

Application Dilemmas of the Rule Excluding Restitution for Illegal-Cause Performance and Its Alternative Approaches

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Abstract: The rule excluding restitution for illegal-cause performance refers to the principle that where a transfer of property is made for a purpose that violates mandatory provisions of law or contravenes public order and good morals, and the underlying juridical act is therefore invalid, courts shall deny the transferor's claim for restitution. As an ancient legal maxim, this rule seeks to deter unlawful conduct by depriving the illegal performer of restitutionary remedies, thereby safeguarding the coherence and authority of the legal order. However, in the context of the implementation of the Civil Code of the People's Republic of China, the application of this rule has encountered substantial doctrinal and practical difficulties. This article systematically examines the major dilemmas arising from the application of the exclusionary rule and, on the basis of a critical review of existing scholarly approaches, proposes alternative solutions. It aims to contribute to the development of a clearer and more coherent framework for resolving disputes concerning illegal-cause performance within the existing civil law system.

Keywords: illegal-cause performance; exclusion of restitution; application dilemmas; alternative approaches; Civil Code

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1 Introduction

Within the system of the Civil Code in China, the problem of restitution caused by illegal-cause performance has become a hot topic, but it has not been explicitly provided for in the legislation, and judicial interpretations and academic discussions are still contradictory. How to build an adjudicative system in accordance with the basic rules of civil law, how to incorporate normative evaluation, how to unify judicial standards, and how to ensure fairness for individuals have become urgent problems in both theory and practice. Therefore, this paper will focus on addressing the above issues.

Performance in bad faith is the transfer of property for a purpose that is prohibited by mandatory laws or violates public order and good morals. For a long time, comparative law has had a traditional rule regarding the disposition of property after the invalidity of such conduct, which is that restitution shall not be provided for illegal-cause performance. In China, however, this rule has not been explicitly included in the law. Article 157 of the Civil Code sets up a general system for the legal effects of invalid juridical acts, but does not distinguish among different reasons for invalidity. This kind of legislation is not suitable for the problem of performance based on illegal grounds and generally has serious defect problems. In light of the above circumstances, the mechanical application of general restitution rules may not reflect the law's negative evaluation of unlawful conduct and may even produce perverse incentives.

In addition, Article 985 of the Civil Code does not explicitly state that performance based on an illegal reason will not constitute unjust enrichment. Due to the lack of this legislation, courts have been in a difficult position to address the rising number of illegal-cause performance disputes and have adopted various judicial paths, leading to different verdicts for the same cases. Therefore, there will be a lack of stability in judicial administration and we need to construct a complete system promptly.

Based on the above, this paper will use a typological method to explore some possible solutions to the problem of illegal-cause performance disputes in the current legal system. To help better address this issue, the category structure of all kinds of illegal-cause performance has been established in theory. In practice, it is to provide the courts with an organised and practical way to handle cases that can balance the consistency of norms with the fairness required in specific cases.

2 Application Dilemmas of the Rule Excluding Restitution for Illegal-Cause Performance

Although it is a rule of law, the exclusion of restitution for performance based on illegal causes has faced various problems in practice and is thus not suitable for addressing serious disputes.

2.1 Rigid Application and Injustice in Individual Cases

First and foremost, the exclusionary rule is used to punish the party that has committed an illegal act. It is too rigid and general; therefore, it may not be suitable in all cases. This is a more serious problem when both parties are at fault; otherwise, according to the rule, only one party will be liable for penalties and the other will be relieved. For example, in the case of paid intermediation for personal connections, if the entrusting party has paid money but the expected result does not occur, a strict application of the exclusionary rule would result in a total loss for the entrusting party, and the intermediary would be able to keep the payment without fulfilling any obligation. Therefore, it is not in line with the general concept of fairness.

As Chen Susu has pointed out, the exclusionary rule may, in fact, allow the beneficiaries of illegal acts to keep the advantages obtained from those illegal acts indefinitely and thus fail to achieve the purpose of such a rule. The first performer will be held responsible for the

illegality, and in the case of unilateral prior performance, the recipient will not be prejudiced.

2.2 Complexity and Uncertainty of the Principle – Exception Model

To alleviate the strictness of the exclusion principle, many other countries' legal systems have adopted a "rule with exceptions", and therefore, although generally not to be compensated, it may be in certain cases. However, the determination and application of such exceptions are not clear; for instance, it may be that there is a difference in fault, no intention to be illegal, or voluntary abdication of the illegality. The accumulation of exceptions often results in too many doctrinal problems and unpredictability for the judiciary.

Ye Mingyi has pointed out that the rule lacks an objective criterion and has too many layers of exceptions. In order to correct the unreasonable results, advocates of the rule have been forced to add more and more detailed exceptions; thus, the interpretation of the law by judges has become increasingly cumbersome and unstable. Instead of resolving the dispute, this may cause more division in the court.

2.3 Difficulties in Systemic Integration

Since there is no specific provision in the law, it is not included in the current civil law system. Some scholars have proposed applying the rule by expanding the interpretation of the existing provisions, in particular by interpreting Article 985(3) of the Civil Code - performance made with knowledge of the absence of an obligation - as including illegal-cause performance. Although the above method provides a doctrinal support, it may be too far from the common understanding of the provision and therefore fail to distinguish between unjust enrichment and property law.

Illegal-cause performance may also be subject to the criminal law and the administrative law. Coordination of civil remedies with public-law sanctions and consistency across different areas of law are still problems in the application of the exclusionary rule.

2.4 Inconsistency in Judicial Practice

Due to the absence of laws and theories, different courts have taken various paths in handling cases of illegal-cause performance. Some courts strictly follow the old maxim and do not grant restitution; others cite the principle of fairness or good faith to support the grant of restitution; still others use public-law measures to confiscate the illegal gains. Lack of consistency in the judgements will reduce people's trust in the fairness of the courts.

3 Scholarly Debates on Approaches to Illegal-Cause Performance

Academic discussion has been concentrated on whether and how to regulate illegal-cause performance, and thus, the affirmative view and the negative view have been proposed, each with its own institutional ideas.

3.1 Debate on the Necessity of Institutional Framework

The affirmative view is that China should learn from comparative law to add an explicit rule to prohibit the return of payments made for unlawful reasons. Tan Qiping thinks that, in principle, such payments should not be returned; otherwise, only if the recipient acted unlawfully on their own initiative or for reasons of law and order or public interests would they be subject to refund. Li Yongjun and Li Weiping put forward that the law should make specific provisions for the presumption of cause, the determination of illegality, the consequences of payment and circumstances for restitution. In principle, according to the above analysis, the payer under an unlawful cause should not be liable for restitution. However, if the recipient violates the mandatory provisions that affect the validity of the contract or harms the public interest, then restitution may be ordered; otherwise, if the payer does not have a reason related to the wrong, or only violates mandatory provisions or social morality, it will not be subject to recovery. For payment failures that only violate moral requirements outside public order and good morals, there will be no natural obligation. Li Xianbo believes that the law should clearly state in China that the beneficiary did not have malicious intent and may keep the illegal gains; thus, confiscation measures should not be applied. In short, the positive theory seeks to unify the application of law by adding explicit rules and has an idea of the unity of the legal system. However, this doctrine has its own problems; its proposed handling model may not be suitable for the actual situation, resulting in fairness issues for individuals, and it is also inconsistent with the current legislative system in China, as the Civil Code has not stipulated this matter specifically.

On the other hand, the negative school of thought is cautious about introducing the exclusion rule for restitution. They believe that the rule has a logical contradiction in theory, will lead to serious injustice in practice, and is not in line with the current legal system of China. Wang Tao thinks that although Article 985 of the Civil Code does not explicitly mention payments made for unlawful reasons, an extended interpretation of Article 985(3) can achieve the same effect. In fact, a payer who knows that the contract is unlawful and void can be considered to have "knowledge of the lack of a payment obligation", and Yin Tian believes that the rule "no restitution shall be sought for payments made for unlawful purposes" is based on the premise that the parties achieved their unlawful goals by means of these payments. As "objective" cannot be restored in an objective manner, to permit restitution for such payments would be to reward unlawful behaviour; thus, it is unacceptable both in principle and in practice. Chen Susu also puts forward that public law confiscation and the flexible application of the public order and good morals principle for case-by-case balancing can fully replace the function of the exclusion rule for restitution without having its disadvantages. In short, the "Negative Theory" is about the problems of applying the restitution rule and proposes finding solutions in the domestic legal system; it is relatively practical. However, there has been no establishment of a general and regular legal system to address the various issues of payment for unlawful reasons in judgments.

3.2 Controversy over Pathways for Institutional Construction

Academia has put forward many constructions in recent years; the main ones are:

- (1) Legal Principle Application Theory: Ye Mingyi believes that when there are no specific provisions in the Civil Code, the theory of

payment for unlawful reasons can be used in individual cases by means such as public order and good morals, good faith, or prohibition of abuse of rights. Xu Guodong believes that the prohibition on seeking restitution for payments made for unlawful purposes is a "clean hands rule", that is to say "he who has unclean hands shall not be saved", and puts forward the idea of good faith to address such problems. It is flexible but does not have specific rules.

(2) Dynamic Evaluation Framework Approach: Wang Hong and Gao Fan, scholars, have put forward the "series of factors" approach in the UK case of *Patel v. Mirza*. Dynamically assess the right to compensation based on the purposes of rule-of-law conformity, the circumstances of the wrongdoing of the parties and the subjects involved, and consider various reasons for the absence or inequality of culpability among the parties. Wang Xuwen believes that, in line with the system of comparative law, "restitution" and "non-restitution" are contrary norms. Among the many connections among them, the essential reference points for the substantive factors of the principle-exception structure in comparative law that determine restitution are: the purpose of the norm, the extent of unlawfulness, and whether unlawful consequences have occurred. Therefore, it has the advantage of material justice and requires strong judicial power.

(3) Non-Debt Discharge Interpretation: Wu Zhicheng proposes extending the interpretation of Article 985(3) of the Civil Code to include payments made under the condition that there is no obligation to perform, such as payments for unlawful reasons. Wang Tao also puts forward that, to solve the problem of unlawful payment restitution in the current provisions of the Civil Code, analogical interpretation combined with a dynamic evaluation system should be employed. It is in accordance with the law; however, we should be cautious about how to interpret it.

(4) Natural Obligation Theory: Li Yongjun and Li Weiping have put forward that, for acts of minor illegality, such as payments that only violate mandatory provisions in regulations or social morality but do not fall under the scope of public order and good morals, natural obligations can be used as the basis for regulation. Qin Yuanchun proposes that payments made for unlawful reasons can be converted into natural obligations in a reasonable way and thus have the purpose of restricting restitution. It will be a deviation, but it cannot be considered an unlawful act.

Although they have different paths, all these theories aim to provide a basis for the interpretation of the Civil Code in judicial application. Therefore, Chinese universities have begun to combine practical and normative elements. However, the present studies are still scattered, and a general analysis system that can coordinate existing resources, handle all kinds of cases, and provide stable but flexible direction for judicial practice has not been formed.

4 Constructing Alternative Solutions for the Return of Unlawful Payments from a Typological Perspective

As the current laws have not specifically stipulated that unlawful payments should not be returned, applying the same rule to all disputes involving such payments will make it difficult to achieve both the maintenance of legal order and justice for the individuals concerned. Instead of a general discussion on whether to introduce an exclusion rule, strengthen the application path of law by developing different kinds according to type under the current legal system could better reduce friction in judicial practice. Therefore, this paper will try to conduct an organised reconstruction of the handling paths for cases of unlawful consideration based on typological analysis.

4.1 Theoretical Necessity and Normative Legitimacy of Typological Analysis

The main reason for the long-standing problem of theory-practice misalignment in cases of unlawful consideration is their high degree of diversity; that is to say, across all these cases, there are different origins and levels of unlawfulness, various kinds of damaged legitimate interests, and other types of fault among parties. In light of the above, if we strictly follow the general rule of "no restitution" or "full restoration", it will be difficult to achieve an equitable result in some individual cases.

The purpose of typological analysis is to predict legal consequences by considering various ways facts and values can be distributed, rather than to exclude the existence of rules. The introduction of typological methods in the calculation of unlawful gain has the following three reasons: First, it can help avoid the mechanistic application of the exclusionary rule and mitigate the structural injustice of "punishing one party while rewarding another"; Second, it is convenient to incorporate problems of unjust enrichment into the existing system of the Civil Code by dividing them into different types and connecting them with other systems, such as unjust enrichment, public order and good morals, and fault liability. Thirdly, it has a certain arrangement of decision-making paths for judicial practice and is not too arbitrary.

Therefore, without introducing new explicit legislative rules, a typological approach can be used to address the issue of recovering payments made for unlawful purposes in a tiered manner and will be practical and in line with norms.

4.2 Classification of Illegal Consideration Payments and Approaches to Their Handling

Among the many kinds of consideration payments based on illegal reasons, those that are mainly due to violations of mandatory provisions in laws and administrative regulations are the most controversial and prone to disputes over restitution. In dealing with such payments, if only the basic rule that "payments made for unlawful purposes cannot be recovered" is used as the basis for judgment, it is often difficult to consider the different values of various illegal norms. According to different reasons for the illegality and aims of the norms, make some distinctions.

4.2.1 Sources of Illegality in Illegal-Type Unlawful Payments

The primary reasons for the illegality of illegal-type unlawful payments are that they have deviated from the norms stipulated in criminal law, administrative management and other mandatory provisions on validity. Not only is it against public order and good morals, but often it is specifically targeted by legislators for regulation in the law, thus having a systematic direction for illegality. Others do not engage in the

mandatory civil law system; for instance, they may purchase property in the name of another person to escape the purchase restrictions or use nominal contracts to hide the illegal purpose of financing. All payments resulting from all kinds of illegal acts fall under the general category of "illegality", but their specific circumstances and reasons are different.

Therefore, when addressing payments with unlawful causes, one should first determine which specific type of norm has been violated by the act of payment, and not merely rely on the general label of "illegality" to decide whether to order restitution.

4.2.2 The Right to Claim Restitution for Illegally Obtained Payments

Whether to refund such payments has not been settled and there are two different views in academia and practice. Advocates of restitution believe that, in accordance with the requirements of Article 157 of the Civil Code to return property obtained by means of illegal acts, unlawful payments should also fall under the scope of restitution. If the recipient obtains the property without a legal basis, it will be considered payment-type unjust enrichment, and thus a claim for restitution can be made in an unjust enrichment lawsuit. The other side is to ban all forms of restitution and hold that illegal enrichment is not the same as unjust enrichment. The payer is involved in the illegal act and, as such, is not protected by law and should not be able to seek legal remedies. Restitution would be "encouraging" such behaviour and would therefore lack the dissuasive force of the law.

It can be seen that the pro-restitution position aims to protect the interests of the debtor and achieve an even balance; thus, it is argued that the anti-restitution view will reduce the role of regulation and risk prevention in law by denying restitution. Payments made in bad faith are not considered legitimate interests under the law. Restitution would "encourage" illegal solicitation; that is to say, even if it was not for a specific reason, the payer would still receive the full amount and thus promote a poor societal value orientation.

Based on the above methods and applying the principle of fairness, if both parties have violated the law or public order, the claim for restitution should be denied. If only the payer has acted unlawfully or breached public morality, an outright refusal is not appropriate; therefore, the interests of both parties need to be taken into account. Only when both parties know that they are involved in illegal activities should restitution be denied. If the recipient did not have malicious intent or was merely exercising a lawful right, restitution may be granted. In light of the actual circumstances and aims of the rule of law system, judges will decide differently for different cases. The following are the general analytical indicators: 1. Determine whether the payment falls under the category of payment based on an unlawful reason, etc. Weigh the effect of the breach on legal order and public interests, as well as the subjective fault and motives of the parties; 3. Overall consideration should be made based on the objective of the rule. Restitution will only be considered in the special circumstances that do not violate the goals of prohibitive norms. This way will not lead to indiscriminate damage and will also keep the rule-of-law system stable and orderly.

4.3 Classification and Handling Approach for Unlawful Consideration Based on Immoral Causes

Unlawful consideration due to immorality is a reason for the debt that is not expressly prohibited by law but is gravely against public order and good customs or moral norms. Compared with unlawful consideration, this category is more subject to value judgement and therefore requires typology for classification.

In payments that are prohibited for the purpose of benefiting from illegal acts, such as those based on violations of sexual ethics or surrogacy fees, the main purpose of the regulation is to stop people from making money through immoral behaviour. In such cases, if only the exclusion rule is applied, it will give rise to unjust enrichment by the defendant and thus violate the spirit of public order and good morals. Therefore, the restitution claim should generally be approved in this case to restore the original situation and take away the benefits enjoyed through the illegal act.

Restitutory payments are "activity fees" for favours, and they are both bad acts. The problem in resolving such a case is not whether the act is against the general rules of society; rather, we should consider whether it achieves its original purpose and how serious the fault of both parties is. If the goal has not been achieved, continuing to refuse compensation will fail to meet the requirements of law and order and may even encourage the behaviour of unjust enrichment. Therefore, restitution should generally be given. If the purpose has been achieved, a comprehensive judgment will be made based on the normative objective, comparative fault and its connection with public law liability.

Payments made in the course of protecting the rights and interests of vulnerable subjects under coercion or control can be subject to withdrawal on the grounds that the purpose was false, but it is difficult to verify in practice. In such circumstances, the general system of unlawful act liability should be deviated from in order to uphold the protective purpose of law for the vulnerable. Restitution Claims should be based on this..

4.4 Handling Approaches for Unlawful Consideration Involving Concurrent Violations of Statutory Law and Public Policy

In judicial practice, unlawful consideration is rarely a single case of "statutory violation" or "public policy breach"; rather, it often has both characteristics simultaneously, that is to say, it violates the provisions of law and also contravenes public order, thus falling under the category of concurrent violations. Such cases are relatively serious in terms of lawlessness, need a high level of normativity, and fall under all kinds of liability. Simply using either of the above ways may not be suitable for solving the problem of value conflict, so we should be more cautious and comprehensive in addressing the issue of restitution.

4.4.1 Sources of Illegality in Concurrent Unlawful Cause

The illegality of a concurrent unlawful act usually takes the form of the following two cases: First, the payment itself is contrary to the criminal law, administrative regulations, compulsory provisions of the civil code, etc., and therefore falls under the category of state coercion. Second, in general, it goes against the morality of society and is therefore considered immoral. At the level of norms, illegality caused by the violation of the written rules of law is generally more explicitly provided for by institutions and has an obvious basis for determination.

Immorality is a general negative attitude that rejects the value system of the act and thus has an auxiliary, catch-all effect. As such payments do not have a legitimate civil legal basis, the contracts or agreements are invalid due to an unlawful reason. At the same time, because the act violates mandatory provisions of criminal and administrative law, it is also liable to penalties under public law and thus constitutes both a breach of the rule of law and harm to the public interest. At the same time, according to the provisions of the Civil Code, it may also be necessary to compensate for losses in property, and under criminal or administrative law, confiscation of illicit gains may be imposed.

4.4.2 Determining Restitution for Payments Made for Unlawful Causes in Concurrent Cases

When the payments made due to unlawful reasons are subject to criminal or administrative law, the priority of criminal regulation should be given by applying the rules of unlawful acts first. If the act of payment is a crime or an administrative violation, the civil court should consider that it is not a purely economic dispute and apply criminal law provisions for resolution. According to Article 139 of the Supreme People's Court's Interpretation on the Application of the Criminal Procedure Law of the People's Republic of China, if a defendant illegally takes or uses another person's property, that property shall be returned or restituted in accordance with the law. If the victim files an incidental civil case or separately files a civil case to recover unlawfully obtained or used property, the people's court will not accept it; this is in line with the principle of criminal priority, that is to say, the disposal of illicit gains should be handled under provisions of criminal law, and civil channels are not allowed to operate simultaneously. In addition, if the payment is confiscated by administrative authorities because it falls under the scope of administrative violations, it is also considered "already confiscated", and generally, it is assumed that there will be no restorable property. Therefore, in cases of the intersection of illegal and unlawful acts, as long as the behaviour violates criminal or administrative legal norms, the logic of criminal regulation shall prevail, and it will be presumed that the payment cannot be recovered through civil litigation.

5 Conclusion

There are many problems in the practice of the rule excluding restitution for payment under unlawful circumstances, such as irregular application in all kinds of cases, lack of clear standards, difficulty in systematic inclusion, and inconsistent judicial interpretation. Supporters and opponents of academic discourse do not agree on whether to retain or abolish it; all have put forward various suggestions, such as introducing laws, amending changes in the evaluation system, adjusting non-contractual discharge, altering natural debts, etc., each with its own strengths and weaknesses. In the absence of specific provisions in the Civil Code, this paper believes that it is more feasible and practical to build a flexible system based on typology than to introduce a rigid "principle-exception" model. By dividing the payments for unlawful reasons into the three categories of illegal acts, acts contrary to public order and morals, and simultaneous illegal acts, and giving different judicial considerations according to the nature of each type, it will be possible to provide clear and flexible directions for judicial practice in line with the existing legal system and promote fairness in individual cases. This framework will help to unify the system of legal criteria and ensure the regularity of judicial standards; thus, it is hoped that the problem of restitution for payments made in violation of the law will be resolved. In the future, based on more judicial cases, new types of law will be developed.

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