Marek Sobczyk

# The problem of «causa conditionis» in the settlements of Roman jurists and in modern Polish unjustified enrichment law

Studia Prawnoustrojowe nr 9, 29-42

2009

UWM Studia Prawnoustrojowe 9
2009

**Marek Sobczyk**
Uniwersytet Mikołaja Kopernika

# The problem of *causa condictionis* in the settlements of Roman jurists and in modern Polish unjustified enrichment law

## 1. Introduction

In my paper I would like to introduce you to the problem of *causa condictionis* in the settlements of Roman jurists and to prove the topicality of this issue in contemporary law, especially in the Polish unjustified enrichment law. Undoubtedly, contemporary regulations on justified enrichment in the various European states rest on Roman foundations, especially on the crucial concept of undue performance. In art. 410 § 2 of the Polish civil code one can find references to condictiones worked out by Roman jurists[1].

Unjust enrichment has been one of the principle sources of obligation since Roman times. This topic has been at the centre of interest of researchers on both Roman and modern civil law for many years. One of the most contentious issues is the problem of *causa condictionis*, that is a ground for claims common to all *condictiones*, a common idea of the remedy for the recovery of an unjust enrichment[2]. This issue has been popular among academics since the *Institutiones* of Gaius were found in 1816[3], mostly due to

[1] On this issue see W. Mossakowski, *Instytucja bezpodstawnego wzbogacenia (condictiones)*, "Forum Iuridicum" 2004, nr 3, p. 87–100.

[2] On the meaning of *causa condictionis* see A. Ehrhardt, *Iusta causa traditionis. Eine Untersuchung über den Erwerb des Eigentums nach römischem Recht*, Berlin – Leipzig 1930, p. 42 and p. 48; F. Schwarz, *Die Grundlage der condictio im klassischen römischen Recht*, Münster – Köln 1952, p. 229, p. 303; A. Simonius, *Zur Frage einer einheitlichen „causa condictionis"*, Festschrift Hans Lewald, Basel 1953, p. 161; S. Hähnchen, *Die causa condictionis. Ein Beitrag zum klassischen römischen Kondiktionenrecht*, Berlin 2003, p. 13, p. 18 f.; W. Dajczak, *Tradycja romanistyczna a współczesna debata o zasadach prawa prywatnego. Uwagi na tle problemu niesłusznego wzbogacenia*, [in:] *Prawo rzymskie a kultura prawna Europy*, A. Dębiński, M. Jońca (eds.), Lublin 2008, p. 132 ff.

[3] On the history of search for *causa condictionis* see S. Hähnchen, op. cit., p. 14.

the fact that the *condictio* is the only action in Roman civil procedure that did not include any *causa debendi*[4]. The problem of *causa condictionis* in Roman law has been tackled both from a narrow point of view, confined to restitution of unjust enrichment, and in its broader meaning, which refers to all cases where *condictio* was applied, so even in the field of contract (e.g. *stipulatio*, *mutuum, expensilatio*), tort law (*furtum*) and quasi contracts[5].

We must assume that the fact that one of the indicated grounds was peculiar to all cases of unjust enrichment does not justify the view that it was peculiar to all *condictiones* as well. Nevertheless, the identification of the ground peculiar to *condictio* within the field of unjust enrichment is beneficial in itself, because it contributes to the better understanding of the theoretical assumptions of this legal institution and enables us to grasp the features of all cases in which it was applied.

I must add that the majority of works on *causa condictionis* were written under the influence of a radical critique of sources; suspicions as to the genuineness of the sources affected the works of G. Donatuti[6], F. Schwarz[7] and U. von Lübtow[8], which is why this issue requires a fresh review. In this context I assume the sources should be treated as genuine unless it is deeply justified that they are not[9].

One can ask to what extent it is a "Roman problem", I mean a problem taken up by Roman jurists, present in the sources of Roman law, and to what extent it is a modern problem, an emanation of the contemporary point of view on the historical sources of law, but alien to Roman jurists. To answer this question I must admit that there are two contentious points of views on this matter, some Romanists regard it as a Roman problem, known to Roman jurists, who tried to find a *causa condictionis*, and some researchers consider it as an artificial problem owing to the fact that there was not

---

[4] O. Lenel, *Das Edictum Perpetuum – Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927, p. 239 f.; D. Liebs, *The history of the Roman condictio up to Justinian*, [in:] *The legal mind. Essay for Tony Honorè*, N. MacCormick, P. Birks (eds.), Oxford 1986, p. 165 ff.; R. Zimmermann, *The Law Obligations. Roman Foundations and the Civilian Tradition*, Cape Town – Wetton – Johannesburg 1990, p. 835 f.; S. Hähnchen, op. cit., p. 13; W. Dajczak, op. cit., p. 132.

[5] F. Schwarz confined himself only to unjustified enrichment (F. Schwarz, op. cit., p. 2). It is contentious whether Roman jurists knew enrichment „in another manner", so enrichment not related to a performance, see R. Santaro, *Studi sulla condictio*, "Annali Palermo" 1971, nr 32, p. 181 ff.; D. Liebs, op. cit., p. 170 f.; S. Heine, *Condictio sine datione. Zur Haftung aus ungerechtfertigter Bereicherung im klassischen römischen Recht und zur Entstehung des Bereicherungsrechts im BGB*, Berlin 2005, passim.

[6] G. Donatuti, *Le "causae" delle "condictiones"*, "Studi Parmesi" I, 1951, pp. 33–169.

[7] F. Schwarz, op. cit., passim.

[8] U. von Lübtow, *Beiträge zur Lehre von der Condictio nach römischem und bürgerlichem Recht. Studien zum römischen und geltenden Recht*, Berlin 1952.

[9] Cf. W. Bojarski, *Remarks on Textual Reconstruction in Roman Law*, [in:] W. Wołodkiewicz, M. Zabłocka (eds.), *Le droit romain et le monde contemporain. Mèlanges à la mèmoire de Henryk Kupiszewski*, Varsovie 1996, p. 89.

any *causa condictionis*[10]. The sources themselves are not clear enough; however, it is very difficult to find a trace of the quest for a common basis of claims, which is why we cannot assume that there was a dispute over it among Romans[11].

In spite of critical voices, which are in the minority, I regard the search for *causa condictionis* as justified.

This issue has always been of great importance in the course of the development of the unjust enrichment doctrine. The name of this institution itself reflects a controversy over its *ratio legis*, because we can wonder which name is proper: unjust enrichment or unjustified enrichment, understood as enrichment without legal basis. Even if we accept the view that there was not any common basis of claims of unjust enrichment in Roman law and that this problem was alien to Romans, it does not diminish its importance for comparative law. The fact itself that Romans did not take up this issue is not sufficient to admit that there was not any *causa condictionis*, on the contrary, the common name of the action with such a wide field of application gives rise to a discussion whether there was something peculiar to all legal relationships where the action was used. Ultimately, it may turn out that the popularity of *condictio* is due to its distinguishing features as an action of civil procedure not to the properties of certain legal relationships. I share the point of view of Emilio Betti that the fact that Roman lawyers did not deal with a particular problem does mean that we are not allowed to tackle this problem[12]. Already more than one hundred years ago Alfred Pernice encouraged researchers not to confine themselves to arguments of Roman jurists but to look for ideas that influenced them[13].

In my opinion due to the fact that contemporary regulations rest on Roman foundations it is legitimate to ask whether the problem of common grounds for claims is still present in the doctrine and judicial decisions. It seems beneficial to establish if the same common grounds are indicated nowadays as in Roman times.

The regulations on unjustified enrichment are very different in various European states, which is why even the reference to one legal family only would exceed the framework of this paper significantly. For this reason I confine myself only to my native legal system, all the more that the Polish regulation is strongly influenced by foreign patterns.

---

[10] W. Flume, *Der Wegfall der Bereicherung in der Entwicklung vom römischem zum geltenden Recht*, [in:] *Festschrift für Hans Niedermeyer zum 70. Geburtstag*, Göttingen 1953, p. 136 ff.

[11] A. Pernice, *Marcus Antistius Labeo. Das römische Privatrecht im 1. Jahrhunderte der Kaiserzeit 3*, Band 1, Halle 1892, p. 260.

[12] E. Betti, *Zum Problem der Gefahrtragung bei zweiseitig verpflichtenden Verträgen*, ZSS 1965, nr 83, p. 17.

[13] A. Pernice, *Über wirtschaftliche Voraussetzungen römischer Rechtssätze*, ZSS 1898, nr 19, p. 98.

My work does not aspire to a comprehensive analysis of *causa condictionis* in every field of its application; my aim is only to introduce you to the grounds for restitution of unjust enrichment both in Roman and in contemporary civil law. The very limited scope of this paper does not let me analyse even the most important relevant sources of Roman law to establish the common ground for recovery of the unjust enrichment. In order to achieve this purpose I would have to write a book, as for example F. Schulz or S. Hähnchen did, not only a short paper; therefore I do not analyse sources but I confine myself only to the presentation of the most popular theories of contemporary researchers of Roman law to check if the theories are still present in the doctrine of civil law. I think that a paper limited only to a comparison of the most important theories on the same issue in the aforementioned legal systems, even without deep analysis of the sources that support the theories, is still beneficial, because it lets us establish if we have the same problems as Romans had and if we solve them in a similar way to them.

To my mind because so many books and articles were written on this issue there is no point in doing further research to establish the *causa condictionis* in Roman law; it is more useful to verify whether this issue is still present in contemporary law and to compare the Roman conception with the contemporary one.

## 2. Common grounds for claims for the recovery of unjust enrichment indicated by the researchers of Roman law

One of the oldest and the most widespread conceptions of the common ground of claims for the recovery of unjust enrichment in Roman law is the theory of fairness or equity (*aequitas*), in the light of which the protection of the impoverished party was derived from the principle of equity. This conception has its foundation first of all in two famous legal maxims *iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*[14] (by the law of nature it is fair that no one become richer by the loss and injury of another), well known also in the version *nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*[15] (for it is by nature fair that nobody should enrich himself at the expense of another) and *heac condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit*[16] (this *condictio*, grounded in

[14] Pomponius D.50.17.206.

[15] Pomponius D.12.6.14.

[16] Papinianus D.12.6.66, on this problem see F. Pringsheim, *Bonum et aequum*, ZSS 1932, nr 52, p. 152; F. Schwarz, op. cit., p. 216 f.; R. Zimmermann, op. cit., p. 852 f.

the idea of what is good and fair, has become the means of reclaiming whatever, belonging to one in the absence of good cause is found in the hands of another).

Since the times of Friedrich Carl von Savigny these statements, which have obtained the status of general maxims, have justified the view that the ground and precondition for *condictio's* applications was the enrichment of one person at the expense of another and that the enrichment should be restored[17]. In the further development of this doctrine the precondition of enrichment has become combined with the law of nature and the principle of equity[18]. It was stressed that the principle of justice is the foundation of recovery of unjust enrichment[19], the leitmotif of classical *condictio*[20]. Nowadays the most prominent supporter of this doctrine is Berthold Kupisch[21]. The doctrine of equity has many opponents who argue that equity was not a principle applied directly[22] and that the aforementioned maxims are only an expression of a general rule of justice not the sources of obligation[23].

The next very popular doctrine of *causa condictionis* in Roman law is the conception of *negotium contractum*[24], a kind of direct dealing or agreement reached by the parties, similar but not identical to contract. In fact *negotium* has a broader meaning than contract[25]. This conception also has foundations in the sources of Roman law, first of all in the settlement of Julianus in the 39 book of his digest (D.12.6.33). In this settlement Julianus refused to grant *condictio* to a person who had built a house on another's land due to the fact

---

[17] F. C. Savigny, *System des heutigen römischen Rechts*, Band 5, Berlin 1841, p. 564.

[18] Ch. Wollschläger, *Das stoische Bereicherungsverbot in der römischen Rechtswissenchaft*, [in:] O. Behrends, M. Diesselhorst, W. E. Voss (eds.), *Römisches Recht in der europäischen Tradition, Symposion aus Anlaß des 75. Geburtstages von F. Wieacker*, Ebelsbach 1985, p. 77 f.

[19] H. Coing, *Zur Lehre von der ungerechtfertigten Bereicherung bei Accursius*, ZSS 1963, nr 80, p. 396.

[20] H. Nelson, U. Manthe, *Gai Institutiones III, 88–181. Die Kontraktsobligationen. Text und Kommentar*, Berlin 1999, p. 85.

[21] B. Kupisch, *Ungerechfertigte Bereicherung. Geschichtliche Entwicklungen*, Heildelberg 1987, p. 25 f.

[22] T. Kipp, *Paulys Realencyclopädie der Altertumswissenchaften*, vol. 7, Stuttgart 1900, s.v. condictio, J. P. Dawson, *Unjust enrichment. A comparative analysis*, Boston 1951, p. 4; R. Zimmermann, op. cit., p. 852; G. Schiemann, *Condictio*, [in:] *Der neue Pauly*, vol. 3, p. 120 f.

[23] R. Feenstra, *Die ungerechtfertigte Bereicherung in dogmengeschichtlicher Sicht*, „Ankara Üniversitesi Hukuk Fakültesu Dergesi" 1972, Sayi 1–2, p. 292; F. Giglio, *Condictio proprietaria und europäisches Bereicherungsrecht. Eine Untersuchung auf rechtshistorischer und rechtsvergleichender Basis mit besonderer Berücksichtigung des deutschen und itallanischen Rechts*, Berlin 2000, p. 42 f.

[24] F. Trampedach, *Die condictio incerti*, ZSS 1896, nr 17, p. 97 f.; G. Donatuti, op. cit., p. 49; F. Schwarz, op. cit., p. 193; A. Simonius, op. cit., p. 165; N. Jansen, *Die Korrektur grundloser Vermögensverchiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherug bei Savigny*, ZSS 2003, nr 120, p. 113; S. Heine, op. cit., p. 29.

[25] On *negotium* see F. Schwarz, op. cit., p. 192; R. Zimmermann, op. cit., p. 854; A. Saccoccio, *Si certum petetur. Dalla condictio dei veteres alle condictiones giustinanee*, Milano 2002, p. 282 ff.; S. Heine, op. cit., p. 26 ff.

that there was not any kind of *negotium* between the parties[26]. The requirement of *negotium* is also present in other sources[27]. However, we can find settlements where the *condictio* was granted in spite of the fact that there was not *negotium*[28].

The followers of this doctrine assume that *datio* was the basic precondition for application of *condictio* with the exception of *condictio ex causa furtiva*[29].

Very similar to the doctrine of *negotium* is the conception that the ground for *condictio* was an express or implied arrangement between the parties in which they determined the premises of restitution of financial benefit. A proof of this kind of arrangements is seen in the cases of *datio ob rem*, because it is assumed that the parties to *datio* determined the circumstances in which the given object had to be given back to a giver, in particular, in the case where the aim of the performance was frustrated[30].

The most popular point of view in contemporary doctrine is based on the distinction between *causa dandi* understood as a reason for performance and the *causa retinendi* understood as a reason that justified the retention of the object of performance by the person to whom it was given[31]. Of course this distinction is applied only to undue performance, but not to the other cases of unjust enrichment due to the lack of *datio*.

Formerly, the researchers paid more attention to *causa dandi*[32]; they assumed the existence of a claim for recovery of the performance in every case when *causa* was vitiated (*falsa*[33], *nulla causa*[34]) or did not exist at all (*sine causa*[35]).

In the contemporary doctrine the usefulness of this conception is perceived in the field of *condictio indebiti* and *condictio ob rem*; however, greater importance is attached to *causa retinendi*. In this conception the claim for the recovery of enrichment rested rest not on the fact that after the performance it turned out that its *causa* did not exist or was defective, but on the fact that there was no proper justification for retention of performance by

[26] On this settlement see I. Koschembahr-Łyskowski, *Condictio*, vol. 1, p. 94 ff.; J. P. Dawson, op. cit., p. 51 f.; S. Hähnchen, op. cit., p. 27 f.; A. Saccoccio, op. cit., p. 279 ff.; S. Heine, op. cit., p. 26 ff.; J. D. Harke, *Das klassische Kondiktionensystem*, IURA 2003, p. 76 f.

[27] Ulpianus D.12.6.2 pr.; Africanus D.23.3.50 pr.; Celsus D.12.1.32; Julianus D.39.6.13 pr.; Gai. 3.91.

[28] See R. Santoro, op. cit., p. 237 ff.; D. Liebs, op. cit., p. 171 f.

[29] Cf. S. Hähnchen, op. cit., p. 27 f.

[30] F. Schwarz, op. cit., p. 193 f.; S. Hähnchen, op. cit., p. 29.

[31] On causa *dandi* and *causa retinendi* see F. Schwarz, op. cit., p. 224 ff.

[32] H. Witte, *Die Bereicherungsklagen des Gemeines Rechts*, Halle 1859, p. 139; M. Voigt, *Über die condictiones ob causam und über causa und titulus im allgemeinen*, Leipzig 1862, p. 489.

[33] Ulpianus D.12.6.23.

[34] Papinianus D.12.7.5 pr. and 1.

[35] Julianus D.12.7.2; Africanus D.12.7.4; Javolenus D.12.4.10; Africanus D.19.1.30 pr.

the recipient[36]. This doctrine is based on the sources where it is written that the *condictio* would go for anything in someone's hands on an unlawful basis[37], property can always be recovered by a *condictio* from people who possess it without proper title[38], because property which is retained on the basis of a gift which is not permitted by law is held to be retained without cause or without just cause, and a *condictio* will be available here[39], the *condictio* can only go against someone for something which came to him other than on a legally sufficient basis or comes to be referable to a basis which is not legally sufficient[40].

An eclective point of view is also very popular, which combines two doctrines – equity and *causa retinendi*. According to this view *condictio* rested on the general principle of equity and it was granted when the recipient could not prove any just reasons for retention of performance[41].

Opponents of the most popular doctrine of *causa retentionis* as a ground that justified the retention of the performance argue that this theory should also be rejected[42]. In fact Roman jurists did not pay attention to a particular situation of the recipient, they did not try to find arguments in his favour to let him retain the object of performance. That is why in their opinion this conception is useless as a *causa condictionis* because it can be applied to any claim based on any legal relationship not only to unjust enrichment[43]. In every situation we can tell that the defendant should give something back if he does not have any justified grounds for its retention, so this conception does not distinguish unjust enrichment from any other claims.

I have just mentioned only the most popular conceptions of *causa condictionis* in Roman law, but apart from them there are con-

---

[36] A. Pernice, *Marcus Antistius Labeo...*, p. 218 f.; I. Koschembahr-Łyskowski, *Condictio*, vol. 1, p. 182; E. Rabel, *Grundzüge des römischen Privatrecht*, [in:] *Enzyklopädie der Rechtswissenschaft*, vol. 1, 1915, p. 399 f.; F. Schwarz, op. cit., p. 210 f.; A. Simonius, op. cit., p. 161 f.; G. Astuti, *Azioni do aricchimento (Premessa storica). Tradizione romanistica e civiltà giuridica europea 3*, Napoli 1984, p. 1786; A. Wacke, *Actio rerum amotarum*, Köln – Graz 1963, p. 110; A. d'Ors, *Creditum*, RE, Suppl. 10, 1965, p. 1158; J. G. Wolf, *Causa stipulationis*, Weimar 1970, p. 33; A. Watson, *Roman Private Law around 200 BC*, Edinburgh 1971, p. 125; T. Mayer-Maly, *Römisches Privatrecht*, Wien – New York 1999, p. 155.

[37] Ulpianus D.12.5.6; Papinianus D.12.6.66.

[38] Marcianus D.25.2.25.

[39] Gaius D.24.1.6.

[40] Ulpianus D.12.7.1.3.

[41] P. Frezza, *Ius gentium*, RIDA 1949, nr 2, p. 292; H. Coing, *Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts*, ZSS 1952, nr 69, p. 24 f.; idem, *Zur Lehre...*, p. 396, E. H. Kaden, *Das Schriftum der Jahre 1950–53 zur römischen Bereicherungslehre*, ZSS 1954, nr 71, p. 586 f.; M. Kaser, *Zur „iusa causa traditionis"*, BIDR 1961, nr. 3, p. 61; idem, *Ius gentium*, Köln – Weimar – Wien 1993, p. 163 f.; R. Zimmermann, op. cit., p. 852 f.

[42] S. E. Wunner, *Der Begriff causa und der Tatbestand der condictio indebiti*, „Romanitas" 1970, nr 9, p. 479; H. Jansen, op. cit., p. 122.

[43] H. Jansen, op. cit., p. 122; S. Hähnchen, op. cit., p. 15.

ceptions of *fides*[44], quasi-contract[45], real contract[46], however, these theories are either in the minority or have already been disapproved many years ago[47].

As I have already said some Romanists deny the existence of any common grounds for *condictio* in Roman law even in the field limited to unjust enrichment, let alone application of this action outside this field[48]. In particular, the *condictio of causa furtiva* causes many inexplicable problems of interpretation because it had many distinguishing features, which do not fit any common conception[49]. However, even these researchers do not exclude that it is possible to establish a common ground for a particular type of *condictio* in all cases where the particular type was applied[50]. That is why in my opinion it is profitable to search for this common ground even if there is not *causa* common for all types *condictiones*.

To sum up, it is very difficult to prove that there was a common ground for the recovery of unjust enrichment in Roman law and to prove that a particular conception prevails over others. Even the most popular theory of *causa retinendi* is not convincing enough to accept it without reservation as common ground for all unjust enrichment claims. It seems that Roman jurists used arguments of very different nature to justify the claims, which is why these arguments cannot be reduced to a single idea.

For the aforementioned reasons I share the point of view of Alfred Ohanowicz that the Roman jurists did not manage to overcome the fragmentary regulation of particular cases and did not find any common principle that can let restitution of unjust enrichment rest on a uniform legal structure[51]. In Alfred Ohanowicz's opinion Romans did not manage to create any distinct institution of unjust enrichment; however, they perceived the need to protect the aggrieved party in particular situations[52].

---

[44] A. Pernice, *Marcus Antistius Labeo*, p. 413; I. Koschembahr-Lyskowski, *Condictio*, vol. 1, p. 24 ff.

[45] R. Leonhard, *Institutionen des römischen Rechts*, 1894, p. 430.

[46] S. Hähnchen, op. cit., p. 32 f.

[47] On the aforementioned theories: F. Boré, *Die Voraussetzungen der condictio causa data causa non secuta des Gemeinen Rechts*, Berlin 1904, p. 11 f.; S. Hähnchen, op. cit., p. 33.

[48] N. Jansen, op. cit., p. 118 f.; C. Sanfilippo, *Condictio indebiti. Il fondamento dell'obligazione da indebito*, Milano 1943, p. 13 f.

[49] On the *condictio ex causa furtiva* see e.g. D. Liebs, op. cit., p. 169 ff., W. Pika, *Ex causa furtiva condicere im klassischen römischen Recht*, Berlin 1988, passim, with a bibliography there.

[50] Cf. F. Boré, op. cit., p. 19.

[51] A. Ohanowicz, *Niesłuszne wzbogacenie*, [in:] idem, *Wybór prac*, Warszawa 2007, p. 717.

[52] Ibidem, p. 722.

## 3. Common ground for *condictio* in 19th and 20th century doctrine

First of all it must be stressed that the issue of common ground for unjustified enrichment claims is still present in the discussions on contemporary conceptions of this institution in various European states. What is more, it is precisly the search for modern common *causa condictionis* that has contributed to the creation of a uniform institution of unjustified enrichment that replaced the previous casuistic approach[53]. This issue was highly popular especially in the 19th century and the theories proposed by 19th century doctrine were strongly influenced by the Roman conceptions and were based on the Roman sources. It is useless to present all these theories in detail because it would exceed the confined framework of this paper, which is why I will confine myself only to the presentation of the most important theories in very broad outline.

The theories of *causa condictionis* can be divided in three groups, called theories of surrogation, theories of *causa* or contract and theories of equity[54].

The most important of the theories of surrogation is the theory of vindication, according to which *condictio* substitutes vindication in those situations where it is impossible to apply *rei vindicatio*, e.g. because of the consumption or alienation of a thing[55].

The peculiar form of the theories of surrogation is the theory according to which an enriched party who retains the object of unjustified enrichment commits a tort[56], apart from which we should mention B. Windscheid's theory of premise (Voraussetzung) and the theory of right of withdrawal[57].

The basic assumption of contractual theories is that the claim is based on the defective *causa* or lack of *causa* of a legal transaction to the increment of assets. *Causa* is understood as a legally relevant purpose of performance; however, not every subjective purpose of performance can be regarded as *causa* but only this purpose which is determined by its function (e.g. causa *solvendi*, *conditionis implendae*, *dotis*)[58].

---

[53] Ibidem, p. 917.

[54] Cf. A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 917 ff.; idem, *Bezpodstawne wzbogacenie* (1981), [in:] idem, *Wybór prac*, p. 1009 f.; E. Łętowska, *Bezpodstawne wzbogacenie*, Warszawa 2000, p. 8 ff.; P. Mostowik, *Bezpodstawne wzbogacenie*, „Studia Prawa Prywatnego" 2007, vol. 2(5), p. 46 f.

[55] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 917 ff.; idem, *Bezpodstawne wzbogacenie* (1981), p. 1009; E. Łętowska, op. cit., p. 8 f.; P. Mostowik, op. cit., p. 46.

[56] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 918 ff.; idem, *Bezpodstawne wzbogacenie* (1981), p. 1009; E. Łętowska, op. cit., p. 8 f.; P. Mostowik, op. cit. p. 46.

[57] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 920 ff.

[58] Ibidem, p. 921 ff.; A. Ohanowicz, *Bezpodstawne wzbogacenie* (1981), p. 1009 f.; P. Mostowik, op. cit., p. 46.

The majority of the supporters of contractual theories come to the conclusion that it is impossible to construe one uniform ground for all cases of unjustified enrichment, but the concept of *causa* can be applied to those cases where enrichment was caused by the impoverished party and in other cases one should search for another different ground of lack of justification of enrichment[59].

The theories of equity emphasize the ethical ground of the obligation of restitution[60]. In the light of these theories enrichment should be restored if, in spite of the existence of a formal ground for gaining of the benefit, the enrichment infringes the moral standards, which makes it unfair[61].

The most prominent supporters of equity theory in Polish doctrine were Ignacy Koschembahr-Łyskowski and Fryderyk Zoll. Ignacy Koschembahr-Łyskowski, who did thorough research into the Roman concept of *condictio*[62], came to the conclusion that the concept was based on the notion of *bona fides* and he appealed for the application of the theory of equity in contemporary law[63]. Fryderyk Zoll applied the concept of unfairness to those cases also where the enrichment did not infringe the positive law but was contrary to the moral and ethical standards.

In the Polish Code of obligations, adopted in 1933, unjust enrichment was regulated in art. 123 and subsequent provisions. The peculiarity of the Polish conception rested on the fact that the notion of undue performance was separated from the unjust enrichment[64].

The authors of the Code of obligations used the notion "unjust enrichment" and according to the general provision of art. 123 the person who unjustly gained benefit at the expense of another was obliged to restore the benefit in kind, in the case where it was not possible to restore the value of the benefit.

The key notion of Polish regulation was "unjust enrichment". The notion itself suggested the reference to the theory of equity. Actually, it is not right to claim that the conception of unjust enrichment in the Code of obligations was based on equity[65].

The use of the notion was justified by the fact that the notion "without legal basis" referred to the concept of a legal transaction to the increment of assets which made it too narrow, because unjust enrichment could also take place without the legal transaction.

---

[59] A. Ohanowicz, *Bezpodstawne wzbogacenie* (1981), p. 1010.

[60] E. Łętowska, op. cit., p. 11; P. Mostowik, op. cit., p. 46.

[61] Por. A. Ohanowicz, *Bezpodstawne wzbogacenie* (1981), p. 1011; E. Łętowska, op. cit., p. 11.

[62] I. Koschembahr-Łyskowski, *Die condictio als Bereicherungsklage im klassischen römischen Recht*, Weimar 1903 (vol. I), 1907 (vol. II).

[63] I. Koschembahr-Łyskowski, *Podstawy skargi o zwrot „niesłusznego wzbogacenia"*, „Kwartalnik Prawa Cywilnego i Handlowego" 1916, p. 1 ff.

[64] For a general suryer see P. Księżak, *Bezpodstawne wzbogacenie. Art. 405–414 k.c. Komentarz*, Warszawa 2007, p. 29.

[65] Cf. A. Ohanowicz, *Bezpodstawne wzbogacenie* (1981), p. 1011 f.; E. Łętowska, op. cit., p. 11.

The next argument was that the notion of legal basis was useless in reference to enrichment owing to the fact that the enrichment could be legally justified in spite of the lack of legal basis, e.g. in the case of abstract legal transaction[66].

Despite the aforementioned explanatory statement of the Code of obligations there were opinions in the doctrine which referred the regulation to the theory of fairness.

The broad conception of unfair enrichment was proposed by Fryderyk Zoll, who regarded the claim for restitution as a general remedy which could, by means of the basic principles of justice, heal also those wounds which were unfairly caused by the application of the legal provisions, even if the positive law did not envisage any claims[67].

Also Jan Namitkiewicz pointed out the meaning of the theory of equity to the application of the provision of unjust enrichment. In his opinion the task of regulation of unjust enrichment and undue performance was to eliminate the transfer of property which was justified neither by law nor equity. The responsibility based on art. 123 of the Code of obligations took place provided that there was an increment of property to the detriment of another's property and the increment was not justified by law or by equity. In Namitkiewicz's opinion enrichment was unjust if it could be justified neither by law nor moral standard[68].

The most prominent opponent of the theory of equity as a ground for unjust enrichment claims was Alfred Ohanowicz. In his view the notion of "unjust enrichment" was too broad, because it let the application of the relevant provisions be extended without clear confines and because it used such vague and basic criteria as principles of justice, equitable law or even intuitive law; consequently, it left the judge too much discretion[69].

Alfred Ohanowicz assessed that the regulation of the Code of obligations was not, in contrast to its name, based on the principle of equity, but was based on the lack of legal justification of increment. He regarded the justification of enrichment as legal title that justifies the enrichment; this title could result from the legal transaction concluded by the enriched party with the impoverished party or a third person or from other events which had this legal effect[70].

Alfred Ohanowicz came to the conclusion that the vague notion of equity or incompatibility with the aims of justice could never justify a claim for the

---

[66] R. Longschamps de Bérier, *Uzasadnienie projektu kodeksu zobowiązań*, vol. 1, Warszawa 1936, p. 177 ff.

[67] F. Zoll, *Zobowiązania w zarysie*, Warszawa 1948, p. 111 ff.

[68] J. Namitkiewicz, *Kodeks zobowiązań. Komentarz dla praktyki*, Łódź 1949, p. 180.

[69] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 797.

[70] Ibidem, p. 798; A. Ohanowicz, *Niektóre problemy niesłusznego wzbogacenia*, [in:] idem, *Wybór prac*, p. 690.

restitution of enrichment, because it made the claim dependent on the arbitral court's decision[71].

For the aforementioned reasons Alfred Ohanowicz campaigned for the change of the name of the institution; unjust enrichment should be replaced by unjustified enrichment understood as enrichment without legal basis[72].

The new name of the institution deprived it of false appearance as a general remedy for all imperfections of the legal system and gave it a proper measure as one of the remedies aiming at the protection against unjustified increment of property at the expense of another[73].

Judicial decisions followed the conception that the enrichment was unjust where it did not have legal justification; therefore the courts searched for the legal basis of enrichment, e.g. the Polish Supreme Court regarded the contract of loan and contract of gift as the proper legal basis of enrichment[74]. Nevertheless, one can also find judgments based on the theory of equity, for instance the Supreme Court stated that the aim of the unjust enrichment was to heal the wounds inflicted by the law where the transfer of legal benefit from the property of one person to another's in spite of being formally legal infringed the principles of equity[75].

## 4. Unjustified enrichment in the contemporary Polish civil code

In the currently binding Polish civil code enacted in 1964 the relevant institution is named unjustified enrichment. Art. 405 of the civil code operates with the general formula "who gains a benefit at the expense of another without legal basis is obliged to give up the benefit in kind or, if it is not possible, to return its value".

The key notion of the Polish regulation is "legal basis". The legal basis is a basis which justifies the enrichment, makes it consistent with the legal order[76]. According to the widespread view there is not legal basis where the benefit does not rest on the legal transaction, provision of a statute, judgment of the court or an administrative act[77].

---

[71] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 799.

[72] A. Ohanowicz, *Bezpodstawne wzbogacenie w projekcie kodeksu cywilnego PRL*, [in:] idem, *Wybór prac*, p. 955.

[73] Ibidem.

[74] OSP 1939, nr 17.

[75] Judgement of 15th Sempember 1945 C I. 116/45, PiP 1946, nr 2, p. 120.

[76] A. Ohanowicz, *Bezpodstawne wzbogacenie* (1981), p. 1024.

[77] K. Kołakowski, [in:] G. Bieniek, *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania*, vol. 1, Warszawa 2005, note 6 to art. 405; E. Łętowska, op. cit., p. 76; K. Pietrzykowski, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz do art. 1–449 [11]*, vol. I, Warszawa 2005, p. 1059; W. Dubis, [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2006, p. 632; P. Księżak, op. cit., p. 73.

The nonconformity of transfer of benefit in the case of unjustified enrichment relates to law and the legal order and rests on the lack of legal basis that justifies the transfer[78].

The same conception is adopted in the court's decisions[79]. As a result the Polish regulation of unjustified enrichment is not based on the principle of equity but having as a central notion the "lack of legal basis" it approaches the causal theories. The adjective "unjustified" stresses more the lack or defectiveness of legal basis of the transfer than its moral disapproval[80]. This conception excludes the application of any criterion outside the sphere of law[81]. In these cases where it is possible to indicate a legal basis there is no duty to restore the enrichment, so in practice the court searches for the legal basis of enrichment instead of assessing if the enrichment is just or unjust. Nowadays equity cannot be seen as the self-contained, sufficient and first of all specific explanation of the institution of unjustified enrichment, which is why the theory of equity is not defended today[82].

## 5. Conclusions

Regardless of the fact whether we accept the existence of one common *causa condictionis* in the Roman unjust enrichment law or not, undoubtedly this issue and the search for the *causa* over the centuries contributed to the creation of unjust enrichment as a legal institution. The academics of the 19th and 20th centuries searched for the common ground for claims both in Roman law and in the contemporary civil law; moreover they tried to apply the Roman conception in contemporary law or at least to justify their theories by references to Roman law. It proves that the Roman law has always been a source of inspiration for civil law regulation and its application by courts.

There are many proposed common grounds for claims in Roman unjust enrichment law, and in my opinion it is extremely hard to prove that one of the theories prevails over the others. There are arguments for and against each of the most important theories. Nevertheless, the theory of the lack of *causa retinendi* seems to be the most popular, in spite of the aforementioned critique.

In 19th and 20th century doctrine this issue was still discussed; there were many theories which often had their roots in Roman law. Especially,

---

[78] A. Ohanowicz, *Bezpodstawne wzbogacenie* (1965), p. 963.

[79] The judgements of Polish Supreme Court of 17th November 1998 III CKN 18/98 and 23th May 2003 III CKN 1211/00, (OSNC 2004, nr 3, p. 39).

[80] E. Łętowska, op. cit., p. 15, cf. P. Księżak, op. cit., p. 8.

[81] A. Ohanowicz, *Bezpodstawne wzbogacenie* (1965), p. 963.

[82] P. Księżak, op. cit., p. 6.

the theory of equity derived from Roman law sources was very popular until the enactment of the civil code in 1964.

Nowadays, the prevailing conception in Polish doctrine is the lack of legal basis; the issue of common ground for unjustified enrichment claims is not so much disputed as it was before the enactment of the currently binding civil code. To a certain extent the conception of "legal basis" seems to be similar to Roman *causa retinendi*, but one cannot deny that Roman jurists assessed the *causa retinendi* from a considerably different perspective from the one from which we assess the lack of legal basis now. First of all the conception of *causa retinendi* seems to be significantly broader than the current concept of legal basis due to the fact that it was not confined only to arguments of purely legal nature and took into consideration also other values. Secondly, Roman jurists paid attention to the fact whether there was a ground for retention of the benefit whereas contemporary doctrine attaches more importance to the legal assessment of the transfer itself, not so much to the search for the ground for retention. The vast majority of the Roman application of *causa retinedi* related to different cases of undue performance whereas the contemporary institution of unjustified enrichment is applied to the enrichment "in another manner" as well, which means it is not limited only to undue performance.

## Streszczenie

Celem niniejszego opracowania jest prezentacja problemu tzw. *causa condictionis* (tj. wspólnej wszystkim *condictiones* podstawy roszczenia) w prawie rzymskim i ukazanie aktualności tego zagadnienia w prawie współczesnym, w szczególności w prawie polskim.

Autor prezentuje w zarysie wszystkie istotne poglądy wyrażone na ten temat w romanistyce, dochodząc do wniosku, że trudno wskazać wspólną jedną podstawę łączącą wszystkie rzymskie *condictiones*, niemniej najwięcej zwolenników ma teoria braku tzw. *causa retinendi* (tj. przyczyny uzasadniającej zatrzymanie wzbogacenia przez wzbogaconego), choć i ta koncepcja budzi zastrzeżenia. W części poświęconej prawu współczesnemu szczególną uwagę zwraca na poglądy doktryny sformułowane w czasach obowiązywania kodeksu zobowiązań z 1933 r. i kodeksu cywilnego.

W konkluzji autor dochodzi do wniosku, że współczesne teorie dotyczące wspólnej podstawy roszczeń z tytułu bezpodstawnego wzbogacenia są silnie inspirowane myślą jurystów rzymskich. W ten sposób źródła prawa rzymskiego przyczyniły się do powstania bezpodstawnego wzbogacenia jako instytucji prawnej.