

# Right to Restitution under Illegal Contracts: Seeking Clarity in Ghana

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## Abstract

The law on the availability of restitution in the context of illegal contracts is unclear. Several irreconcilable approaches have been proposed at common law in search of a solution to the question of whether or not a party to an illegal contract who has benefitted from the contract has any right to restitution. This article examines the Ghanaian judicial approach and ascertains the extent to which it sheds light on this difficult issue. It does so by examining the evolution of judicial solutions in English common law and, in that context, evaluating the approaches adopted by the Ghanaian courts.

## Keywords

Illegal contracts, right to restitution, Ghana

## INTRODUCTION

As far as possible, courts give effect to what they determine to be the legitimate expectations of the parties to a contract. However, an exception may arise where a contract is tainted with illegality. In pursuit of an overriding public interest goal, common law courts generally uphold the defence of illegality and disregard the parties' wishes altogether.<sup>1</sup>

The precise parameters that define when the defence of illegality applies have, however, generated much judicial controversy. In attempting a solution, Lord Bingham opined:

“Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand, it is unacceptable that any court of law should aid or lend its authority to a

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1 PS Atiyah *Essays on Contract* (1986, Oxford University Press) at 7–12.

party seeking to pursue or enforce an object or agreement, which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.”<sup>2</sup>

The contemporary approach of the English courts to the problem of illegal contracts and their consequences has been to examine the public interest reasons that justify the application of the illegality defence and explain why it applies to the facts of the case.<sup>3</sup>

In their formulation of the so-called structured discretionary approach, the Ghanaian courts mirror the English position.<sup>4</sup> Under this approach, the court prescribes a range of factors that must be taken into account in determining whether a party to an illegal contract is entitled to restitution. In recent judgments however, the courts seem to have abandoned this approach. Unlike their counterparts in England, where the public interest is assessed on the basis of a range of competing policy considerations,<sup>5</sup> the Ghanaian courts simply justify their decision on the basis of an overriding need to protect the supremacy of Ghana’s Constitution 1992 (the Constitution).<sup>6</sup> The problematic nature of the Ghanaian approach is reflected in the words of Toulson:

“[O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality”.<sup>7</sup>

The author agrees with Toulson that a broad conclusion that an illegal contract harms the Constitution and therefore demands refusal of restitution without interrogating the context of the illegality may yield an unfair outcome.

What has occasioned the shift in perspective by the Ghanaian courts? What principles, if any, guide this perspective? How can it be justified? This article seeks to interrogate these issues against the backdrop of English case law.

2 *Saunders v Vautier* [1987] 1 WLR 1116 at 1134.

3 *Patel v Mirza* [2016] UKSC 42.

4 *City and Country Waste Ltd v Accra Metropolitan Assembly* [2007–08] 1 SCGLR 409.

5 *Les Laboratoires Servier and Another v Apotex Inc and Others* [2014] UKSC 55 per Lord Toulson.

6 *Martin Amidu v Attorney General and Two Others* [1/5/2012] SC.

7 *Patel v Mirza*, above at note 3 at 120.

## APPROACH AT COMMON LAW

In general, courts will not assist by enforcing an illegal contract.<sup>8</sup> This is seen in Lord Mansfield's classic statement in *Holman v Johnson* that:

“No court will lend its aid to a person who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”<sup>9</sup>

The general legal position of a person who transfers property or pays money under an illegal contract is that the money or property is lost, except under some notable exceptions such as where the plaintiff is not *in pari delicto* [equally at fault] with the defendant or where a party to an executory contract repents before performance.<sup>10</sup> It is observed that courts around the world encounter little difficulty in refusing to apply the principle to a particular case if that would be more just.<sup>11</sup> In fact, it is clear from a cursory review of the cases cited in this article that courts around the world have been consistently inconsistent in their handling of the problem. In its 2009 report, *The Illegality Defence*, the English Law Commission criticized the law on contractual illegality as being complex, uncertain and arbitrary.<sup>12</sup> Further, more recently Lord Sumption has observed that there “remains considerable uncertainty in the case-law about the true rationale of the illegality defence” and that the law “remains excessively complex and technical”.<sup>13</sup> In the recent case of *Patel v Mirza*, Lord Toulson appears to have provided some guidance in addressing this problem by laying down a multifactorial approach in the following words:

8 *Stewart v Thayer* 168 Mass 519, 47 NE 420; *Case v Smith* 107 Mich 416, 65 NW 279.

9 [1775] 1 Cowp 341 at 343; 98 Eng Repr 1120 at 1121.

10 *CCWL v Accra*, above at note 4 at 435. The case of *Tomkins v Bernet* 1 Salk 22, 91 Eng Rep 21 (KB 1693) is generally credited with establishing this proposition. The rule is clearly spelt out in *Collins v Blantern* 2 Wils 341 at 350, 95 Eng Rep 847 at 852 (KB 1767): “Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again.” See also *Tinsley v Milligan* [1994] 1 AC 340.

11 A Phang “The intractable problems of illegality and public policy in the law of contract: A comparative perspective” in R Merkin and J Devenney (eds) *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (2018, Routledge) 180.

12 *The Illegality Defence: A Consultative Report* (Law Commission CR No 189, 2009) at 34–36.

13 Sumption J “Reflections on the law of illegality” (speech given to the Chancery Bar Association, 23 April 2012), available at: <<https://www.chba.org.uk/for-members/library/annual-lectures/reflections-on-the-law-of-illegality.pdf/view>> (last accessed 29 April 2022).

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.”<sup>14</sup>

In providing clarity to this view, Toulson opines that an ordinary claim for unjust enrichment arising from an illegality may not in itself undermine the integrity of the legal system. He observes:

“A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case.”<sup>15</sup>

## GHANAIAN COURTS AND ILLEGAL CONTRACTS

The general approach of the Ghanaian courts to the question of illegal contracts and their consequences has generally been akin to that of common law.<sup>16</sup> The prevailing view is that contracts made in breach of statute are void.<sup>17</sup> The implications of the illegality on the rights of parties have, however, presented a mixed picture. The traditional view preceding recent Supreme Court jurisprudence has been that parties to an illegal contract, irrespective of who they are or the nature of the illegality, are entitled to restitution

14 *Patel v Mirza*, above at note 3 at 39.

15 *Id* at 40.

16 See *Mensah v Ahenfie Cloth Sellers Association* [2010] SCGLR 680, per Brobbey JSC.

17 *Ibid*.

subject to the common law exceptions. This position was captured succinctly in the case of *Kwarteng v Donkor*, where it was observed, “[i]t seems to me fairly well established that except in well recognized circumstances money paid in pursuance of an illegal contract cannot be recovered by action. One of the exceptions to the rule is where the parties are not *in pari delicto*”.<sup>18</sup>

A notable expression of the courts’ position is the case of *Addy v Irani Brothers*.<sup>19</sup> In this case, the parties had entered into a contract to sell goods above the control prices and share the profits. The plaintiff had further requested the defendant to convert some money he had advanced to him into foreign currency and smuggle it out of the country in breach of foreign exchange and anti-smuggling legislation. The court established from the plaintiff’s pleading that he willingly contributed to the illegal transactions and received his share of the profits. It therefore held that the monies paid to the defendant could not be recovered.

Recent Supreme Court jurisprudence on illegal contracts involving the state as a party, however, seems to have modified the legal position regarding the consequences of illegal contracts. Aside from expanding the considerations for granting restitution beyond the common law exceptions, the court made a subtle distinction between the consequences of illegality emerging from breach of statute on one hand and that emerging from the Constitution on the other. The following discussion analyses this contemporary attitude of the Ghanaian courts in the light of four relevant decisions.

### ***Faroe Atlantic case***

The Ghanaian courts were confronted with the question of the legal effects of a contract made in breach of the Constitution in *The Attorney General v Faroe Atlantic Co Ltd (AG v Faroe Atlantic)*.<sup>20</sup>

The material facts of this case were as follows. The respondent, a private company, Faroe Atlantic, entered into an agreement with the government of Ghana, acting through its Ministry of Mines and Energy, for the purchase of electric power. As part of the agreement, the government made an advance payment of USD 855,000 to Faroe Atlantic for execution of the works. Shortly after the award, the government abrogated the contract. Faroe Atlantic sued the government at the court of first instance<sup>21</sup> for, inter alia, specific performance or, in the alternative, damages for breach of contract. The High Court gave judgment in favour of Faroe Atlantic and awarded damages and costs, including loss of profit and interest. The government appealed against the

18 [1962] 1 GLR 20 at 22.

19 [1991] 2 GLR 30.

20 [2005–6] SCGLR 271.

21 The High Court had original jurisdiction in this matter under the Constitution, art 140.

award of loss of profit and interest, but the appeal was dismissed by the Court of Appeal. On further appeal to the Supreme Court, the government for the first time raised a constitutional issue that the contract was fundamentally unlawful for being in breach of article 181 of the Constitution, which provides:

- (1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorize the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
- (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
- (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.
- (4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide -
  - (a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and
  - (b) that any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan.
- (5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan."

The government contended that the agreement constituted an international purchase or economic agreement to which the government was a party and which, in accordance with article 181 of the Constitution, should have been laid before Parliament before taking effect. Having not been so laid, the appellant contended that the agreement was void.<sup>22</sup> The Supreme Court found that the agreement did indeed fall within the scope of article 181(5) and declared the contract null and void.<sup>23</sup> The court went further to draw a distinction between the case of void contracts and the usual common law illegal contracts. The court reasoned as follows:

"For although it is settled law that in general money paid under an illegal contract cannot be recovered, I do not regard the power purchase agreement as an illegal contract in the common law sense. Rather, it is a contract that is null and void and unenforceable for constitutional reasons. Restitution of money paid under such contracts should be allowed."<sup>24</sup>

22 *AG v Faroe Atlantic*, above at note 20.

23 *Ibid.*

24 *Id* at 279.

Thus, although the Supreme Court declared the contract null and void and unenforceable, it ordered the respondent to refund the advance payment made by the government of Ghana under the contract. This order seems to be a departure from the long-held common law position that property transferred or money paid under an illegal contract is lost, except under some notable exceptions such as where the plaintiff is not *in pari delicto* with the defendant. In this particular instance, the government had the ability and responsibility to obtain parliamentary approval for the contract. Even more crucially, the government was relying on its own wrongdoing by raising the defence that the contract had not obtained parliamentary approval and was therefore void, when it knew that its omission led to the lack of such approval.<sup>25</sup> Given this conduct, it was not within the equitable considerations that justify restitution under the *in pari delicto* exception. The court, however, proceeded to award restitution in favour of the government by ordering recovery of the advance payment paid to Faroe Atlantic.

### **CCWL v Accra case**

*CCWL v Accra*<sup>26</sup> appears to have provided a formula for resolving the vexed issue of the implications of illegal contracts, especially the concern about unfair outcomes raised in *AG v Faroe Atlantic*. The brief facts were that Accra Metropolitan Assembly awarded a waste management company, City and Country Waste Ltd (CCWL), a contract to manage waste in the Accra Metropolis. With the consent of the defendant, the plaintiff proceeded to perform the contract. The defendant subsequently terminated the contract before it had expired. In answer to a claim for payment for work done, and damages for breach of contract, the defendant averred that the contract had been void from the outset for non-compliance with statute. In answering the question of whether or not a right to restitution arises where there is payment of money or transfer of property under an illegal contract, the court applied a so-called structured discretionary approach and responded in the affirmative. The court found the basis of this approach in an English Law Commission consultation paper on illegal transactions, which provides:

“We have said that we believe that there is a continued need for some doctrine of illegality in relation to illegal contracts and that in certain circumstances, it is right that the law should deny the plaintiff his or her standard rights and remedies. However, we have also explained how, in some situations, we believe that the plaintiff is being unduly penalized by the present rules. This injustice

25 See *Tingsley v Milligan*, above at note 10. In that case, the majority gave effect to the illegal agreement made between the parties. The agreement was that ownership of the house should be shared equally between Miss Milligan and Miss Tingsley and that they should misrepresent to a state agency that it was owned solely by Miss Tingsley. Miss Milligan succeeded because she did not need to rely on the illegal component of the agreement.

26 Above at note 4.

would seem to be the inevitable result of the application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the defendant, or may be merely incidental to the contract in question. We consider that the best means of overcoming this injustice is to replace the present strict rules with a discretionary approach under which the courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. The adoption of some type of discretionary approach has the support of the vast majority of academic commentators in this area: and it is the approach which has been followed in those jurisdictions where legislation has been implemented. Moreover, we have not been able to devise a new enlightened regime of 'rules' that would provide satisfactory answers to all disputes involving illegal contracts. In our view, a balancing of various factors is required so that put quite simply, the law on illegal contracts does not lend itself to a regime of rules."<sup>27</sup>

Having referred to this view, the court stated what the structured discretionary approach is and what it seeks to achieve, and proceeded to apply it as follows:

"In exercise of our structured discretion, we have taken into account the issues mentioned in the passage quoted above from the Law Commission of the UK, namely, the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. Because of the good governance implications of the purpose of the statutory rules that we have construed to make the contract impliedly prohibited and illegal, it is important to avoid a direct enforcement of the terms of the contract. At the same time given that the plaintiff was on the evidence not aware of the illegality and that the purpose of the rule rendering the contract illegal would not be defeated if the plaintiff is awarded some compensation at a rate below the contract rate for the services rendered to the defendant, we hold that the defendant is liable to the plaintiff to pay a reasonable compensation for the plaintiff's services."<sup>28</sup>

It is evident from this that the court recognized the *in pari delicto* exception as one of several important considerations in its determination of whether the defendant is entitled to restitution. The approach thus modifies the traditional approach for assessing the rights of parties, which invariably dwells mainly on the *in pari delicto* exception. Also notable, *CCWL v Accra* seems to add to the instances where the court is willing to grant restitution to private parties. The defendant in *CCWL v Accra*, although a state corporation, is legally

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27 "The effect of illegality on contracts and trust" (Law Commission consultation paper no 154, 1999) at 191.

28 *CCWL v Accra*, above at note 4 at 439, per Date-Bah JSC.

constituted as a separate entity from central government that can sue and be sued.<sup>29</sup> Thus, unlike in *AG v Faroe Atlantic*, the Attorney General (the state's lawyer) was not a party to the case. The claim for restitution was, therefore, strictly speaking against a non-state party. In the author's view, this puts *CCWL v Accra* into an anomalous category. Thus, this case at least endorses the trend revealed by earlier decisions that, for non-state parties to an illegal undertaking, the court may generally grant a right to restitution, subject to important considerations noted above.

### **Waterville case**

In *Martin Amidu v Attorney General and Two Others (Waterville)*,<sup>30</sup> the Supreme Court was confronted with similar facts to those in *AG v Faroe Atlantic*. In *Waterville*, a private citizen brought an action invoking the original jurisdiction of the Supreme Court to enforce the Constitution<sup>31</sup> against the state as first defendant, a private company (Waterville) as second defendant and an individual (Mr Alfred Agbesi Woyome) as third defendant. Waterville had been awarded two contracts by the government for the construction of stadia. Neither of the contracts received parliamentary approval as required by the Constitution.<sup>32</sup> At the negotiation stage, before the contracts were awarded, the government handed over the site to Waterville and authorized it to begin work. Waterville mobilized to the site and began extensive preparatory work, including demolishing structures in preparation for construction. The government subsequently terminated the contracts. Waterville claimed against the government for payment for the value of work done before termination. Following certification by the consultant to the project, Waterville was paid EUR 22,365,624.40 for work done.<sup>33</sup> The third defendant (Mr Woyome), who claimed he had provided financial structuring services in relation to the contracts, also successfully claimed an amount of GH¢ 51,283,480.50 (Ghanaian cedis) from the government. The plaintiff sought a refund of these payments on the grounds that the agreements under which they were paid were illegal because they violated the Constitution.

29 The Local Governance Act 2016 (Act 936), sec 4 provides for the establishment of a district assembly that can sue and be sued. It further empowers the district assembly to hold movable and immovable property, dispose of property and enter into a contract or any other transaction.

30 Above at note 6.

31 A private citizen has capacity to invoke the interpretation and enforcement jurisdiction of the Supreme Court of Ghana under the Constitution, art 2(1).

32 See *CCWL v Accra*, above at note 4.

33 About this payment, the court observed, "this payment was problematic since it appeared to have used a restitutionary route to bypass the legal consequences of an inchoate business transaction to which the government was a party which had not yet been approved by Parliament in terms of article 181(5)": *Waterville*, above at note 6 at pages 7–8 of the judgment.

In responding to these claims by the plaintiff, the courts observed that the claims by the second and third defendants constituted restitutionary claims arising from a contract void for constitutional non-compliance. This position was advanced strongly in the following words:

“Thus even assuming that the 2nd and 3rd defendants are not *in pari delicto* with the 1st defendants in the breach of article 181, the fact that the norm breached is a constitutional provision, in contradistinction to breach of an ordinary statute, is a relevant consideration. Clearly there should be less room to award a restitutionary remedy where the breach is of a constitutional provision. A contract which breaches article 181(5) of the Constitution is null and void and therefore creates no rights (See the *Attorney General v Faroe Atlantic Co Ltd* [2005–2006] SCGLR 271 and the *Attorney-General v Balkan Energy Ghana Ltd* 2 Ors Unreported, 16th May, 2012). It should not be legitimate to evade this nullity by the grant of a restitutionary remedy. Although one accepts the cogency of the argument that there is a need to avoid unjust enrichment to the State through its receipt of benefits it has not paid for, there is the higher order countervailing argument that the enforcement of the Constitution should not be undermined by allowing the State and its partners an avenue for opportunity for doing indirectly what it is constitutionally prohibited from doing directly. The supremacy of the Constitution in the hierarchy of legal norms in the legal system has to be preserved and jealously guarded. Thus, the flexibility that the Supreme Court introduces in the CCWL case is to be exercised sparingly in the case of breaches of the Constitution. The requirement that international business contracts to which the Government is a party should be approved by Parliament has a purpose and it should be made clear to Government and its partners that non-compliance with the requirement, directly or indirectly, will have consequences. We are accordingly inclined to the view that, where article 181(5) has been breached, a restitutionary remedy would be in conflict with the Constitution and therefore not available ... The Government’s action in paying the 2nd defendant for the work it did prior to the conclusion of the terminated 26th April agreements was unconstitutional, according to the analysis already set out above ... In our view, it was fundamentally erroneous in ignoring the effect of article 181(5) of the 1992 Constitution on the transaction. From the analysis earlier made of the penumbra effect of article 181(5), we would reaffirm that there is no liability of the State to the 2nd defendant. The 2nd defendant is thus obliged to return all monies paid to it pursuant to the transaction. The settlement, pursuant to which the monies were paid, was founded on an unconstitutional act and should be treated as null and void. It is obvious that the agreements of 26th April never became operative and even if they had become effective, they would have been null and void if not approved by Parliament. Equally, any restitutionary claims intended to achieve results similar to those contemplated by the provisions in the inoperative agreements of 26th April would be invalid. The Supreme Court has jurisdiction under article 2(2) of the 1992 Constitution to make a consequential order compelling the 2nd defendant

to refund all monies paid to it in relation to the work that it did on the stadia.”<sup>34</sup>

With this statement, the Supreme Court made it clear that, since the case concerned a breach of a constitutional provision, it should be considered differently from a situation involving a breach of “an ordinary statute”. The court failed to evaluate the *in pari delicto* exception as a relevant factor even though, as in *AG v Faroe Atlantic*, the state’s omission to obtain approval resulted in the illegality. Moreover, the court, instead of seeking to achieve mutual restitution, pursued only a one-way restitution. It ordered Waterville to refund all monies paid to it, which included what had been paid to it to mobilize to site. There was no consideration in the court’s assessment of wasted expenditure or benefits conferred on the state by Waterville. Such considerations may have resulted in a parallel order of restitution in Waterville’s favour. Thus, notwithstanding its wrongdoing, the state enjoyed restitution but was relieved of any burden of refunding any losses incurred, or benefits conferred, by Waterville.

Also important is that, in refusing restitution outright to one party, the court failed to consider and thereby compromised important constitutional principles and core values. The Constitution makes provision for equality of treatment and the right to non-discrimination.<sup>35</sup> The judgment seems to give the impression that, upon declaring a contract unconstitutional, the Ghanaian court is only interested in ascertaining and restoring the expenditure of one party (the state), without similar treatment of the non-state party, even where the state is at fault. This treatment appears unequal, unfair and discriminatory. It also results in the unjust enrichment of the state. If the “range of factors” test had been adopted, the court would have weighed reasons for refusing one party restitution against other reasons and perhaps concluded with a more equitable outcome. Could there be any justification for the court’s attitude beyond the ratio of the decision?

Before *Waterville*, the president of Ghana had expressed worry about the phenomenon of recurrent judgments arising from claims for contractual abrogation. The president observed that the government had paid more than GH¢ 600 million in three years in satisfaction of these claims; he lamented, “[w]e must find a way of avoiding these Judgment debts. These are

34 *Id* at 14, per Date-Bah JSC.

35 See generally, the Constitution, art 17: “(1) All persons shall be equal before the law. (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed, or social or economic status. (3) For the purposes of this article ‘discriminate’ means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinion, colour, gender, occupation, religion, or creed whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject to or are granted privileges or advantages which are not granted to persons of another description.”

resources we can channel to areas that will provide the needs of our people”.<sup>36</sup> Towards achieving this end, the president commissioned a state agency (the Economic and Organized Crime Office) to investigate the circumstances surrounding the occurrence of these debts and make recommendations.<sup>37</sup> The office found, inter alia, that public officials, particularly state lawyers, were complicit in creating these debts. A rather disturbing finding was that the wife of a chief state attorney involved in the conduct of *Waterville* had received a transfer of USD 400,000 from Mr Woyome.<sup>38</sup> This single payment raised a strong suspicion of collusion to defraud the state.

The concurring opinion of Dotse JSC seems to hint that, in his view, the court may have taken into account some deep policy considerations, notably the need for the court to avert corruption where it is put on enquiry by the facts before it. Tracing the history of the case right from the trial courts, he states:

“It is therefore important that trial courts must be on the alert, to prevent cases where collusion can occur and ensure that they act as watchdogs not only of the public purse but also protective of the rights of any person who appears before them. The courts of law established under the 1992 constitution of Ghana must not be used by anybody or group to unlawfully or illegally enrich himself or themselves to the disadvantage of any person or state. Trial Courts must as a control measure, ensure that claims or endorsements in actions brought before them especially where default applications for judgments arise are scrutinized thoroughly to prevent collusion and or abuse of the judicial system. In this regard even an ex parte application, though one sided ought to be scrutinized by the Court and must be granted only if it satisfies the conditions lawfully and legally required to be proved or established.”<sup>39</sup>

36 See L Quartey “Ghana president laments huge judgement debts” (9 January 2012) *The Africa Report*, available at: <<https://www.theafricareport.com/7827/ghana-president-laments-huge-judgement-debts/>> (last accessed 31 March 2022).

37 Ibid.

38 See Democracy Watch “In the annals of democratic governance” (August 2012) 10/1 *Democracy Watch* (Newsletter of the Ghana Center for Democratic Governance), available at: <[https://www.files.ethz.ch/isn/155880/D-Watch%2035\\_Vol10No1.pdf](https://www.files.ethz.ch/isn/155880/D-Watch%2035_Vol10No1.pdf)> (last accessed 29 April 2022). This report gives further details as follows (at 2): “In February 2012, Mr Woyome, Mr Paul Asimenu, head of the Legal Directorate at the Ministry of Finance and Economic Planning, Mr Samuel Nerquaye-Tetteh, Chief State Attorney, and his wife Mrs Gifty Nerquaye-Tetteh were arrested for corruption of a public officer, and defrauding by false pretences. Mr Nerquaye-Tetteh had responsibility for the Woyome case in the Attorney General’s Department while his wife, according to the EOCO, was complicit because her bank records revealed she had received a transfer of \$400,000 from Mr Woyome in the course of the negotiations with the government. Though charges against the latter three have been suspended for reasons that remain unclear, Mr Woyome is currently being tried for causing financial loss to the state, and defrauding by false pretences.”

39 *Waterville*, above at note 6 at 22, per Dotse JSC.

Profound as these statements may be, Dotse JSC failed to draw any analytical connection between the suspicion of a possible conspiracy to defraud the state (as he probably gleaned from the facts before him) and the court's reasons for denying mutual restitution. In addition, these observations were not presented as part of the court's reasoning, but appeared as obiter. Thus, based on a rather narrow ground presented as the need to protect the supremacy of the Constitution, the Supreme Court found a basis to order Waterville to refund all monies the government of Ghana had paid to it for the work it had done, without in like measure ordering the state to return any benefits conferred on it or expenditure incurred by Waterville.

In a review judgment of this case, the court followed the earlier decision of the ordinary bench and further ordered the third defendant, Mr Woyome, to refund all monies paid to him.<sup>40</sup>

### ***Isofoton case***

*Martin Amidu v Attorney General, Isofoton and Forson (Isofoton)*<sup>41</sup> further reinforced the position of the Ghanaian courts in relation to contracts considered to breach the Constitution.

The background to this case was as follows. Isofoton, a foreign company, and second defendant in the case, was awarded a contract to execute agricultural, irrigation and electrification projects based on solar technologies. The contract was re-awarded to another foreign company. Isofoton accused the government of allegedly abrogating the contract and sued for compensation at the High Court through its lawful attorney, the third defendant (Forson). Isofoton obtained default judgments against the government. Subsequently, the default judgments were set aside to enable the parties to settle the case out of court. An amicable settlement was reached between Isofoton and the government and it was agreed that Isofoton be paid GH¢ 1,300,000 in respect of the claim. Isofoton through its lawful attorney later initiated garnishee proceedings on the basis of these consent judgments and obtained garnishee orders nisi. The government had already made part payment of GH¢ 488,208.

The plaintiff then brought this action<sup>42</sup> seeking, inter alia, that the two international business agreements into which the second defendant had entered with the Republic of Ghana were not laid before Parliament for its approval and were thus void. The plaintiff's claim was that, on a true and proper interpretation of article 181(3) and (4) of the Constitution, the laying

40 *Amidu (No 3) v Attorney General, Waterville Holding (BV) Ltd and Woyome* [2013–14] SCGLR 606 at 654. The court ordered Mr Woyome to refund to the republic monies paid to him for services allegedly rendered in pursuance of the Waterville contract as having been made and received by him in violation of the Constitution.

41 (2013) JELR 68601 (SC).

42 The plaintiff brought the action as a private citizen seeking enforcement of the Constitution under art 2 of the Constitution. Apparently, the Attorney General was the first defendant because the plaintiff considered the acts of the state in entering the contract through the government to be in breach of the Constitution.

before Parliament and the approval of the terms and conditions of an agreement for a loan raised by the government on behalf of itself or any other public institution or authority does not exempt from being laid before Parliament for approval any international business or economic transaction to which the government is a party and that will be financed by the loan approved under article 181(3) and (4).

In upholding the plaintiff's claims and ordering Isofoton to refund monies paid to it back to the government of Ghana, the Supreme Court held in a unanimous decision that:

“The purposive approach insisted upon by the 2nd Defendant, when reasonably applied, should lead to the conclusion that an international business or economic transaction to which the Government of Ghana is a party should not cease to be treated as such, under article 181(5), simply because activities under it are to be financed under a loan agreement that has already been approved by Parliament. This conclusion connotes that the two impugned agreements entered into by the 2nd Defendant are null and void, because they were not approved by Parliament. ... There was thus no liability of the Republic of Ghana to the 2nd Defendant. The unconstitutional contracts, concluded in breach of article 181(5), cannot lawfully found the consent judgments relied on by the 2nd Defendant. The said consent judgments are vitiated by the unconstitutionality of the contracts on which they are based and, apart from declaring those judgments to be in breach of article 181(5) of the Constitution, this Court has jurisdiction under article 2(2) of the Constitution to order that the said judgments be set aside. ... It is consequentially ordered, pursuant to article 2(2) of the 1992 Constitution, that the 2nd Defendant is to pay or refund to the Government of Ghana the cedi equivalent of US\$ 325,472.00 received from the Government of Ghana and any subsequent payments thereafter made so far, pursuant to the contracts declared void by this court. Interest is to be paid on the sum adjudged above from the date of its receipt by the 2nd defendant, in accordance with the Court (Award of Interest and Post Judgment Interest) Rules 2005 (CI 52).”<sup>43</sup>

In this case, the Supreme Court extended the legal position already established in *AG v Faroe Atlantic and Waterville*. The apex court ruled that, since the transactions were entered into in breach of article 181(5), they were unconstitutional and thus null and void; it then went on to order that all monies that the government had paid pursuant to the void contract should be refunded. An interesting twist in this case is that the Supreme Court further ordered that Isofoton should pay interest on the money it received from the government, counting from the date of receipt. Similar to the thinking in *Waterville*, the Supreme Court ignored the very important fact that the

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43 *Isofoton*, above at note 41 at 7.

defendants' conduct had not contributed to the illegality. There being no fault on the part of Isofoton, the court's further order of interest may be considered excessive and harsh.

## A JUDICIAL DOUBLE STANDARD?

Dworkin in his *Law's Empire* asserts that adjudication must strive towards achieving the ideal of what he calls "law as integrity". He captures the essentials of this ideal as follows:

"Law as integrity asks judges to assume so far as this is possible that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in fresh cases that come before them so that each person's situation is fair and just according to the same standards."<sup>44</sup>

Dworkinian adjudication thus strives to achieve an outcome that is coherent and consistent, and treats persons equally.

As observed above, in assessing rights to restitution under an illegal contract, the common law does not distinguish between sources of illegality or the type of parties involved. In the author's view, this ensures a fair and equitable outcome. It also makes the law on illegality more coherent and predictable, consistent with the Dworkinian ideal.

The approach of the Ghanaian courts on the other hand is one of double standards. A private party's right to restitution is dependent on whether the contract is made in breach of statute or the Constitution. Unlike in a case of breach of statute, the courts deny outright a right to restitution where there is breach of the Constitution. The state, however, seems to have a general right to restitution whether it is involved in a contract in breach of statute or the Constitution, and whether or not it is the guilty party. The distinctions made in the treatment of parties lead to a very inequitable and unequal approach to the question under discussion. Also, the distinction made between different types of illegality and their consequences is inconsistent with long-established common law principles and thus offers an incoherent and unprincipled account of the law. An approach that denies institutional rights and departs from settled principles, without justification rooted in the principles of political morality, is inconsistent with Dworkin's ideal of "law as integrity".

## CONCLUSION

This article has discussed the rights of parties to restitution under an illegal contract, looking at the English and Ghanaian positions and making

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44 RM Dworkin *Law's Empire* (1986, Harvard University Press) at 50–52.

comparisons. It revealed that the current approach of the English courts to the problem is to weigh a set of competing policy factors and make a determination as to whether it is fair in the circumstances to grant restitution. Where evaluation of these factors points to the conclusion that the integrity of the legal system will be harmed, the English courts may decline restitution.

On the other hand, the approach of the Ghanaian courts seems to take into account the source or type of illegality and the parties involved. A contract that breaches statute may generally entitle parties to restitution if the established requirements discussed in this article are satisfied. However, in a contract between the state and a private party, the right to restitution is only available to the state party. The article has argued that this approach is contradictory in terms because, although it seeks to protect the integrity of the Constitution, it leads to compromising important constitutional values, such as equality of treatment and non-discrimination. In addition, it creates an incoherence in the law, making it incompatible with the Dworkinian ideal of law as integrity.

It is yet to be seen whether the Ghanaian courts will adopt this approach in subsequent cases of illegal contracts involving a breach of the Constitution and non-state parties. Also yet to be seen, is whether the courts will adopt their approach to breaches of statutes to cases involving the state and a private party.

As we await resolution of these issues, the apparent conclusion from what is now known is that the Ghanaian law on illegality is in a state of flux.

## **CONFLICTS OF INTEREST**

None