

# Acknowledgement of Unjust Enrichment to Achieve Corrective Justice in the Path of Indonesian Law of Obligations Reform

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Abstract: The recent development to claim damages on the basis of either breach of contract (*wanprestatie*) or unlawful act (*onrechtmatige daad*) would not provide satisfactory grounds to the question of justice. There will be a situation in which that no one shall be unjustly enriched at the expense of another which all outside the scope of contract and tort. This has led to the existence of an independent legal doctrine known as the unjust enrichment. It is among the most debated private law subjects today in asking for justice. The corrective justice brings to the remedial relation between the plaintiff and the defendant; it is solely concerned with the norm of justice that provides reasons for the restitution. The corrective justice properly evaluates the structure of unjustness to both sides, i.e. the plaintiff and the defendant. It gives the effect to the restitutionary proprietary interests rather than compensation. This article elaborates the law of unjust enrichment as the ground for the restitution in conjunction with the corrective justice. Furthermore, this article focuses on the theoretical foundation of corrective justice to meet the unjust enrichment criteria.

## 1 INTRODUCTION

In the last few decades, the debate on Law of Obligations (Worthington, 2003) focuses on the attempt to discover the new basis related to the methods of restitution or indemnification for damages arising from the situation in which there is no contractual relationship between the parties. (Stone, 2000) To date, the basis used to demand restitution or indemnification in the Civil Code are dominated by two basic grounds, that is the parties' contractual relationship or the existence of unlawful acts. (Agustina, 2012) However, as time goes by, these two grounds are no longer considered to be effectively used in the development of law. These two grounds are deemed unable to accommodate a situation where there is no contractual relationship between the parties and also no unlawful act has been conducted by the beneficiary of the circumstances. (Stone, 2000) The most obvious and often used example to describe this situation is the occurrence of payment errors.

A customer who wrongly paid his bills twice should be entitled to a repayment of the second payment. However, in this kind of situation, the second payment made by the customer was done without any contractual relationship with

the seller, or does the seller make any mistake that causes the customer to make payments the second time. In other words, the customer is unable to file a lawsuit based on a contractual relationship or unlawful acts. This is clearly contrary to the basic principle of justice as one of the ultimate legal purposes, between the purpose of legal certainty and legal benefit. To resolve such issue and establishing a new concept of the fulfillment of justice, the concept of unjust enrichment could be applied. Black's Law Dictionary (1990) defines unjust enrichment as:

*"a general principle that one person should not be permitted to unjustly enrich himself at the expense of another but should be required to make restitution of property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly"*.

Some literature and articles mention that the application of unjust enrichment doctrine is to actualize the corrective justice doctrine. (Barker, 1995) Corrective justice concept itself is derived from Aristotle whom initiated the concept of justice. Aristotle (1894) stated that liability is a legal response to unjustness. Aristotle further claimed that the concept of justice can be distinguished into two types,

i.e. distributive justice and corrective justice. Distributive justice is defined as, 'manifestation of distribution of honour or money or the other things that are able to be divided; among those who have a share in the constitution, which may be allotted among its members in equal or in unequal shares.' (Rawls, 1992) Corrective justice, in the other hand, is defined as the actions conducted to balance something unbalanced due to unjustness.

Initially, corrective justice is only utilized as the basis to determine justice and liability in the unlawful acts, (Coleman, 1992) while distributive justice is used as the basis of fair distribution of rights and obligations between the parties in a contractual relationship. (Hernoko, 2008) This is drawn from the characteristic of corrective justice that seeks to eliminate unjustified gain achieved on the account of another party's loss. From the corrective justice doctrine, the beneficiary of an unjustified gain has the obligation to return the injured party to their original state. (Epstein, 1995) On the contrary, distributive justice emphasizes more on the efforts to provide or divide the rights and obligations of the parties proportionally; indicating that there is a contractual relationship as the basis to place the provisions of rights and obligations distribution. (Weinrib, 2009) The consequence of conceptual separation between distributive justice and corrective justice as claimed by Aristotle is that distributive justice cannot be applied as the basis of the emergence of someone's liability to another, (Klimchuck, 2004) but corrective justice is deemed to be more appropriate to be the basis of consideration of the liability's emergence.

The presence of unjust enrichment doctrine in the Civil Law system is well-known. However, the scope and setting of unjust enrichment are different in each and every country. The Netherlands, for instance, acknowledged the concept of unjust enrichment in the Article 212 Book 6 of NBW which essentially regulates that 'A person who has been unjustifiably enriched at the expense of another is obliged, insofar as **reasonable**, to make good the other's loss up to the amount of his enrichment.' (Warendorf, 2009) Such condition demonstrates that the unjust enrichment criteria in the Netherlands are very wide, i.e. as long as the return is 'reasonable' and can be calculated nominally, then the party obtaining the wealth or property in the 'unjust' way shall return the property to the rightful party. Meanwhile, in the United States of America ('USA'), based on the Restatement of the Law (Third) Restitution and Unjust Enrichment, the unjust enrichment criteria are a. A benefit which has been unjustly received (the 'enrichment'); b. A loss or detriment suffered, usually by the plaintiff; c. A

rule of law which deems the enrichment (or the retention of it) 'unjust'; d. A *prima facie* duty to make restitution; e. The absence of a valid legal basis for the payment or transaction (including voluntariness or election); and f. Absence of a defence.

In Indonesia, the concept of unjust enrichment is better known and widely discussed as a concept in the field of the Criminal Law, especially the Law of Corruption, which is adapted from the provisions of Article 20 of the United Nations Convention Against Corruption ("UNCAC") in 2003 that has been ratified by Indonesia through the Law No. 7 of 2006 on the Ratification of the United Nations Convention Against Corruption. The concept of unjust enrichment in the Article 20 of UNCAC is termed as illicit enrichment which can be freely translated as the wealth of unclear origin or the unnatural wealth. Article 20 of UNCAC states that:

*"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of public official that he or she cannot reasonably explain in relation to his or her lawful income."*

The concept of unjust enrichment that applied in Indonesia is clearly different to the initial concept of unjust enrichment that is derived from the Civil Code, especially in the field of Property Law. Under such circumstances, Indonesia should further regulate unjust enrichment as the basis of civil liability to respond to the unrest and public demand for justice, especially in the existing business relationships in the society, considering the concept of liability known in Indonesia so far, namely the liability based on the contractual relationship and the liability based on the unlawful acts, is still unable to accommodate justice and development of the society. For that purpose, this article attempts to elaborate the concept of unjust enrichment in the application as the basic claims for damages or returns in Indonesia based on the corrective justice doctrine, with the focuses of the discussion as follows: 1) the criteria for profit and loss in the unjust enrichment, and 2) the meaning of corrective justice as the philosophical foundation for determining the unjust enrichment criteria.

## 2 THE PROFIT AND LOSS CRITERIA IN UNJUST ENRICHMENT

Unjust enrichment is a form of legal doctrine formed in order to establishing a just civil relationship, especially in business activities. The concept itself is based on the principle that 'one shall not be allowed to unjustly enrich himself at the expense of another'.

In the last few decades, unjust enrichment is developed as the basis for claiming indemnification within Common Law system, i.e. the principle that 'A person who has been unjustly enriched at the expense of another is required to **make restitution to the other**' in the Restatement of the Law (Third) Restitution and Unjust Enrichment which replaced the Restatement of Restitution (1937). In contrast, unjust enrichment has long been known in Civil Law system. (Diaz, 2007) The presence of the unjust enrichment doctrine firstly established within the Civil Code in the mid-1980s and since then, became a vital doctrine in the Civil Law system.

In the Netherlands, the doctrine of unjust enrichment began in 1992 through the provision of unjust enrichment in Article 6: 212 of NBW (Verhoeff, 2016) Meanwhile in Indonesia, some Scholars argue that the doctrine of unjust enrichment is equal to the provision of Article 1359 paragraph (1) of BW regarding the unpaid payments. The article regulates that 'each payment presumes a debt; each payment made which was not pursuant to a debt may be reclaimed.' However, this paper argues that the concept of unjust enrichment cannot be equalized with the concept of unpaid payment within Article 1359 paragraph (1) of BW.

The Law of England establishes that as an 'unjust' act must satisfy one of the following factors: 'a) Mistake of fact; b) Mistake of law; c) Duress; d) Undue influence; e) Total failure of consideration; f) Miscellaneous policy-based unjust factors; g) Ignorance/powerlessness; h) Unconscionability; i) Partial failure of consideration; j) Absence of consideration.' (Vout, 2005) Based on those criteria of unjust enrichment, it can be comprehended that the scope or jurisdiction of the unjust enrichment application varies according to its region. Therefore, it is needed firstly be determined the scope of unjust enrichment application so then the parties will be able to understand the limit of unjust enrichment.

In overcoming such problems, Common Law system applies the limitation to the right of restitution for payment error. Such restitution can only be granted if the transferor does not intend to make the

payment or transfer in the first place. The transferor in requesting the restitution then has the obligation to provide evidence, supporting that they have no intention to send their fund or property to the party receiving the payment.

However, a different approach might apply in a case between a house owner and a house decorator. The evidence to establish that the house owner has no intention to pay the decorator after the decoration has been done, is extremely hard to be submitted. This is due to the fact that the house owner enjoy benefit in the form of house decoration, and regardless the decorator itself being commissioned or not by the house owner, the benefit achieved brought the right of payment for the house decorator.

Both examples above demonstrate the firm differences in applying the unjust enrichment doctrine. In practice, however, it could be indistinguishable on which position does someone making the payment currently in. To solve such an issue, Common Law creates a borderline to distinguish when the payment can be withdrawn and when the payment is binding so that no withdrawal or refund can be made.

The first restrictive mechanism is the wrong intention (viated intention) which could be the basis for the paying party to argue that they do not intend to grant or make such payment to the party receiving the payment. In addition, as an effort to limit the number of proposed restitution requests, Common Law system also differentiates the 'causal mistakes' where the paying party commits a misstatement or there is a defect in the intention of the paying party, and the 'causal mispredictions' where the paying party makes a mistake in calculating the business risk. In the case of 'causal misprediction', the claim of restitution cannot be justified.

Secondly, the 'failure of basis' or the 'failure of consideration' could also be used as the mechanism to request restitution. The 'failure of consideration' in unjust enrichment means a failure of implementation, but it does not mean that there is a contractual relationship indicating a contractual obligation to be implemented. The 'failure of consideration' in unjust enrichment is unique and different from the concept in the contract law which defines the 'failure of consideration' as the state of 'no promised counter-performance'; making no binding contract can be concluded under the 'failure of consideration'. For instance, the house owner paid the house decorator but the decorator does not do their work. In such condition, the payment given could be restituted given the fact that the payment in the first place is intended to pay the decorator to decorate the house.

In this circumstance, there is no viated intention from the paying party. Thus, the paying party can only claim that his contract with the decorator is void. Such a claim can be done based on tort or based on the 'reliance damages' of payments made through unjust enrichment.

Those two limitations are considered by modern scholars as an outdated theory and could no longer apply in today's legal system. Nowadays, the limitations are reformulated from the 'viated intention' into the 'unintended transfer' because legally, the intention of the paying party is to engage in a contractual relationship and to make a legally binding payment. Yet, the request of restitution is made because the contract is defective. (Vout, 2005) In a similar vein, the second limitation is altered from the 'total failure of consideration' into 'unintended gift'. This formulation is used when the payment made as a result of a commercial engagement, not as a gift. In other words, the paying party does not intend to award a gift to the party receiving the payment.

Moreover, the modern jurists pointed out that if a contract is void whereas one of the parties has not made any achievements or obligations under such contract, then the party who has not obtained the contra-achievement may file a claim on the basis of unjust enrichment. The claim cannot be proposed based on the material claim because the status of the claim is *in personam* not *in rem*, in the sense that what the plaintiff initially demanded the performance of the defendant's duty, not the demand to return the payment given to the defendant.

*In personam* jurisdiction is a jurisdiction over individual (*person*), which means that the court has the authority in deciding the case of the defendant for the unlimited amount and concerning all of his assets. Meanwhile, *in rem* jurisdiction is a jurisdiction over things (*res*) in the forum country area, which is directly or indirectly related to the encountered case. (Harley, 2010) However, in Indonesia, the claim that distinguishes the *in personam* and the *in rem* lawsuit has yet been used nor understood by legal practitioners in Indonesia.

Based on the explanation *supra*, it can be derived that the concept of unjust enrichment in the first stage is known as one of the engagement forms that creates rights and obligations, in addition to the commitments arising out of the agreement. As the basis for the emergence of the engagement, unjust enrichment doctrine also indirectly raises the rights and obligations of the parties for the profit and loss arising from the state of unjust enrichment. In this case, Kantian attempted to interpret Aristotle's original idea of the relationship between rights and obligations

by stating that the relationship between profit and loss refers to as the relationship between rights and obligations. Aristotle (1894) observed that:

*'Gain' is what it is generally called in such cases, even though in certain cases it is not the appropriate term, for instance, for one who struck another – and 'loss' for the one who suffered-but when the suffering is measured, it is called a loss for one party and a gain for the other.'*

Based on Aristotle's observation above, it can also be taken into account that the position of profits and losses is a mutual reciprocity, that if a party earns profits then in the other hand, another party will receive losses. Bearing in mind such position, Aristotle added that the corrective justice aspires the equality between the parties, so that if there is an event which disturbs the equality between parties and causing unjustness, then the corrective justice seeks to make the failing party to correct the losses that have occurred by returning the profit to the suffering party. By doing so, at a time the act eliminates both profit and loss, the parties will then return to the equal position again. (Weinrib, 2012)

Aristotle considered that it is the duty of a judge to be able to restore justice in the form of equality between such profits and losses among the parties. (Harahap, 2005) Thus, the emerged profits and losses also must have interrelated relationship. However, this relationship will then restricts the demand for restitution against a person, in which someone cannot demand a refund of payment to any person as he pleases, but these demands can only be requested to the parties who clearly benefit from the harm he suffers. This is what distinguishes the corrective justice and the distributive justice, whereas the distributive justice involves various profits and losses in accordance with several criteria. Within distributive justice, instead of solely putting one party as the perpetrator and the other as the injured party, distributive justice further divides the existing profits and losses to all parties. Furthermore, distributive justice does not limit itself to the relationship of two parties, but it can also be constructed between more than two parties. (Weinrib, 2012)

The concept of profit and loss in unjust enrichment cannot be equalized with the profit and loss of engagement arising from the contractual relationship or unlawful acts. In Indonesia, the formation of loss within its civil code originated from the tort of unlawful acts. Based on the provision of Article 1246 of BW, it can be seen that the element of loss in tort consists of cost, loss, and interest. (Muhammad, 1982) At the same time, the losses in unlawful acts are not clearly stipulated. It is only

slightly appear within Article 1371 paragraph (2) of BW and Article 1372 paragraph (2) of BW which indicates that the losses due to unlawful acts are only in the form of scades or losses only. Furthermore, the losses in unlawful acts include material losses and immaterial losses that could be assessed by money, while the losses in tort are only in the form of material losses. (Agustina, 2002)

In the concept of corrective justice, the concept of loss is formed through the connection between loss suffered and benefit gained by other through unjustly manner. (Weinrib, 2012) The emerged loss due to the unlawful acts, for instance, appears when A injures B, thus the loss suffered by B can be regarded as a loss if the loss can be measured and it benefits other party at the same time.

### **3 CORRECTIVE JUSTICE AS THE PHILOSOPHICAL FOUNDATION TO DETERMINE UNJUST ENRICHMENT CRITERIA**

The term 'unjust' in the unjust enrichment doctrine indicates that this doctrine closely related to the principle of justice since the concept of 'unjust' should clearly describe the justice itself. (Susanto, 2010) In relation to the concept of 'unjust', Peter Birks mentioned that '... "unjust" can never be made to draw on an unknowable justice in the sky.' (Birks, 1985) According to Peter Birks' the discussion on unjust concept cannot be separated from the discussion of the concept of justice itself. The question regarding justice concept is the fundamental question that always becomes the main topic of discussion all the time. Similarly, Robert Reiner in his work 'Justice' assets discussion on the concept of justice as an 'essentially contested concept'. (Penner, 2004)

The problem arisen from justice, according to Rawls, is in the abstraction of justice in general on the various legal relationships emerged in the society. For instance, the formation of contractual relationship within certain community that abides to specific set of rule as their 'basic structure of society' and further determines the value agreed by the aforementioned community. Within this community, what considered as justice may contradicts with what the general community abides to. A well-known example is the construction of justice within a company which abides to Company Regulations. (Wacks, 1995)

On the other hand, Hart establishes the 'legal positivism' which is contradictive with the concept of the natural law theory. He claimed that (1) a set of regulations (the primary rules) that is officially acknowledged is the law, and (2) the society should accept and adjust themselves to the acknowledged regulations as the 'primary rules'. Each regulation legislated is the enforced and valid law. The enforceability of the legislated and enforced regulations is still binding even if the regulations are never accepted or applied by anyone at all. Moreover, Hart mentioned that the validity of a regulation should be distinguished from the effectiveness of the regulation enforceability. The positivists emphasize the acknowledgement of a regulation based on the effectiveness. The ineffective regulation will still prevail and be valid as long as it is not revoked by the sovereign authority. The opinion of Hart is read in a close heart with John Austin's perspective that regulations have a sovereign authority if the sovereign obtains the trust from the society. Thus, justice within 'legal positivism' perspective is viewed as the justice that is contained in the rules of law which are institutionalized by the authority.

The scholars' opinion *supra* indeed cannot be directly related to the injustice within 'unjust enrichment' doctrine properly. As it is known that the most fundamental thing in placing the rationale of unjust enrichment doctrine is the absence of justness, one of the possible approaches to be taken is through assessing whether the increase of benefits obtained by a person is unjust. Additionally, the appropriate theory of justice to be applied is the corrective justice theory. The corrective justice theory weighs upon the correction toward unjustness occurred between the parties. The unjustness committed by the defendant and suffered by the plaintiff is a reciprocal entity that is *mutatis mutandis* toward the burden of liability.

Additionally, the concept of unjustness should also be firmly determined. The unjustness structure comes from the claim on the rights and the discharge of obligations. In principle, the corrective justice can only be enforced if the unjustness structure is aligned with the correlative structure of liability. Thus, in submitting a claim under unjust enrichment, the loss suffered should also be proven to have relation with the benefit received by the other party.

The correlative structure toward unjustness aims to reach coherence and fairness. The structure of correlative justice intended to return the positions all parties, both the plaintiff and the defendant, in the equally unjust circumstances, thus each party is given the burden of liability. The correlative structure is based on the principle of wholeness (the thematic

unity). (Harbermas, 1998) Based on the principle of wholeness, every liability always correlates with the engagement characteristics emerged from the parties, for example, the engagement arises from contractual relationship and unlawful acts which then emerged from negligence. In creating a correlative structure that can be determined as an intact (unity) structure, it shall then be articulated in each legal concept underlying legal relations between the parties. *Ergo*, the concept then becomes the foundation for determining the single measure of unjustness that applies to both parties.

It is reaffirmed that engagement is conveyed from the contract and unlawful acts. The two concepts bring the different consequences of liability. From the contractual relationship aspect, in assessing unjustness in the contractual relationship, it can be identified through the principle of good faith underlies the relationship of the contractants. Normatively, good faith is one of the essential principles in evaluating the contractual justice made by the parties. The measurement of contractual justice is placed on the good faith and good conscience either from the stage of contract formation to the stage of contract implementation, even the actualization of the good faith principle is implicitly contained in the clauses of the contract. Andrew Wallis adds that the good faith requires that the parties should conduct the acts reasonably in achieving the contractual justice. (Wallis & Maslem, 2001)

On the other hand, for engagement that emerges from unlawful acts, the approach used is the existence of violation off the laws and regulations as well as norms of propriety and prudence. The working power of the unlawful acts concept must be found between the points of error or negligence, with the losses suffered caused by actions that are qualified as unlawful (wrongful) acts. In creating the collective structure of unjustness, a form of unjustness that can be applied to both parties should be formulated. The purpose of such is to provide evident that the loss suffered by the plaintiff is indeed a logical consequence of the mistake or negligence conducted by the other party. Meanwhile, in unjust enrichment case, the working power of unjust enrichment concept does not require the evident of whether there are good faith and honesty in the contract or whether there is evidence of error or omission, since the claim of unjust enrichment is not based on a contractual relationship or the unlawful acts. The working power of unjust enrichment concept emphasizes more on the existence of 'unjust' addition of wealth or property that causes a loss on one party and profit on the other. (Vout, 2005)

As explained *supra*, every unjustness or inappropriateness in acquiring wealth or benefits resulting in losses on one party and profit on the other cannot necessarily be said as 'unjust'. It still needs an addition condition whereas every advantages or benefits obtained should fulfil the elements of 'unjust enrichment'. In other words, the determination of unjust enrichment criteria is essential as the basis for applying the unjust enrichment doctrine. One way to determine the criteria of unjust enrichment is deriving it to the corrective justice concept as stated by Aristotle. (Rawls, 1992)

Aristotle's perspective on justice starts from that the virtue idea of natural law. Whereas when justice is based on the natural law, it cannot change and stay the same wherever it is, while the justice created by human is not the same in every place since it depends on the constitution in which the law is created. (Llyod, 2002) The perspective of Aristotle provides a description of law, that the highest law is defined as someone who never changes, otherwise, the positive law will always change. In analyzing justice, Aristotle differentiates justice in general and justice in particular sense. Generally, there are two concepts of justice, namely lawfulness and equality. For justice in particular, there are two kinds of justice, i.e. the distributive justice and the corrective justice.

In the practice, the general criteria used by some countries to determine whether one has been enriched unjustly derived from the verdict of *Everhart vs. Miles* (47 Md. App. 131, 136, 422 A 2D) which are: 1) there is a benefit or advantage given or done by the plaintiff to the defendant, 2) the benefit or advantage is valuable or understood by the defendant or in other words, it has the economic value, and 3) the defendant receives or retains the benefit and it is improper (unjust) if it is not accompanied by the payment.

The three criteria of unjust enrichment are the results of Aristotle's classical theory regarding the corrective justice that attempts to eliminate the mistakes towards advantage that is received unjustly by a person and the disadvantage suffered by another person on the other side. (Weinrib, 2005) Aristotle also suggested the concept of liability, which is a form of responses toward the unfair profit received by the defendant against the loss suffered by the plaintiff, in which, if there is an unjust enrichment, then there is an obligation for the beneficiary to make restitution to the suffering party. (Smith, 1992)

The thing that differentiates the application of unjust enrichment among countries lies on the scope of improper acts (unjust) as one of the criteria of unjust enrichment. Based on the English Law, it must meet one of the following factors to state the

existence of unjust enrichment: a) Mistake of fact; b) Mistake of law; c) Duress; d) Undue influence; e) Total failure of consideration; f) Miscellaneous policy-based unjust factors; g) Ignorance/powerlessness; h) Unconscionability; i) Partial failure of consideration; or j) Absence of consideration.

In the relation of the concept of appropriateness (equity) as the *a-contrario* of the concept of inappropriateness (unjust), Aristotle argued that equity is complementary to the fairness of justice and as the guardian of the law implementation, since equity is outside the legislation (the law) yet, also demands justice in certain circumstances. (Curzon, 1987) The existence of equity itself does not mean to change or diminish justice. However, it is proposed to correct and/or complete certain individual circumstances, conditions, and specific cases. In other words, equity imposes the justice values in the relationship among individuals with the purpose of reinstating the parties to their proper positions.

In the countries that adopt civil law system like Indonesia, the principle of equity is implemented in the principle of good faith, propriety and merit or appropriateness. One of the implementations of equity principle in Indonesian legal system can be observed in Article 1339 of BW which states that 'Agreements shall bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by **propriety** (*billijkheid*), customs, or the law.' Moreover, the principle of equity is also reflected in the provisions concerning the unlawful acts, namely by extending the scope of unlawful acts based on the Decision of *Hoge Raad* on January 31, 1919, which extends the criteria of unlawful acts, including the acts contrary to the accuracy that should be considered in the public traffic. (Niewenhuis, 2008) Meanwhile, what is meant by the principle of appropriateness (equity) in the unjust enrichment in Indonesia has not been arranged.

It is also worth noting that until now, Indonesia does not yet have a regulation that specifically regulates the act of unjust enrichment in the field of Civil Law. Some scholars argue that the concept of unjust enrichment has been accommodated in the Law of Obligation, especially in Article 1359 paragraph (1) of BW about the unpaid payment which states that 'Each payment presumes a debt; each payment made which was not pursuant to debt may be reclaimed'. Referring to the clauses of Article 1359 paragraph (1) of BW, there are some elements that can be recognized, i.e. 1) there is a payment; 2) the payment is based on the presumption from the

paying party that they have a debt; 3) the debt, in fact, does not exist; 4) the payment made can be reclaimed.

Those elements indicate that it is as if payments are always in the form of money or material. Meanwhile, as has been previously described, the scope of the unjust enrichment doctrine is not limited only to the objects of money, but it can also be in the form of commodity, even the performance that emerges the rights to file a claim for recovery of compensation for the benefit. (Stone, 2005) Other than that, the provision of Article 1359 paragraph (1) of BW also presumably restricts that the payments made on an unpaid basis are only based on the mistakes of fact, i.e. due to the prejudice that the paying party has a debt, yet they actually do not. This clearly extremely limits the criteria of unjust enrichment that also can be based on the mistakes of law, duress, and many other factors. Therefore, it can be ascertained that the provision of Article 1359 paragraph (1) of BW cannot be equalized to the concept of unjust enrichment, but only the small part of the scope of the unjust enrichment concept.

Even if it is presumed similar to the provision of NBW, Article 1359 paragraph (1) of BW can only be categorized as a form of performance that is not as referred in the Article 203 until the Article 211 Book 6 of NBW. Meanwhile, the NBW has regulated unjust enrichment in the separated subchapters, namely in the Article 212 Book 6 of NBW. Hence, it is necessary to regulate the basic application of unjust enrichment doctrine independently in Indonesian legislation, with the aim of providing the foundation for the losing party to claim restitution toward their wealth or properties despite the condition there is no contractual relationship as well as there is no error or negligence in the beneficiary.

The justice and moral values contained in the unjust enrichment doctrine are the requirements of providing the legal protection for a person whose rights are decreased improperly (unjustly by another party). In this case, although unjust enrichment doctrine has not yet being accommodated in the positive law of Indonesia, this paper argues that such doctrine could and should be applied in Indonesia. This is in order to achieve the purpose of corrective justice which attempts to correct the presence of unjustness in a relationship of a party and another. *Ergo*, the loss suffered by the plaintiff and the benefit enjoyed by the defendant unjustly, can be returned in its initial equal position.

## 4 CONCLUSION

The profit and loss in the unjust enrichment are defined as a system of mutual reciprocity, in the sense that when there is a loss on one party, then there will be advantages on the other side. Unlike the profit and loss in both the contractual relationship and the unlawful acts, the profit and loss criteria in unjust enrichment are more than merely a value that can be calculated mathematically. Rather, the concept of profit and loss normatively refers to the distinction between what the parties discharge and what they must have in accordance with the norms governing the interaction or engagement between them. In other words, the existence of loss and profit alone cannot indicate the existence of unjust enrichment. In order to determine the existence of loss and gain in unjust enrichment doctrine, then the actions which cause loss and profit must fulfil the criteria of unjust enrichment. Therefore, the basis for determining the normative profits and losses is the relevant legal norms governing the criteria of unjust enrichment itself.

Corrective justice as the philosophical foundation of unjust enrichment attempts to eliminate the unjustified gain which causes loss on the other party and intended to provide restitution to the injured party. Hence, the criteria for determining unjust enrichment should be adjusted to the purpose of justice that is carried in corrective justice.

## 5 SUGGESTIONS

1. There should be reformulation toward the basic criteria of the lawsuit of tort and unlawful acts that still conventionally become the basis of a compensation claim against unjust enrichment doctrine. The repositioning of unjust enrichment doctrine in Indonesia has been used as the basis for determining errors in criminal acts should be returned to its basic purpose, i.e. the Civil Law.
2. In reaching corrective justice, unjust enrichment doctrine needs to be incorporated into court decisions by putting back the basic principle of separation between the lawsuit of tort and the lawsuit of unlawful acts.
3. The incorporation of unjust enrichment doctrine also becomes the basis of a change of national contract law system, especially the law of obligation as the basis of lawsuit restitution claim in Indonesia.

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