the restoration of corresponding benefits and losses. This is known as the “principle of statics” (Ger. *Statikprinzip*). See: C. Wendehorst, *BeckOK BGB* (H. G. Bamberger et al. eds.), Verlag C.H. Beck, Munich 2017, § 818, para. 33.

<sup>29</sup> See e.g. H. Goetzke, “Subjektiver Wertbegriff im Bereicherungsrecht?”, *Archiv für die civilistische Praxis* 173 (1973), 292.

<sup>30</sup> E. Bant, “Change of Position: Outstanding Issues”, *Defences in Unjust Enrichment* (A. Dyson, J. Goudkamp, F. Wilmot-Smith eds.), Hart Publishing, Oxford, Portland, Oregon 2016, 139.

<sup>31</sup> J. Edelman, “Change of position: A defence of unjust enrichment”, *Boston University Law Review*, Vol. 92, 2012, 1014.

<sup>32</sup> Which circumstances of the case should be taken into account when striking a fair balance between parties was discussed in detail by Flessner. See: A. Flessner, 108–141.

<sup>33</sup> See e.g. P. Birks, 209; R. Zimmermann (1995), 413; C. Wendehorst, § 818, paras. 34 and 66.

in the security of the receipt deserves protection. As Birks explains, “The defence avoids the need to sterilize funds against the danger of unsuspected unjust enrichment claims.”<sup>34</sup> It is in line with this rationale that it only offers protection to *bona fide* recipients, i.e. recipients who did not know and could not have known that they were not entitled to the received benefit. Exempt from protection are *mala fide* recipients and those who are subject to strict liability due to a filed restitution claim.<sup>35</sup>

Moreover, reliance on the definitiveness of the acquisition of assets may also enjoy the protection of property as enshrined in Article 1 of Protocol No. 1 to the European Convention on Human Rights. According to the settled case law of the European Court of Human Rights, this right applies not only to a person’s existing possessions but may also in certain circumstances protect a legitimate expectation of obtaining an asset.<sup>36</sup> The issue of limiting the right to restitution in order to protect the recipient’s legitimate expectation of the definitiveness of received assets was discussed by the ECtHR in its recent decision in *Čakarević v. Croatia*.<sup>37</sup> This case concerns the applicant’s complaint that she was ordered to return unemployment benefits that she had been receiving due the employment bureau mistakenly renewing her entitlement to benefits. By ordering her to repay unemployment benefits (about 2,600 euros in sixty instalments), the County Court in Rijeka referred to the general rule on unjustified enrichment enshrined in the Croatian Obligations Act.<sup>38</sup> The ECtHR noted that Ms. Čakarević had a legitimate expectation of being able to retain the funds received without her entitlement to unemployment benefits being called into question retroactively.<sup>39</sup> Namely, she had done nothing to mislead the employment bureau to renew her entitlement to unemployment benefits and was in good faith, whereas it took over three years for the authorities to react to their error. The Court observed that the applicant was unemployed, ill and in a poor financial

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<sup>34</sup> P. Birks, 209.

<sup>35</sup> See e.g. § 818 (4) BGB.

<sup>36</sup> *Anheuser-Busch Inc. v. Portugal*, No. 73049/01, para. 65, ECtHR, judgement from 11 January 2007; *Bélané Nagy v. Hungary*, No. 53080/13, para. 74, ECtHR, judgement from 13 December 2016.

<sup>37</sup> No. 48921/13, judgement from 26 April 2018.

<sup>38</sup> Section 210 Zakona o obveznim odnosima, *Official Gazette of Croatia*, Nos. 53/1991, 73/1991, 3/1994, 7/1996 and 112/1999, states that: “(1) When a part of the property of one person passes, by any means, into the property of another person, and such a transfer has no basis in a legal transaction or law, the acquirer shall return that property. If this is not possible, the acquirer shall provide compensation for the value of the benefit received. (2) The transfer of property also includes any benefit obtained by someone performing an action. (3) The obligation to return the property or provide compensation for its value shall arise even when something is received on account of a cause which did not exist or which subsequently ceased to exist.”

<sup>39</sup> Para. 54 of the Judgement.

situation. She had spent the received money for covering her basic living expenses and had accumulated no savings. The Court noted that in such circumstances paying the debt, even in sixty instalments, would threaten her subsistence.<sup>40</sup> Taking into account all circumstances of the case and the fact that the State was fully responsible for the overpayments, while the whole burden of the State's error fell on the applicant, the Court held that ordering her to reimburse the full amount of the overpaid unemployment benefits violated her right to protection of property.

In my view, this decision could be interpreted as acknowledging an individual's right to the change of position defence, provided that they can demonstrate that their changed position is a consequence of their reliance upon the receipt of the benefit and that ordering them to make restitution would violate their conventional rights. However, it should be noted that the ECHR primarily applies to vertical relationships between the state and individuals, the case in question being no exception. In public law, the rules of unjustified enrichment are usually adapted to the particularities of such relationships,<sup>41</sup> since the state and individuals do not "interact with each other as free and equal agents without the law's subordinating either of them to the other," which is one of the key features of corrective justice.<sup>42</sup> However, change of position as a defence of private entities against public authorities has also been acknowledged by the CJEU in several cases.<sup>43</sup> Similar to the ECtHR in *Čakarević v. Croatia*, the CJEU considers the defence to be closely connected to arguments based on legal certainty and the rule of law, such as legitimate expectations. Moreover, in *Oelmühle Hamburg AG v. Bundesanstalt für Landwirtschaft und Ernährung* the CJEU held that "the plea of loss of enrichment" is, in principle, part of Community law.<sup>44</sup> As we can see, the change of position defence, as a primarily private legal defence, has been, together with its main features developed in private law,<sup>45</sup> transplanted into public law as a manifestation of the principles of legal certainty and the rule of law.

In private law, disenrichment as a way of measuring liability, regardless of whether it is a rule or a defence, has common features

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<sup>40</sup> Para. 89 of the Judgement.

<sup>41</sup> See e.g. R. Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU*, Hart Publishing, Oxford and Portland 2010.

<sup>42</sup> E. J. Weinrib, 31.

<sup>43</sup> Cases 205–215/82 *Deutsche Milch-Kontor GmbH v. Germany* [1983] ECR 2633; case C-298/96 *Oelmühle Hamburg AG v. Bundesanstalt für Landwirtschaft und Ernährung* [1998] I ECR 4767; case 316/86 *Hauptzollamt Hamburg-Jonas v. Firma P Krücken* [1988] ECR 2213.

<sup>44</sup> Para. 31 of the Judgement.

<sup>45</sup> In *Oelmühle Hamburg AG v. Bundesanstalt für Landwirtschaft und Ernährung*, the CJEU referred to the foreseeability of the risk and the need for good faith. For a detailed analysis, see: R. Williams, 265–267.

from a comparative perspective. In German and Swiss law, where loss of enrichment is explicitly enshrined in the civil codes, the following rules are regarded as generally accepted. Firstly, the received benefit should have been disposed of without consideration (Ger. “*ersatzloser Wegfall der Bereicherung*”), which is not the case if the recipient saved their own assets while using or disposing of the received benefit.<sup>46</sup> Thus, a defendant pleading loss of enrichment must not only prove the loss of the received object but also that no benefit in any other form remained in their assets.<sup>47</sup> A similar view has been taken in English law, where only detriments that reduce the defendant’s overall wealth can be taken into consideration.<sup>48</sup> In German law, several presumptions were developed by case law in order to ease the defendant’s burden of proof. It is, for instance, presumed that the enrichment has fallen away without consideration if the defendant had no assets whatsoever left at the time when the action was filed.<sup>49</sup> The same is presumed if the defendant with a lower or middle income received relatively small overpayments in wage, emolument or maintenance.<sup>50</sup> Secondly, the defendant may also plead that the received benefit is of no value to them.<sup>51</sup> By referring to the subjective value of the received benefit, a defendant will usually succeed in excluding the enrichment claim when the enrichment was imposed on them without their consent (Ger. “*aufgedrängte Bereicherung*”) and cannot be returned in kind. Thirdly, by relying on disenrichment the defendant can set off the losses that they suffered due to their faith in the validity and definitiveness of their acquisition and which are sufficiently causally linked to the enriching event.<sup>52</sup> Fourthly, the disenrichment defence is only available to *bona fide* recipients and cannot be pleaded by *mala fide* recipients and those subject to strict liability.<sup>53</sup> For very similar reasons, the change of position defence

<sup>46</sup> M. Schwab, *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (F. J. Säcker et al. eds.), Verlag C. H. Beck, Munich, 2017, § 818, para. 182.

<sup>47</sup> *Ibid.*, para. 183.

<sup>48</sup> R. Goff, G. H. Jones, 8, para. 27–07.

<sup>49</sup> C. Wendehorst, § 818, para. 52.

<sup>50</sup> *Ibid.*, para. 55.

<sup>51</sup> In such cases, the enrichment does not fall away subsequently since the benefit received is of no value for the recipient from the very beginning. Nonetheless, according to German doctrine, such cases can also be pleaded by referring to the disenrichment rule (§ 818 (3) BGB). See e.g. M. Schwab, § 818, para. 132.

<sup>52</sup> R. Zimmermann, J. du Plessis, 40; C. Wendehorst, § 818, para. 65.

<sup>53</sup> In German law, strict liability is foreseen in four cases: (i) when proceedings for restitution in unjustified enrichment are pending (§ 818 (4) BGB), (ii) if the recipient is in bad faith (§ 819 (1) BGB), (iii) if the recipient breached the law or acted *contra bonos mores* (§ 819 (2) BGB), (iv) if the recipient knew that the legal ground for the acquired benefit might subsequently fall away or might not come to existence. See: U. Loewenheim, *Bereicherungsrecht*, Beck, Munich 2007, 159.

is also excluded in English law.<sup>54</sup> However, relying on disenrichment is, as a rule, excluded in cases of unwinding failed reciprocal contracts, due to the synallagmatic nature of the parties' performances, which is also supposed to find some recognition in the unwinding process.<sup>55</sup> A similar view has been taken in English law, where the rescinding party claiming restitution in unjust enrichment should be able to make counter-restitution to the other, otherwise their claim is barred.<sup>56</sup>

### 3. SLOVENIAN LAW OF UNJUSTIFIED ENRICHMENT IN A NUTSHELL

The law of unjustified enrichment in Slovenia is codified, as it is in many other civil law countries. Its provisions are enshrined in the Code of Obligations (Articles 190–198) and are based on the previous ones of the Yugoslav Act on Obligations. In contrast to the Austrian Civil Code (ABGB), which had been in force in Slovenian territory from 1815 until 1946, and as an informal source of law until 1978 (when the Yugoslav Act was adopted), the Yugoslav Act united all enrichment claims into a separate chapter on unjustified enrichment and subjected them to a general clause. Although some legal scholars opposed the idea of unifying the law of unjustified enrichment,<sup>57</sup> the legislator followed the solution proposed by Mihailo Konstantinović in his draft of the Yugoslav Act on Obligations,<sup>58</sup> which was most likely inspired by Swiss law.<sup>59</sup>

Provisions on unjustified enrichment as contained in the Slovenian Code of Obligations consist of a general clause, restitutionary rules and certain types of non-performance-based enrichments. The Code adopted the unitary approach, whereby all enrichment claims are based on a single general rule. It follows from the wording of the general clause that “If

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<sup>54</sup> In English law, as in German law, the change of position must be in good faith. The defendant will not succeed with the change of position defence if they changed their position with knowledge of the claim for unjust enrichment or in belief that the enrichment would have to be returned to the claimant or that some performance would have to be rendered to the claimant in exchange. As is the case in German law, change of position should also not be made with the knowledge of the claim for unjust enrichment.

<sup>55</sup> For more about various doctrines on this issue (such as *Zweikonditionenlehre*, *Saldotheorie* and the modified *Zweikonditionenlehre*), see e.g. B. Häcker, 71–77.

<sup>56</sup> R. Goff, G. H. Jones, 8, paras. 31-01 – 31-21; B. Häcker, 112.

<sup>57</sup> See e.g. S. Lapajne, *Današnje kondikcije*, Juridična fakulteta, Ljubljana 1926; S. Lapajne, *Reparacije civilnega prava*, Juridična fakulteta, Ljubljana 1927.

<sup>58</sup> M. Konstantinović, *Obligacije i ugovori: Skica za zakonik o obligacijama i ugovorima*, Centar za dokumentaciju i publikacije Pravnog fakulteta, Belgrade 1969.

<sup>59</sup> Z. Povh, *Jugoslawien: Gesetz über Schuldverhältnisse (Obligationenverhältnisse)*, Jahrbuch für Ostrecht XXIX (1988), 292.

a person becomes enriched to the detriment of another without a legal basis, they shall be obliged to return the benefit received if possible, or to repay the value of the benefit achieved.”<sup>60</sup> However, Slovenian theory follows the pluralistic approach<sup>61</sup> and differs among various enrichment claims, where the main distinction is drawn between performance-based and non-performance-based enrichment claims, a taxonomy established by Walter Wilburg and Ernst von Caemmerer.<sup>62</sup> In a comparative perspective, different views may be identified regarding the unity of the law of unjust(ified) enrichment. While some authors believe that unjustified enrichment cases all reflect a single principle that benefits received without a legal basis must be given up,<sup>63</sup> others argue that the unitary unjustified enrichment claims, especially those in the German and Swiss Civil Codes, are based on nineteenth century doctrinal assumptions which have long since been superseded.<sup>64</sup> According to observations made by Nils Jansen that “Civilian jurists have begun to realise that the different claims that developed under the umbrella of unjustified enrichment belong to different contexts, and that the codifications’ order is no sufficient reason to integrate within a unified institute claims that are of fundamentally divergent legal nature”, it could be said that a pluralistic approach is the first step towards recognising the differences between enrichment claims that should, in my opinion, be taken into consideration also when applying the rules of restitution.

The Code of Obligations contains a set of restitutionary rules that apply to both performance-based and non-performance-based enrichment claims. The measure of restitution can be summarized as follows: the impoverished party can claim restitution in kind, if this is possible, or otherwise the monetary value of the enrichment.<sup>65</sup> There is no provision on loss of enrichment (or the change of position defence, in common law terminology) apart from a special provision on disenrichment that applies

<sup>60</sup> Section 190 para. 1 of the Code of Obligations. Translated by the author.

<sup>61</sup> See e.g. R. Vrenčur, “Splošna razvrstitev obogatitvenih obveznosti”, *Zbornik 2. Dnevov stvarnega in zemljiškopravnega prava 2010*, 81–100; Z. Strajnar, “Verzije – predpostavke, obseg vračanja ter razmerje med obligacijskopравnimi in stvarnopравnimi povračilnimi zahtevki”, *Pravosodni bilten 33/1 (2012)*, 11–32; M. Dolenc, “Pravne posledice ničnosti pogodbe (o nekaterih problemih kondicijskih zahtevkov)”, *Pravni letopis 2011*, 19–32.

<sup>62</sup> W. Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht*, Leuschner & Lubensky, Graz, 1934; E. von Caemmerer, *Bereicherung und unerlaubte Handlung, Festschrift für Ernst Rabel* (H. Döhlte, M. Rheinstein, K. Zweigert eds.), Vol. 1, Mohr, Tübingen, 1954.

<sup>63</sup> For instance P. Birks.

<sup>64</sup> N. Jansen, “Farewell to Unjustified Enrichment?”, *Edinburgh Law Review*, Vol. 20, Issue 2, 123–148.

<sup>65</sup> Section 190 para. 1 of the Code of Obligations.

to wrongfully paid compensation for personal damage.<sup>66</sup> The *mala fide* recipient is obliged to return the fruits and pay default interest from the day of the receipt, while this obligation is imposed on the *bona fide* recipient from the day the action for restitution in unjustified enrichment was filed.<sup>67</sup> Both recipients are entitled to reimbursement of the necessary and beneficial expenses they had with the received object, whereas the *mala fide* recipient gets the beneficial expenses reimbursed only to the amount of the increase in value upon return. The recipient is further obliged to pay compensation for the unauthorized use of another's assets.<sup>68</sup>

Due to the causal tradition system in Slovenian law, the unjustified model of restitution overlaps in certain situations with the owner/possessor model of restitution.<sup>69</sup> Since its rules differ to some extent from those of unjustified enrichment,<sup>70</sup> the relationship between these two models is not merely an academic issue but also a matter of practical relevance. There is no consensus among the scholars as to which model should prevail in the event of overlapping. Some authors argue that the rules of the owner/possessor model as a special and more recent law take precedence over those of unjustified enrichment.<sup>71</sup> I do not share this view, as the owner/possessor model is applicable only to proprietary remedies (e.g. *rei vindicatio*).<sup>72</sup> This approach was also adopted by the Slovenian Supreme Court.<sup>73</sup>

#### 4. DISENRIICHMENT AS A MEASURE OF LIABILITY IN SLOVENIAN LAW

A disconcerting feature of the law of unjustified enrichment in Slovenia is that it does not contain any provision on subsequent loss of enrichment. The situation was similar in the Yugoslav Act on Obligations. This has led to several debates among scholars as to whether the measure of liability is the value received or the value remaining. In the process

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<sup>66</sup> Section 195 of the Code of Obligations.

<sup>67</sup> Section 193 of the Code of Obligations.

<sup>68</sup> Section 198 of the Code of Obligations.

<sup>69</sup> As enshrined in Articles 95 and 96 of the Law of Property Code (Stvarnopravni zakonik, *Official Gazette of Slovenia*, No. 87/2002, 91/2013).

<sup>70</sup> Especially regarding the restitution of fruits, the reimbursement of expenses and compensation for the unauthorised use of the received object. For the details see e.g. K. Lutman, "Vračanje izpolnitev zaradi prenehanja pogodbe", *Razsežnosti zasebnega prava* (Damjan Možina ed.), Pravna fakulteta v Ljubljani, Litteralis, Ljubljana 2017, 179.

<sup>71</sup> R. Vrenčur, 99.

<sup>72</sup> See also: K. Lutman, 179 sqq.

<sup>73</sup> Supreme Court of the Republic of Slovenia, case No. II Ips 1261/2008, dated 1 June 2009.

of adopting the Yugoslav Act, the prevailing opinion among members of the Federal Assembly commission, which was in charge of the law of obligations, was that the value received should be taken as the measure of enrichment liability.<sup>74</sup> According to this view, subsequent losses of the defendant should not be taken into consideration. However, there was no generally accepted measure of liability in Yugoslav case law. While in some cases the courts applied the value received, the value remaining could also be traced in some judgements.<sup>75</sup>

After the enforcement of the Yugoslav Act on Obligations, the Slovenian law of unjustified enrichment was strongly influenced by Stojan Cigoj, who was in favour of adopting the value remaining as the measure of enrichment liability. He interpreted the general clause which stated that if the restitution in kind is impossible, the recipient should repay *the value of the benefit achieved*, as a manifestation of the “enrichment principle”, according to which the recipient is only liable for the existing enrichment at the time of the proceedings.<sup>76</sup> The Slovenian theory supports this view.<sup>77</sup> However, while the courts recognize the enrichment principle in general and apply it in certain types of cases,<sup>78</sup> there is no settled case law on its universal application in all types of enrichment claims. For instance, in relatively frequent cases of overpaid wages or pensions, in which the general rules of unjustified enrichment apply, the recipients never raise the disenrichment defence even though they would most likely meet all the required criteria for its recognition. Also, in general, the legal practice seems rather reluctant to use the doctrine of disenrichment. Therefore, the question inevitably arises whether disenrichment as a way of measuring liability should be generally recognised, taking into account its philosophical foundations and tendencies in other legal systems.

<sup>74</sup> J. Danilović, “Neosnovano obogačenje”, *Enciklopedija imovinskog prava i prava udruženog rada* (S. Ristić ed.), Novinsko-izd. ustanova Službeni list SFRJ, Belgrade, 425, para. 221.

<sup>75</sup> For details, see: J. Danilović, 425, para. 221.

<sup>76</sup> S. Cigoj, *Teorija obligacij: splošni del obligacijskega prava*, Uradni list Republike Slovenije, Ljubljana, 2003, 253.

<sup>77</sup> A. Polajnar Pavčnik, *Obligacijski zakonik s komentarjem* (M. Juhart, N. Plavšak eds.), Vol. 2, GV založba, Ljubljana 2003, 46; Z. Strajnar, 14; D. Možina, Vsebina in obseg obogatitvenega zahtevka, *Razsežnosti zasebnega prava* (Damjan Možina ed.), Pravna fakulteta v Ljubljani, Litteralis, Ljubljana 2017, 151 sqq.

<sup>78</sup> Enrichment (remaining at the time of *litis contestatio*), as a way of measuring liability, is applied by the courts in cases of non-performance-based enrichment claims, more precisely in those where the claimant has built on the defendant’s property or otherwise invested in their real estate. According to settled case law, the claimant can claim only the repayment of the enrichment at the time of *litis contestatio* (which is the increase in value of the property) and not the whole amount of the invested assets. See e.g. Supreme Court of the Republic of Slovenia, cases No. II Ips 97/2016, dated 11 August 2016, para. 17; II Ips 125/2011, dated 8. December 2011; II Ips 249/2009, dated 16 July 2009.

Additionally, if the “principle of enrichment” is to be generally recognised, it is unclear whether it should be applied as a rule or rather as a defence. In the first case, the remaining enrichment is treated as an aspect of the general enrichment enquiry, more precisely as an integral part of the “enrichment”, as the first element of the action for unjustified enrichment.<sup>79</sup> In the second case, the received benefit is the initial measure of liability, whereas the subsequent loss of enrichment can only be taken into consideration if the disenrichment defence is raised. The difference concerns the allocation of the burden of proof.<sup>80</sup> Since the elements of the action should be proved by the claimant, the first system requires them to demonstrate the surviving enrichment in the defendant’s hands.<sup>81</sup> However, it is not the case if disenrichment is the defence, as it requires the defendant to produce evidence of subsequent loss. In English and American law, change of position is considered a defence.;in German law, its legal nature has been controversial due to its historical interpretation,<sup>82</sup> but it is nowadays widely accepted that it is a defence (Ger. “*rechtsvernichtende Einwendung*”).<sup>83</sup>

In my opinion, disenrichment as a way of measuring liability should be generally recognized in Slovenian law. It aims to strike a fair balance between the interests of both parties and prevents a *bona fide* recipient from incurring loss due to restitution. Protection of the security of the receipt is another valuable reason that supports the idea of the general recognition of the disenrichment rule in our legal system. As an aspect of legal certainty and the rule of law, it is promoted also by the CJEU and ECtHR. Taking into consideration its philosophical foundations, in my opinion, disenrichment as a way of measuring liability is inherent to the law of unjustified enrichment, as it prevents the unjust results that restitution might lead to. Therefore it could be argued that it justifies an expansive cause of action in cases of unjustified enrichment.<sup>84</sup> As regards

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<sup>79</sup> See: A. Dyson, J. Goudkamp, F. Wilmot-Smith, 11; E. Bant, “Change of Position: Outstanding Issues”, in: A. Dyson, J. Goudkamp, F. Wilmot-Smith, *Defences in Unjust Enrichment*, 140.

<sup>80</sup> *Ibid.*, 14.

<sup>81</sup> *Ibid.*

<sup>82</sup> According to Dannemann “in German law, disenrichment is so wide a defence that many have doubted whether it is a defence at all or rather a rule,” where he refers to P. Schlechtriem, *Schuldrecht Besonderer Teil*, 6th edition, Mohr Siebeck, Tübingen, 2003, 778–780. See: G. Dannemann, *The German Law of Unjustified Enrichment and Restitution, A Comparative Introduction*, Oxford University Press, Oxford 2012, 139.

<sup>83</sup> See e.g. M. Schwab, § 818, paras. 130 and 131.

<sup>84</sup> See: A. Dyson, J. Goudkamp, F. Wilmot-Smith, 12.

In *Lipkin Gorman v. Karpnale Ltd.*, when the change of position defence was established in the modern English law of unjust enrichment, Lord Goff stated that “The recognition of change of position as a defence should be ... beneficial [because it] ... will

its application in practice, opting for a defence seems to be a better solution. The recipient is thereby in a better position to evaluate their remaining enrichment and to prove the losses they suffered. Therefore, the value received is the first measure of the enrichment liability that should be proved by the claimant, while the value remaining is to be taken into account only if the change of position defence is raised and proved by the defendant. The Slovenian theory has recently suggested applying the “enrichment principle” as a defence<sup>85</sup> and has been followed by a decision of the Higher Court in Ljubljana.<sup>86</sup>

However, it should be noted that despite the fact that the Slovenian Code of Obligations lacks a provision on general disenrichment defence, it does contain a rule according to which subsequent loss of enrichment in certain cases excludes the unjustified enrichment claim. More specifically, Article 195 of the Code states that “the debtor is not entitled to claim back compensation sums paid out for physical injury, damage to health or death without valid legal basis if they were paid to a *bona fide* recipient”. In other words, if a *bona fide* creditor received compensation for personal damages without a valid legal basis (or if the legal basis subsequently lapsed) and spent the money received in good faith they can rely on disenrichment. Parliament’s authentic interpretation of this article from 2004<sup>87</sup> added that this provision applies also to cases in which compensation was paid on the grounds of a final judgement (*res judicata*) that was subsequently reversed or set aside. Since the *condictio ob causam finitam* is also applicable to reversed or avoided judgements, this interpretation seems superfluous.

In practice situations often occur where a judgement debtor (often an insurance company) fulfils their obligation to pay compensation for damages under the final and enforceable judgement to a judgement creditor. Because either the debtor or the creditor (or both) disagrees with the final judicial decision, they file a final appeal on points of law to the Supreme Court. If the Supreme Court subsequently reduces the amount of compensation or sets the final judgement aside, the judgement debtor is entitled to claim restitution for the unjustified enrichment. Problems arise if the judgement creditor has already spent the money received. It could be argued that a special provision of the disenrichment defence, such as Article 195, denies the existence of a general disenrichment defence in Slovenian law, since the special article would otherwise be superfluous. However, this is not the case, as the provision was only recklessly

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enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in more appropriate cases, available.”

<sup>85</sup> D. Možina, 151 and 152.

<sup>86</sup> Higher Court in Ljubljana, case No. II Cp 2088/2017, dated 13 December 2017.

<sup>87</sup> *Official Gazette of Slovenia*, No. 32/04.

transplanted from former Soviet law, where the disenrichment defence was generally rejected.<sup>88</sup>

When applying this provision, the Slovenian Supreme Court adopted a very restrictive approach. For this reason, the judgement creditor can succeed with the disenrichment defence only in exceptional cases. According to the view of the Supreme Court, the recipient cannot rely on disenrichment if they knew or could have known that the final appeal on points of law was filed, as they should have been aware of the possibility that the final judgement could be reversed or set aside.<sup>89</sup> From that moment on, they bear the risk of potential disenrichment. In other words, if they spent the money received after they were informed about the filed final appeal on points of law, they cannot rely on disenrichment. To be more precise, they cannot rely on reliance-based change of position, however they are also not liable for non-reliance-based change of position (e.g. if the money received was stolen).<sup>90</sup> The interpretation of the Supreme Court was adopted *inter alia* because of the fact that the rules on execution procedure do not explicitly recognise the disenrichment defence in the procedure of counter-execution.<sup>91</sup> According to this, a debtor who claims back their payment in a counter-execution procedure would be in a better position than a debtor who files a restitutionary claim based on unjust enrichment rules, which recognise the disenrichment defence.

This view seems problematic because it interferes with the function of the finality of judgements. According to the maxim *res judicata pro veritate habetur*, the creditor does not have to expect that they will have to return the received payments. In German and English law, strict liability applies if the action for restitution in unjust(ified) enrichment has been filed, which is not the case if the proceedings for the final appeal are pending. It is my opinion that this should not be changed by the fact that the recipient is aware that the final appeal on points of law has been filed. This view is also supported by statistics, according to which, in 2017, 71% of the contested higher court judgements were confirmed by the Supreme Court.<sup>92</sup> Thus, it is rather unlikely that a final judgement

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<sup>88</sup> A. Galič, "Kdaj je mogoče prejeto obdržati: neupravičena obogatitev in 195. člen OZ (216. člen ZOR)", *Odvetnik*, 5/4 (2003), 7, fn. 8.

<sup>89</sup> See e.g. Supreme Court of the Republic of Slovenia, cases Nos. II Ips 193/2010, dated 21 November 2013, II Ips 731/2007, dated 23 June 2010, and II Ips 532/2009, dated 8 April 2010.

<sup>90</sup> Supreme Court of the Republic of Slovenia, case No. II Ips 193/2010, dated 21 November 2013.

<sup>91</sup> A. Galič, 6–8.

<sup>92</sup> The annual report of the Supreme Court for 2017 is available at: [http://www.sodisce.si/mma\\_bin.php?static\\_id=2018051513241144](http://www.sodisce.si/mma_bin.php?static_id=2018051513241144), last visited 16 November 2018.

would be reversed by the Supreme Court, and even less so if the appealed judgement is in line with the settled case law.<sup>93</sup>

If a judgement creditor is not allowed to dispose of the money received (as they otherwise risks disenrichment), the institution of the enforceability of final decisions is completely negated. Furthermore, it is not in line with one of the main functions of damages, which is to promptly compensate the loss suffered, so that the purpose for which they were awarded may still be achieved. The interpretation of the Supreme Court is strongly in favour of the judgement debtor, whereas the burden of subsequent disenrichment is fully on the judgement creditor's side. Such an approach is particularly questionable, as the judgement debtor who filed the final appeal on points of law has other effective legal remedies to protect their position. Namely, they can, under certain conditions (if they prove that they would otherwise suffer irreplaceable damage in excess of the harm caused to the judgement creditor by the postponement of the enforcement), demand that the court postpone the enforcement of the final judgement.<sup>94</sup>

## 5. CONCLUSION

Change of position is a defence against an unjust(ified) enrichment claim stating that the recipient is no longer enriched. It was first introduced as a rule of loss of enrichment in the German and Swiss civil codes, under the influence of the Pandectists. Nowadays, it forms an integral part of the law of unjust(ified) enrichment in numerous legal systems and is as such promoted in the model rules of the DCFR and PEL Unj. Enr. It is underpinned by the “no worse off” rationale and aims to protect the security of the receipt; by doing so it reflects the principles of legal certainty and the rule of law. This has contributed to the recognition of the change of position defence in EU law. As a manifestation of the protection of property, the security of the receipt also enjoys the protection of the European Convention on Human Rights. According to the recent ECtHR case law, it seems that the Court is in favour of recognising the change of position as well.

The Slovenian Code of Obligations does not contain an express defence of change of position. However, there is a special provision which allows a *bona fide* recipient of compensation for personal injury to rely on disenrichment if it subsequently turns out that the compensation was without valid legal basis. It is therefore debatable whether the change

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<sup>93</sup> See also: D. Možina, 165.

<sup>94</sup> Article 71 of the Claim Enforcement and Security Act (Zakon o izvršbi in zavarovanju, *Official Gazette of Slovenia*, No. 3/07 with amendments).

of position defence should be universally recognized in Slovenian law, i.e. also outside the scope of wrongfully paid compensation. While theory supports this view, legal practice seems rather reluctant to apply it in all types of enrichment claims. Its philosophical foundations and the rationale underpinning it speak in favour of its recognition. However, when applying the change of position defence, the courts should find a proper balance between the interests of both parties, taking into account various factors, especially their good or bad faith, and the way in which the enriching event was brought about.

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