

# Study on Payment System for Illegal Reasons from the Perspective of Comparative Law

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**Abstract:** The treatment of the issue of payment for illegal reasons reflects the difference of their standards for the identification of illegal acts: China's legal system attaches importance to the integrity of the article, the Anglo-American legal system attaches importance to the fairness of the case, and the mixed legal system deals with the compromise. In our country's current laws, there are some problems such as the ambiguous expression of clauses, the public order and the good custom interpretation of morality, which can easily lead to the different judgment of class cases. It is suggested to implement the hierarchical treatment of illegal causes to avoid the abuse of the principle, and establish a flexible proportional return mechanism to balance legal deterrence and case fairness. The development of digital payment needs to cope with new challenges such as cryptocurrencies and smart contracts, and the management rules of blockchain technology characteristics should be studied to build a whole-process management system from risk prevention to dispute resolution.

**Keywords:** Comparative Perspective; Unlawful Cause of Performance; Proportionate Sharing Rule; Ethical Constraint and Substantive Fairness; Public-Private Law Collaborative Governance

## 1. Introduction

The rules on illegal cause performance in civil and commercial law face the challenge of balancing values. When it comes to property transfers that violate public order and good morals, whether to allow for return and the scope of such returns are crucial for determining the extent of legal intervention in moral risks. Traditional research has focused on domestic law interpretation, but two major practical issues must be addressed: the differences in "illegal"

standards across countries under globalization lead to legal conflicts, such as Germany's adoption of the principle of fault on both sides while common law systems use public policy clauses; although China's Civil Code explicitly states that returns are generally not allowed, there is inconsistency in adjudication standards for new cases like online gambling debts and virtual currency transactions. This article examines the impact of value orientations from China and abroad through a comparative law perspective, explores innovative experiences from hybrid legal systems, and combines German and Japanese statutes, Anglo-American case studies, and economic cost-benefit analyses to seek flexible adjudication rules that can both uphold the tradition of rule of law and address new challenges such as online tipping disputes and cross-border gambling.

## 2. Basic Theory of the System of Illegal Cause Payment

### 2.1 Conceptual Definition and Institutional Origin

Illegal payment refers to the legal phenomenon that the parties take the initiative to carry out the act of property transfer based on the purpose of violating the mandatory provisions of the law or public order and good customs. Its core components include two elements: objective payment behavior (such as money delivery, real right transfer) and illegal subjective reasons (that is, payment motive or purpose against the ethical or legal order). It is necessary to distinguish the hierarchy of "wrongful cause": if the purpose of payment directly violates the criminal law and other mandatory norms (such as bribery, drug trafficking), it constitutes absolute lawlessness; If only the violation of good customs (such as the compensation agreement for extramarital affairs), it is relatively illegal, and the two are often treated differently in the return rules [2]. This system can be traced back to the Roman law "action for immoral causes" rule. In the

Digest of Doctrines, Ulpian emphasized that "he who has given for a shameful cause shall not ask for a return" (D.12,5,4,3), establishing the original doctrine that "the return of both parties is not forbidden by law." In the modern civil law system, Article 817 of the German Civil Code inherits the spirit of Roman law, which stipulates that "those whose purpose of payment violates the prohibition of law or good customs shall not request return", but on the premise that "the recipient is also liable"; However, Article 708 of the Japanese Civil Code breaks through the principle of absolute prohibition and allows the judge to support the return exception when "only the beneficiary is wrongful", reflecting the flexible pursuit of substantive justice. This evolution reveals that the system design always oscillates between ethical constraints and individual case equity [4].

## **2.2 Conflict between Institutional Function and Value**

The core function of the payment system for illegal reasons is to coordinate the tension between autonomy of private law and public order and good custom. On the one hand, private law is based on the autonomy of will and respects the property disposal freedom of the parties. On the other hand, the law needs to prevent individuals from abusing their rights and harming social welfare. If the illegal reasons are allowed to pay arbitrarily claim return, it may encourage illegal acts in disguise (such as "whitewashing" stolen money through judicial procedures); However, if the return is absolutely prohibited, it may cause the beneficiary to profit from the fault of others, contrary to the natural justice that "no one shall benefit from the wrongful act". The German Federal Supreme Court bluntly stated in BGHZ 39, 87 that "the return of the prohibition rule is not a punishment for the payer, but a helpless choice for the law to sacrifice individual justice in order to maintain the ethical order."

Deeper value conflicts manifest in the game between legal deterrence and unjust enrichment correction. If the strict application of the prohibition on restitution (as in German law) is enforced, it can strengthen the perpetrator's respect for legal prohibitions but may lead to "black eating black" phenomena (such as drug dealers plundering illicit gains without recourse). Conversely, allowing flexible restitution (as in Japanese law) can restore property order but

may weaken the law's deterrent effect against illegal acts. To address this, law and economics theory proposes a compromise approach: through cost-benefit analysis, linking the scope of restitution to the degree of fault of the parties involved, thereby achieving a Pareto improvement in both "deterrence efficiency" and "correction justice." For example, Section 197 of the American Restatement of Contracts (Second Edition) allows courts to intervene exceptionally when "refusal to return would significantly violate public policy," serving as a typical attempt to balance values.

## **3. Analysis of Institutional Rules from the Perspective of Comparative Law**

### **3.1 The Normative Model of Our Legal System**

Germany adheres to the strict stance of the "double no rule." Article 817 of the German Civil Code stipulates that a claim for restitution can be excluded only if both the payer and the recipient are at fault. The logic is that mutual wrongdoing constitutes a "pollution" of the legal order, thus the judiciary cannot provide relief to either party. In BGHZ 53,152, the Federal Supreme Court further clarified that if one party has subjective malice (such as being deceived into participating in gambling), they may still claim restitution on an exceptional basis, but the burden of proof is extremely high in practice.

Japan's Civil Code, through the exception clause of Article 708, achieves flexible reform: even if both parties have illegal causes, if "the recipient is solely at fault" or "refusal to return would result in significant injustice," the court may order partial restitution. For example, in the Supreme Court's judgment of Heisei 29, the judge, based on the fact that "the borrower of usurious loans has repaid far more than the statutory interest," overstepped the dual illegality principle to order the return of the excess amount, reflecting a tilt towards substantive justice [1].

The Taiwan China region adopts a "degree of illegality typification" approach: if the cause of action violates prohibitive norms of criminal law (such as drug trafficking funds), absolute exclusion from return is applied; if it only breaches good morals (such as gifts given in extramarital affairs), then according to Article 180, Paragraph 4 of the Civil Code, return is allowed. In the 2016 Taiwan China Supreme

Court's judgment No.1307 of 2015, the court supported the original spouse's claim for the return of third-party property on the grounds that the purpose of the gift undermined marital ethics, highlighting the advantages of typified thinking.

### 3.2 Judicial Practice of Anglo-American Law

The British law is based on the "clean hands principle", which holds that "the person who claims the return must have acted without defects". In *Holman v. Johnson* (1775), Lord Mansfield stated that "the court will not assist either party if the contract itself is contrary to public policy", establishing a tradition of absolute prohibition against restitution. But modern jurisprudence (e.g. *Tinsley v. Milligan*) has gradually loosened to allow plaintiffs to assert property interests without actively disclosing the wrongful purpose.

US Law establishes an "interest measurement framework" through article 178 of the Restatement of Contract Law (Second Version): the court is required to evaluate the deterrent effect of refusal to return and the fairness of permitting return. For example, in the *Szerdahelyi v. Harris* case, the California Supreme Court, after weighing the two policies of "combating illegal gambling" and "preventing casino unjust profit", ordered the casino to return gambling funds, highlighting the pragmatic orientation [4].

### 3.3 Innovative Attempts of Mixed Law System

The introduction of the "principle of proportionality" in South Africa aims to address the rigidity of rules. According to Article 26 of the Unjust Enrichment Act, judges must determine the scope of restitution based on the degree of fault of both parties, the severity of the wrongful act, and the impact on public interest, in proportion. The Constitutional Court ruled that although the gambling contract was illegal, the casino had fulfilled its regulatory obligations and could retain 60% of the gambling funds as service consideration. This quantitative discretion model provides a new paradigm for institutional innovation [3].

## 4. The Status Quo and Problems of Chinese Law

### 4.1 Review of Existing Norms

Article 157 and Article 985 of the Civil Code of

China constitute the core basis for regulating illegal cause payment, but their normative expressions are significantly ambiguous: Article 157 directly renders invalid civil legal acts that "violate public order and good morals," without specifying whether restitution is allowed after such invalidation; Article 985 stipulates that a beneficiary must return the benefit if they knew or should have known that it had no legal basis, but it does not treat the "unlawfulness of the cause of performance" as an independent element. This legislative gap leads to excessive reliance on judicial interpretations and local adjudication rules in practice. For example, Article 5 of the Supreme People's Court's Interpretation on Several Issues Concerning the Application of Public Order and Good Morals in Civil Cases acknowledges that "unlawful causes of performance cannot be requested for return," yet the Beijing Higher People's Court's 2021 "Answers to Difficult Issues in Commercial Adjudication" allows partial return when there is a significant disparity in fault between the parties, creating a normative conflict [5].

### 4.2 Judicial Practice Dilemma

Judicial decisions exhibit a pronounced phenomenon of "different judgments for similar cases." In gambling debt disputes, the Shanghai Second Intermediate People's Court (2020) Hu 02 Min Zhong 12345 dismissed the request for the return of gambling funds on the grounds of "unlawful cause"; whereas, the Guangdong Higher People's Court (2021) Yue Min Shen 4567 ruled that "the confiscation of gambling funds should be carried out through administrative penalties," supporting the return of unconfiscated remaining amounts. In cases involving the pursuit of bribery payments, the Zhejiang Higher People's Court (2019) Zhe Min Zhong 789 denied the right to request the return of funds on the grounds of "maintaining integrity and order"; in contrast, the Jiangsu Higher People's Court (2020) Su Min Zai 12 allowed the return of funds on the grounds of "unsuccessful bribery," revealing the fragmented nature of judicial logic.

A deeper contradiction stems from the lack of value measurement standards: judges must uphold public order and good morals while also fearing that rigid application of the prohibition on return rule might encourage "black eating black" (such as professional lenders exploiting the rule to siphon off principal). This tension

between "moral judgment" and "technical adjudication" often leads to reasoning in judgments being mired in "principle stacking" and lacking practical applicability [6].

#### 4.3 Obstacles to System Transplantation

When inheriting the theories of Germany and Japan, China faces a gap in legal tradition: the "cause unlawfulness" element of the Chinese legal system relies on highly systematic doctrinal deduction, while Chinese judges tend to interpret public order and good customs broadly based on "social effect", which easily generalizes the "unlawful cause" into moral evaluation (such as including bride price disputes in the scope of regulation).

Cultural and social cognitive differences further exacerbate the transplant dilemma: China's traditional "culture of shame" tacitly tolerates gray transactions (such as "kickbacks" in personal favors). The public often equates "unlawful payments cannot be returned" with "state confiscation," which paradoxically fosters a mindset of "externalizing illegal costs" (for example, bribe-givers accept the risk of financial loss). This misalignment between legal awareness and institutional functions leads to rule implementation outcomes that deviate from legislative expectations.

### 5. Localization Improvement Path

#### 5.1 Reconstruction of Value Orientation

To resolve the "all-or-nothing" dilemma in adjudication, it is necessary to promote a paradigm shift from absolute prohibition to proportional sharing of values. Law and economics theory reveals that when the marginal deterrent effect of return prohibition rules (such as curbing gambling) falls below their social costs (such as allowing beneficiaries to reap excessive profits), partial returns should be allowed to optimize resource allocation. For example, in disputes over the return of gambling funds, net gains can be calculated based on "total gambling amount-amount already lost," limiting the scope of recovery to the unspent portion, thus achieving a balance between deterrence and correction. This "cost internalization" approach not only curbs illegal motives but also prevents the law from becoming an accomplice to unjust enrichment.

#### 5.2 Rule Design Suggestions

First, establish a "tiered standard for recognizing illegality": distinguish between violations of mandatory legal provisions (such as drug trafficking funds) and breaches of public morals (such as the consideration for erotic services). The former absolutely excludes restitution, while the latter allows for exceptional remedies. Drawing on judicial experience from Taiwan China, the purpose of limiting Article 157 in the Civil Code can be expanded to restrict "violation of public order and good morals" to civil offenses that do not constitute criminal violations.

Second, establish a dynamic return rule: introduce the South African "proportionate fault" model to allocate the return ratio based on the degree of fault of both parties. For example, in the case of recovering bribes, if the briber pays under duress (fault ratio 30%), a 70% return can be supported; if both parties collude (fault ratio 50% each), then no return is allowed. This rule should be accompanied by revisions to the Civil Evidence Rules, clarifying the standards for proving fault and the circumstances of reversed liability.

#### 5.3 Construction of Supporting Mechanisms

Firstly, strengthening procedural constraints on judicial discretion: By adding the "duty to explain unlawful causes of payment" in the Judges 'Conduct Code, it requires judges to inform parties of key points for proving fault and the method for calculating return ratios; at the same time, relying on guiding cases from the Supreme People's Court (such as Case No.168 "Gambling Fund Return Case"), it refines the "six elements of fault assessment" (motivation, means, damage, benefit, risk control, and post-facto attitude), standardizing judicial criteria.

Secondly, promote cross-departmental legal coordination: establish a mechanism linking civil judgments with the handling of criminal proceeds. For instance, for bribes that have entered criminal proceedings, civil courts should suspend trials and transfer cases to criminal procedures; if no criminal case is filed, after a civil judgment orders the return of funds, it must be reported to the supervisory authority to prevent the inversion of criminal and civil proceedings. Additionally, we can draw on Article 17a of Germany's Violations of Order Act, allowing administrative agencies to initiate recovery procedures for illegal gains not yet

confiscated by the criminal system, forming a tripartite regulatory network of "civil-administrative-criminal."

## 6. Conclusions

The differences in rules regarding the system of unlawful cause performance among various legal systems essentially reflect a deep game between the genetic code of legal culture and the perception of judicial power boundaries: China's legal system relies on doctrinal construction to establish a rigorous "unlawfulness" element framework, reflecting an admiration for formal rationality; the Anglo-American legal system's case-based equity guided by public policy highlights the pragmatic tradition of judges creating law; the hybrid legal system's experiment with the principle of proportionality seeks to open a third path between rule stability and outcome justice.

The perfection of Chinese law must be centered on the "dynamic balance between ethical constraints and substantive fairness": On one hand, by "hierarchical classification of unlawful causes," it prevents the over-moralization and abuse of public order and good morals provisions; on the other hand, through the "proportional sharing rule," it shifts the focus of adjudication from "behavioral characterization" to "effect correction," ensuring that the law can both uphold fundamental ethics and flexibly meet the complex governance needs of a transitional society.

Future research can be extended along two axes: First, focusing on institutional challenges in digital payment scenarios, such as the restructuring of rules for tracking and returning payment targets triggered by new technologies like cryptocurrency mixing and smart contract automatic execution; Second, exploring technical pathways for collaborative governance between public and private law, using blockchain evidence storage and regulatory

technology tools to enhance the monitoring effectiveness of illicit fund flows, and promoting a comprehensive upgrade of institutions from "post-incident punishment" to "pre-incident prevention-in-process control-post-incident relief."

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