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THE ILLEGALITY DEFENSE: A CASE FOR REFORM IN UGANDA'S JUDICIAL SYSTEM.

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ABSTRACT

*The illegality rule is strict and inflexible. Its application has often led to unjust results between the parties who seek court's intervention. The courts need to apply a more liberal and flexible framework for the illegality defence. Professor Virgo asserts that, UK Supreme Court in *Patel v Mirza*¹ has adopted a discretionary approach as regards the interpretation of illegality². Uganda's judiciary on the other hand lacks a framework on application of illegality rule. This article focuses on the uncertainty, complexity and injustice of the illegality as considerations for judicial reform of illegality in private law. The author compared the English position and the Singapore approach to illegality test. Finally, this article is presenting a novel test for illegality in Uganda's judiciary.*

1.1 INTRODUCTION

This article seeks to provide insights into limiting the illegality rule in private law of contract, tort and unjust enrichment. There is scarcely any judicial discretion to prevent injustice and enrichment of one party by another. This article suggests that the doctrine of illegality should be replaced with a power vested in the courts to reject claims on "considerations of public policy".

It is worth noting that, in a number of jurisdictions, illegality is a defense to all claims in private law. Illegality also has the potential to provide a defense

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¹ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467

² Professor Virgo (2019), *The State of Illegality* Vol. 31 Singapore Academy of Law Journal available at <https://cebcla.smu.edu.sg> (accessed 5 March 2021)

to civil claims of all sorts whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances.

Uganda's illegality doctrine is unprincipled and this is evident from the general recourse to dismissing meritorious claims based on illegal transactions. The aim of this article is to highlight that judges with the desire to reach a just result on the facts have the opportunity of resorting to the exercise of discretionary policy-approach before adhering to the stern doctrine of illegality. Illustratively, the English decision of *Patel v. Mirza*³ is juxtaposed as a new model for Ugandan courts with a structured approach "*a trio of considerations*" to avoid unjust results caused by the illegality defense.

This article reaches a number of conclusions. Firstly, Ugandan judges need to adopt a policy-based approach to the illegality defense. That is to say, a trio of considerations which calls for (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.

Secondly, the courts should refrain from the general blanket application of the ratio in the *Makula International Limited*⁴ without considering "other policy considerations" in private law except where illegality arises from breach of civil procedure.

Thirdly, the courts will need to apply the "*trio of considerations*" approach in the *Patel v. Mirza* case for every illegality defence notwithstanding whether the illegality is statutory or at common law.

³ In the present case, Mr Patel paid £620,000 to Mr Mirza pursuant to a contract, under which Mr Mirza was to use the money to trade in RBS shares with the benefit of inside information for their common benefit. That was a contract whose agreed fundamental purpose was illegal. In fact, the anticipated inside information was not forthcoming and the contract effectively lapsed.

⁴ SCCA no. 4 of 1981 [1982] UGSC 2 [8 April 1982]

1.2 NATURE AND EFFECT OF ILLEGAL TRANSACTIONS

The doctrine of illegality can be divided into two areas -statutory illegality and illegality at common law. Statutory illegality requires the contravention of a statutory provision. A transaction is illegal or at least affected by illegality if the transaction or some aspect of it is prohibited by the law⁵.

Illegality at common law is based on whether the contract or transaction is entered into with the object of committing an illegal act. This is the case where the transaction either involves conduct which is illegal and contrary to public policy even though it is not otherwise prohibited by the law. The principal area of contention in the former category is whether, if the legal wrong is one created by statute, the intention of the legislator was to prohibit any transaction which involves a breach of a statute⁶.

In *Makula International v His Eminence Cardinal Nsubuga and Another*, the Supreme court of Uganda opined that court cannot sanction that which is illegal and that illegality once brought to the attention of the court overrides all questions of pleadings.⁷ Thus, an illegality once brought to the attention of court cannot be ignored.

The effect of illegality is evident in the latin phrase *ex dolomalo non oritur action*; “No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”⁸ Similarly, the forfeiture rule to the effect that no one should profit from one’s own wrong.

The author focuses with judicial reform of the approach by Ugandan judiciary to civil matters involving illegality defences. Dr. Nelson Enonchong argues that, the law may set about reversing the consequences, financial or

⁵ Not all transactions fit neatly into one clear-cut category as either unenforceable, void or illegal. Some fade into a grey area between ‘void’ and ‘illegal’. See N Enonchong , *Illegal Transactions* (London: LLP ltd, 1998) pg. 2-3

⁶ Dr. Nelson Enonchong (1998) *Illegal Transactions*-University of Leicester published - London Hong-Kong.

⁷ SCCA no. 4 of 1981 [1982] UGSC 2 [8 April 1982] *Republic of Uganda*

⁸ Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 cited in *Patel v Mirza* [2016] UKSC 42

proprietary, of the transaction so far as the parties have given effect to them.⁹ It may also simply decline to have anything to do with it.¹⁰ The first approach seeks to regulate the consequences of the illegal transaction, so as to put the parties so far as possible in the position they would have been in had the transaction not occurred. The second simply withholds legal remedies, and generally leaves the loss to lie where it falls.

1.3 THE BURDEN OF PROOF

The burden of proof under the defense of illegality was stated under the sub-heading Presumption of legality thus¹¹:

“The party alleging the illegality of the contract bears the burden of proving this fact; therefore if the contract to be reasonably susceptible of two meanings or two modes of performance, one legal and the other not legal, the burden of proving its legality is un-discharged and that interpretation is to be put upon the contract which will support an illegal intention, an evidential burden lies upon the party supporting the contract to bring evidence capable of establishing the legality of the intention.”

Thus, the legal burden of proving the illegality lies on he who alleges it.

2.1 THE PATEL CASE AND THE ILLEGALITY DOCTRINE

In the recent past, UK Supreme Court set the illegality test in a case which involved a claim to recover money paid under a contract tainted by illegality.

In *Patel v Mirza*, the respondent had transferred £620,000 to the Appellant, a City trader who had suggested the scheme, so that the Appellant could use the money to bet on share price movements based on inside information.¹² Such insider dealing was a crime under Part V of the Criminal Justice Act 1993. The inside information was not forthcoming and so the

⁹ See N Enonchong , *Illegal Transactions* (London: LLP ltd, 1998) at pg. 2-3

¹⁰ *ibid*

¹¹ Chitty on Contract 28th Edition Vol. 1 page 948

¹² *Patel v Mirza* [2016] UKSC 42, [2017] AC 467

agreement was not carried out.¹³ The Respondent sought restitution of the money paid on the ground that the Appellant had been unjustly enriched at his expense, the ground of restitution being that the basis for the transfer had failed totally. Because the parties had committed a conspiracy to commit insider dealing and so were tainted by illegality, the Appellant refused to make restitution.

The court held that one 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.

From the above considerations set by the Court, this decision is an important check against the absolute application of the illegality defence. The 2016 UK Supreme Court decision in *Patel v Mirza*¹⁴ affirmed judicial discretion as regards the interpretation of illegality¹⁵. Judges with the desire to reach a just result on the facts have the opportunity of resorting to the exercise of judicial discretion.

2.2 WHERE JUDICIAL REFORM APPLIES AND WHY

Reform of the illegality test could be carried out by the Judiciary, developing the common law in its characteristic piecemeal fashion¹⁶. Graham Sinclair asserts that, often the court will look at the consequences of holding that the statute has impliedly prohibited a transaction before deciding whether

¹³ Summary of Professor Graham Virgo (QC) (Hon), *The State Of Illegality* available at <https://cebcla.smu.edu.sg> [accessed 23 April 2021]

¹⁴ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467

¹⁵ Professor Graham Virgo (QC) (Hon), *The State of Illegality* *ibid*

¹⁶ Tsun Hang (2009) *Reforming Illegality in Private law*, Singapore Academy of Law Journal Vol. 21

this is so.¹⁷ In many jurisdictions, the courts differ about the consequences of applying the illegality defenses.¹⁸

The judicial reform for Uganda's judiciary is to adopt the new illegality test. The rationale for discretionary approach in judicial reform arises from the weakness of the illegality doctrine; that is, uncertainty, complexity and injustice.

2.2.1 Uncertainty and Complexity

The courts need to employ judicial discretion because it is unclear to what extent the doctrine of illegality applies to a contract whose object includes something which is in some respect unlawful or the performance of which will involve some form of illegality, but not in a way which is central to the contract.¹⁹ It is worth noting that, the UK Law Commission has described the effect that unlawful performance has on the parties' contractual rights as very unclear²⁰.

To demonstrate the uncertainty and complexity of the illegality doctrine in Uganda's jurisprudence, let's consider these inquiries: (1) Does the silence of the statute on an issue amount to an implied prohibition or illegality? (2) Does the reversal of a fraudulent transaction to the status antecedent amount to illegality? (3) To what extent does conflict of interest amount to illegality? (4) Whether the manner of performance of a contract is such illegality to bar recovery? (5) To what extent does fraud in land transactions amount to illegality? (6) To what extent does contempt of court extend to an order tainted with illegality?

¹⁷ Dr. Nelson Enonchong (1998) *Illegal Transactions*-University of Leicester published - London Hong-Kong at pg.3

¹⁸ Graham Sinclair(2019) *The effect of illegality since Patel v Mirza-East* Anglian Chambers published 26 May 2019 available at <https://www.ealaw.co.uk/wp-content/uploads/2019/05/The-effect-of-illegality-since-Patel-v-Mirza-rev.pdf> >accessed 14th December 2020

¹⁹ Lord Toulson, in *Patel v. Mirza* pg. 3

²⁰ Consultative Report on the Illegality Defense, LCCP 189 (2009), para 3.27.

Note, that these inquiries are not exhaustive of the extent of uncertainty and complex application illegality doctrine.

I. Does the *silence of statute on an issue amount to illegality?*

One may argue that lacunas in the law to fill non-existent gaps in the statute are a realm of parliament only. However, it is also argued that in statutory interpretation, there are desirable gaps in the law which judicial discretion can fill to meet the ends of justice. For instance, in *Sudhir Ruparelia & Meera Investments versus Crane Bank Limited [In Receivership]* the applicant challenged the respondent for lack of locus standi in the main suit, arguing lack of capacity to sue in receivership.²¹

Unfortunately, Justice Wangutsi interpreted section 96 of the Financial Institutions Act to bar a suit by the statutory receiver even in circumstances where the statute was silent. The rule in issue was that no other proceedings and no execution or other legal process may be commenced or continued against the financial institution or its property. The court relied on the authority of *Gordon Sentiba & Others v Inspectorate of Government* where the Supreme Court held that the authority to sue came from statute and where no provision to sue was provided for, the courts would not fill in the gaps by recognizing a nonexistent right.²²

Without resorting to policy considerations, the Court thus declined its competence to determine the matter by a statutory receiver where the law was silent with regard to capacity to sue. The court noted that “it is not upon Court now to imagine and say the legislature forgot this, we should insert it for them”.

The Court, by not suing the Crane bank (in receivership) due to the non-existent right to sue meant that the statute impliedly prohibited the statutory receiver from prosecuting any case. This strict statutory interpretation left zero room for judicial discretion. Indeed, the courts’ hands

²¹ Arising From High Court Civil Suit No. 0493 Of 2017) in the Republic of Uganda

²² SCCA No. 6 of 2008 Republic of Uganda

are tied and no relief can issue to a party who is tainted by illegality. This article contends that if the court had used its judicial discretion, the court would not have been prepared to construe the statute as having the effect of making the capacity to sue prohibited.

Similarly, in *Ham Enterprises Ltd, Kiggs International (U) Ltd, Hamis Kiggundu v Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd*, the plaintiffs challenged the credit facility for illegality as it was being enforced by a party not licensed by Bank of Uganda.²³ There was no law prohibiting a Ugandan from mortgaging property to a foreign financial institution, let alone a foreign lender from enforcing a credit facility obtained in another jurisdiction. The issue of silence of the Financial Institutions Statute on whether a foreign credit facility is enforceable within Uganda, was interpreted as an illegality in absence of a license from Bank of Uganda.

The court found that the 2nd defendant bank was/is a financial institution licensed to carry on banking business in Kenya and it conducted financial institutional business in Uganda through the first defendant without first seeking the authority and license from Bank of Uganda as provided for in the Financial Institutions Act, 2 of 2004 As Amended.

The Court seems to have placed emphasis on the lack of permission from Bank of Uganda to grant the loan yet the loan facility agreement was entered into in Kenya. The issue may therefore arise whether a national illegality doctrine which prevents a party from enforcing a contract is compatible with the East African Community law from which the contractual right arose.

Nevertheless, close scrutiny of the dearth of judicial reference to policy considerations shows that illegality defenses are absolute and strictly applied by Ugandan courts where the law is silent.

- II. Does the reversal of a fraudulent transaction to the status antecedent amount to illegality?

²³ Miscellaneous Application No. 654 OF 2020 Republic of Uganda

The illegality principle allows no room for the exercise of any discretion by the court in favour of one party or the other.²⁴ To compound the complexity of illegality rule, Uganda's land laws prohibit land ownership in mailo, customary and freehold land by foreigners except on lease basis. Let's consider the decision in *Crane Bank (in receivership) v. Meera Investments & Anor*²⁵, where the Court of law declined to order a retransfer of mailo land titles from Meera Investments Ltd to Crane Bank which was found to be a foreign entity. Even though there were allegations of undervaluation of the sales to Meera Investments Ltd, the Court of Appeal overlooked the pleadings and focused on the non-justiciability of the illegality in land ownership. That is, that Uganda's land laws expressly prohibit land ownership by foreigners in mailo interest.

Suffice to say that by reversing the transaction, the court claimed that it would be made an active participant in aiding an illegality. The better opinion is that two wrongs cannot make a right. Therefore, reversing a fraudulent transaction to its formerly illegal position calls for a discretionary approach in order that unjust enrichment and unfair results are prevented against several meritorious claims. The claim of fraud vis-à-vis defence of illegality calls for judicial reform of the approach to illegality rule rather than circumspection of the merits of the case owing to illegality defenses. It is critical to note that reversal of a fraudulent transaction due to illegality can also have devastating effects where the claimant seeks to avoid their obligations in contract. That is why other public policies need to be considered.

This article reckons that fraud and illegality are both wrongs. Therefore, where one party X is tainted by fraud and another party Y is tainted by illegality, it is debatable in whose favour can the courts reverse the

²⁴ *Tinsley v Milligan* [1994] 1 AC 340, 355.

²⁵ (Civil Appeal-2019/252) [2020] UGCA 2050 (23 June 2020) Available at <https://ulii.org/ug/judgment/court-appeal-uganda/2020/2050> (accessed 10 April, 2021)

transaction. This conundrum of fraud claim versus illegality defence further compounds the uncertainty of the illegality doctrine.

III. To what extent does conflict of interest amount to illegality?

Overtime public policy has supported the notion of integrity and absence of conflict of interest. However, the gray area on conflict of interest has become a springboard for many litigants to avoid transactions raising the defense of *ex turpi causa non oritur actio*. In the case of DFCU Bank Ltd v. William Kasozi, the respondent was challenged for purchasing a mortgage property for being an employee of Bank of Uganda.²⁶

The appellant Financial Institution extended a loan to Nagongera Millers and Farmers Ltd amounting to 80,000,000/= (eighty million shillings) under the Investment Term Credit Re-Finance Fund (ITCRF) of Bank of Uganda. The loan was secured under a mortgage of a piece of land comprised in block 244 Plot 1709 situated at Kisugu. The repayment schedule to be followed by the parties was provided by BOU. The company defaulted in repayment and the appellant as the Mortgagee put the property for sale. At the auction sale, the respondent an employee of BOU in the Legal Division was the successful bidder.

The Court of Appeal held that Bank of Uganda was not the de facto mortgagee and the loan from Bank of Uganda to the respondent to purchase the mortgage security was not illegal for conflict of interest. Thus, this conflict of interest never tainted the transaction with illegality expressly prohibited by law.

The conflict of interest issue came up again in Threeways Shipping Services Group Limited. v Kabiito Karamagi & Anor where the applicant argued that the receivership was illegal due to conflict of interest and that the respondent could not act lawfully as a receiver and lawyer for the 2nd respondent bank in the main suit.²⁷ The main contention of the Application

²⁶ Civil Appeal No. 70 of 2001 Republic of Uganda

²⁷ Misc. App. No. 121 of 2018 Republic of Uganda

was that conflict of interest barred a receiver where he or she was a witness in a case against the company under receivership. The court dismissed the application for review on wrong procedure. However, the conflict of interest area is still unresolved with regard to illegality.

IV. Whether the manner of performance of a contract is such illegality to bar recovery.

Contract law generally draws a distinction between a contract performed illegally after formation (which is generally enforceable, even by the guilty party)²⁸, and one where the illegality was contemplated by the contracting parties at formation (which is unenforceable by the guilty party)²⁹.

In *Hall v Woolston Hall Leisure Limited*, it was held that the conceptual basis on which a contract neither illegal nor prohibited at the time of its formation may become unenforceable due to the manner of its performance is open to debate.³⁰ Thus, in *Anderson Ltd v Daniel*, a claim for the price of goods was held to be unenforceable because the seller had failed to give the buyer an invoice containing details which the seller was required to give him by statute.³¹

However, the same position was controversial in the earlier mentioned case of *Ham Enterprises & Ors versus DTB Bank (U) Ltd & Anor*³², where the loan agreement not illegal not prohibited at the time of its formation in Kenya became unenforceable upon its default in Uganda and the manner of enforcing the security involved a nonparty DTB (U) Ltd to enforce a security.

²⁸ See, eg, *Wetherell v Jones* (1832) 110 ER; *Coral Leisure Group Ltd v Barnett* [1981] ICR 503. Cited by Tsun Hang (2009) reforming illegality in Private law, Singapore Academy of Law Journal Vol. 21 at pg. 220

²⁹ See, e.g. *Langton v Hughes* (1813) 105 ER 222; *Mason v Clarke* [1954] 1 QB 460 (this was a decision of the court of Appeal; though subsequently overruled by the House of Lords in [1955] AC 778 on a finding of fact, the legal principles laid down were not challenged). Cited by Tsun Hang (2009) reforming illegality in Private law, Singapore Academy of Law Journal Vol. 21

³⁰ [2001] WLR 225, 246

³¹ [1924] 1 KB 138

³² *ibid*

The court held that DTB(U)Bank Ltd was illegally performing a loan agreement on behalf of an unlicensed banker DTB(K) Ltd. Simply put, DTB(U) Ltd was not a proper collecting agent if the principal DTB (K) Ltd was an unlicensed lender in Uganda. To this extent, the illegality defense is problematic in circumstances where the manner of performance is illegal after the formation of the contract.

Another example would be the significance of the distinction between contracts which involve the breach of a statutory prohibition in their formation and those which involve a breach of statutory prohibition in their performance. Tsun Hang argues that enforceability of a contract "illegal in its conception" is unclear. This article makes a stand point that the illegality defence falls short of certainty and the courts need to apply discretion to cure the problems of illegality.

V. To what extent does fraud in land transactions amount to illegality?

The general rule is that fraud on government revenue is a common law illegality which vitiates a transaction. In *Samuel Kizito Mubiru & Anor v. G.W. Byensiba & Anor*, the court held that a buyer is not a bona fide purchaser where he inserts a lesser figure on the transfer form as consideration when he actually paid more in order to defraud government of revenue.³³ The mode of acquisition becomes tainted with fraud and illegality. The Supreme Court of Uganda in *Betty Kizito v David Kizito Kannyonya* held that the under declared value on transfer forms constituted fraud which defeated the bona fide purchaser for value without notice defense.³⁴

Under declaration of the purchase value of land is fraud on government revenue. Section 59 of the Registration of Titles Act does not specifically provide for fraud on government as such breach that defeats on a bona fide purchaser for value without notice.

³³ H.C.C.S no.513 of 1982 Republic of Uganda

³⁴ Civil Appeal No. 104 of 2018 Uganda Supreme Court

In Land transactions, the Courts in Uganda have settled that fraud on government revenue in transfer instruments amounts to an illegality. However, the strict application of fraud on government revenue in land transactions falls short of fair results and justice. For instance; the seller will be left remediless to sue on a contract of sale of land tainted by illegality where the transfer instruments have an under declaration of value. This begs the question whether the law allows for apportionment of blame both on the seller and the buyer or whether we need a policy that prevents unjust enrichment in land transactions.

The problem of raising the nature of fraud on government revenue to illegality status poses problems for bona fide purchasers for value without notice. For instance, in *Friends Estates Ltd v. Haji Numan Mubi Akulamusa*, the Court of Appeal refused to set aside acquisition of title by the respondent who purchased land from a real estate company (Mash Investments Ltd) being intermediaries of the sellers who were administrators of the estate.³⁵ The respondent purchased land worth 1.2 billion shillings but the transfer forms had an underdeclared value of 300 million shillings. The plaintiff (previous owner) sought to challenge the sale on grounds of fraud on government.

However, the Court of Appeal did not regard the under-declared transfer value of land as fraud on the previous owner/claimant within section 59 of the Registration of Titles Act. Thus, the court declined its competence to determine fraud on government revenue as illegality that disentitles a buyer of the defense of bona fide purchaser for value. In conclusion, Uganda's judiciary has placed fraud on government revenue on the status of illegality under section 184 of the Registration of Titles Act in order to defeat the defence of bona fide purchaser for value without notice³⁶. This approach is uncertain and complex which leaves some gaps to fill through judicial reform by applying a discretionary policy approach to illegality.

³⁵ Civil Appeal No. 104 of 2018 UGSC

³⁶ Kanoonya's case (supra) Republic of Uganda

VI. To what extent does contempt of court extend to an order tainted with illegality?

It is a matter of public policy that a court has the authority to decide wrong as well as right. It is also universally accepted that court orders must be obeyed whether erroneous or legally justified.

In *Kansiime K. Andrew v. Himalaya Traders Limited & 7 Others* the plaintiff had a court order against the 8th respondent Uganda Land Commission restraining it from dealing with the land and declaring him as a lawful owner of customary interest in Kampala City.³⁷ Notwithstanding the court order, the 8th respondent Uganda Land Commission went ahead to lease out the same land to other third parties in breach of that court order.

The plaintiff sued the subsequent lessees of the piece of land arguing contempt of court. The plaintiff asserted that he was a bona fide or lawful occupant under s.29 of the Land Act (as amended) 2010; however, his claim to the land dated from 1994 when he purchased the land. Under the Land laws, customary tenancy is protected where the occupation predated 12 years before the 1995 constitution. Therefore the interest the plaintiff claimed in land was unlawful or illegal to that extent because his interest dated from 1994.

In this case, the Court of Appeal overlooked the wrongfulness of the court order granting customary tenancy to a plaintiff whose interest fell outside the scope of the Land Act. By extension, the court referred to public policy of obeying the sanctity of court orders at the expense of illegality in the same court order. The subsequent lease-holders argued that the court order was tainted by illegality since the plaintiff sought an unlawful interest in land that is a customary tenancy in an urban area. However, the Court of Appeal declined its inherent *jurisdiction* to set aside that court order for illegality

³⁷ *Kansiime K. Andrew v. Himalaya Traders, Kamukamu Associates Limited, Treasure Trove (U) Ltd, Tejwant Sigh, Gulzar Singh, Jamil Kiyemba, Commissioner for Land Registration and Uganda Land Commission -Civil Appeal no. 208 of 2019 Court of Appeal of Uganda*

due to the unlawful interest and instead ordered that the subsequent lessees of land acquired the land in contempt of a court order. Overall, the breach of the court order was the paramount illegality over the illegal nature of interest in land.

The irony of non intervention by courts in illegality defences is based on the policy of integrity in the judicial system arguing that a judgment of court, however wrong it may be, is always enforceable until it is set aside. A question then arises whether the courts should lay their tools down where the court order was entered in error or per incuriam of the necessary statutes or principles. Scrutton L. J opined that, 'But it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it³⁸.'

2.2.2 INJUSTICE

Under this head, these are the reasons for asserting that illegality defences are unjust; that is: (i) Illegality is a Principle of Policy³⁹ (ii) Punishment Is A Rebate of Criminal Law Not Civil Law (iii) Disproportionality of the Illegality Doctrine (iv) illegality is not concerned with public interest.

(i) Illegality is a Principle of Policy

The principle *ex turpi causa non oritur actio* is not a principle of justice; it is a principle of policy; whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation⁴⁰.

(ii) Punishment Is A Rebate of Criminal Law Not Civil Law

Another argument advanced in favour of limiting the absolute application of rigid illegality defense in the private law of contract, tort and unjust enrichment is that civil law is not designed for punishment where there is a clear Penal Law which provides for the same.

³⁸ Philips v Copping [1957] 1 KB 15, Cited in Makula International ltd v. His Eminence Cardinal Nsubuga & Rev. Dr. Father Kyeyune, Republic of Uganda

³⁹ Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277, 293

⁴⁰ Tinsley v Milligan [1994] 1 AC 340, 355.

Punishment is generally not the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing⁴¹.

For example, in the case of *Thackwell v Barclays Bank plc* where an action for conversion failed by virtue of the illegality defense, but only after the court had considered all the circumstances of the case, including the nature of the illegality, to determine whether the granting of a remedy to the claimant would be seen to be indirectly assisting or encouraging his criminal act.⁴² A remedy was eventually denied because the claimant had been party to a fraudulent transaction. The public conscience test was, however, rejected by the House of Lords in *Tinsley v Milligan* on the ground that it was inconsistent with previous authority and that it would replace a principled system of rules with a discretionary balancing operation.⁴³

(iii) Disproportionality of the Illegality Doctrine.

Indeed, illegality is an unsatisfactory doctrine that depends upon the state of the pleadings. According to Lord Toulson in *Patel v Mirza*⁴⁴, the *ParkingEye*⁴⁵ is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If he had realized that the letters which he was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of

⁴¹ See 35 para 108 Of *Patel v Mirza* decision

⁴² [1986] 1 All ER 676

⁴³ UKHL 3, 1 AC 340

⁴⁴ *Ibid*

⁴⁵ UKSC 2015/0116

the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.

A court should not refuse to enforce legal or equitable rights on the ground of illegality if to do so would be disproportionate to the seriousness of the conduct or if it would not further the purpose of the statute. It is also argued that:

“It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality⁴⁶.”

From the foregoing, illegality defenses should not necessarily be used as punishment to bar a defaulting party from recovering its bargain.

(iv) Illegality is not Concerned with “Public” Interest

The 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).⁴⁷

In *Parkinson v College of Ambulance Ltd*, the plaintiff made a donation to a charity to secure a knighthood.⁴⁸ When the honor failed to materialize he sued for the return of his money. The claim was rejected.

The rationale for adopting a discretionary approach is in Lord Toulson’s dictum;

⁴⁶ *Ibid*

⁴⁷ *ibid*

⁴⁸ [1925] 2 KB 1

“The courts must obviously abide by the terms of any statute, but it is right for a court which is considering the application of common law doctrine for illegality to have regard to the policy factors involved also known as “a trio of considerations” and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the judicial system should result in denial of the relief claimed.”⁴⁹

3.1 THE ILLEGALITY TEST: WHICH WAY FOR UGANDA

This paper recommends that Uganda needs to adopt a discretionary policy-based approach to illegality in line with the UK position in Patel's case.

In *Patel v Mirza*⁵⁰, Lord Toulson stated that:

“if a contract involving prohibited conduct is not void as a matter of statutory construction; that in deciding whether a claim arising from it should be disallowed by reason of illegality, the court should have regard to the policies that underlie the doctrine. He further argued that it is not a general discretion, but a principled evaluation recognizing and that the maxim ex turpi causa must be applied as an instrument of public policy and not in circumstances where it would not serve the public interest.”

3.2 THE CONTROVERSY BETWEEN ILLEGALITY TESTS: THE ENGLISH VERSUS THE SINGAPORE APPROACH

i. The English Position

The Court in England has put the law on illegality on a new course, a course which purports to be discretionary. ⁵¹ But this can only properly be called discretionary if principles can be discerned.

⁴⁹ Lord Toulson in *Patel v. Mirza* *ibid*

⁵⁰ *Ibid*

The illegality defense test in England is one of policy approach with a trio of considerations. This is referred to as the “range of factors” test to illegality defences. The policy-based approach was adopted in *Stoffel & Co. v Grondona* where the Supreme Court applied policy-based approach to reject illegality defense to solicitor’s negligence where claimant had engaged in mortgage fraud.⁵² The Supreme Court of UK held that a claimant who had engaged in mortgage fraud was not barred from bringing a claim against her solicitors for negligently failing to register the forms transferring the property to her and releasing a prior mortgage. The Court of Appeal noted that although the mortgage application was fraudulent, it did not result in a sham transaction as between the claimant and BM in relation to the legal charge. The Court noted that whilst mortgage fraud is a canker on society it is not in the public interest to allow negligent conveyancing solicitors and their insurers) to avoid their professional responsibilities and doing so would be unlikely to reduce the prevalence of such fraud.

The UK position allows their courts to exercise a much higher degree of discretion in deciding whether to strike down a contract for illegality. Therefore, the current law provides for a general right of restitution of money paid under an illegal contract pursuant to either statute or common law.

ii. The Singapore Position

Singapore has decided to apply a balancing exercise based on proportionality to a very limited category of contract tainted by illegality. The principle of proportionality is the only balancing exercise that is applied to contract which are not illegal per se but entered into with the object of committing an illegal act.

⁵¹ *ibid*

⁵² [2020] SC 42

In *Ochroid Trading Ltd v. Chua Siok Lui*, the Court of Appeal summarized the existing law of illegality (i.e the two-stage approach) as applicable in Singapore...⁵³

“The first stage of the inquiry is for the court to ascertain whether the contract is prohibited either under a statute or common law. If the contract is so prohibited, there can be NO recovery pursuant to the illegal contract. However, for the general category of contracts which are not unlawful per se but entered into with the object of committing an illegal act, the proportionality principle laid down in *Ting Siew May v Boon Lay Choo and another*⁵⁴ ought to be applied to determine if the contract is enforceable.

At the second stage of the inquiry, the court is to ascertain whether notwithstanding that there can be no recovery pursuant to the illegal contract, there might nevertheless be restitutionary recovery of benefits conferred thereunder. Under the existing law, there are at least three possible avenues for such restitutionary recovery:

- (i) where the parties are not in *pari delicto* (i.e. where the plaintiff is less blameworthy than the defendant);
- (ii) where a party to an illegal contract repents in time before the illegal purpose is effected; or
- (iii) where the restitutionary recovery is premised on recovery through an independent cause of action”

In Singapore, the illegality defense test is one of proportionality/balancing process. For instance; where the contract is not prohibited but the conduct is illegal at common law, there may be scope for a remedy to be provided. This is illustrated by *Ting Siew May v Boon Lay Choo* itself.⁵⁵ In that case an option was backdated to enable a housing loan to be obtained from a bank. This was caught by common law illegality, not because the contract was

⁵³ [2018] SGCA 5 Singapore Court of Appeal

⁵⁴ [2014] 3 SLR 609

⁵⁵ [2014] SGCA 28 Singapore

unlawful per se but because it was entered into with the object of committing an illegal act.

It was accepted that in such a case there was no rule that the contract was automatically unenforceable, but this would turn on the facts of the case with regard to the principle of proportionality as to whether it would be disproportionate to treat the contract as void and unenforceable. Relevant factors in assessing proportionality include whether allowing the claim would undermine the purpose of the prohibiting rule; the nature and gravity of the illegality; the remoteness or centrality of the illegality to the contract; the object, intent and conduct of the parties and the consequences of denying the claim. It was emphasized that this proportionality test is narrower than the balancing exercise adopted in *Patel* of which proportionality is only one factor. Therefore, there is no general right of restitution of money paid under contracts illegal by statute and at common law.

4.0 CONCLUSION

This article demonstrates that there is need for a new illegality test by Ugandan Judiciary especially a ‘*trio of considerations*’ test introduced in *Patel v. Mirza*⁵⁶. A new illegality test can offer sufficient protection for parties in suits involving matters tainted by illegality.

From the foregoing discussion, judicial reform of the illegality law in Uganda will require a discretionary approach adopted by the UK Supreme Court in 2016 because illegality defenses appear to be very limiting and unjust results ensue. A better model is needed based on policy approach to avoid the stern and strict application of illegality doctrine.

The article recommends that Ugandan judges should take a policy-based approach in the application of illegality doctrine where they deem it just. For instance; the New Zealand Illegal Contracts Act 1970, section 7, provides that the court may grant to any party to an illegal contract “such relief by way of restitution, compensation, variation of the contract, validation of the

⁵⁶ supra

contract in whole or part or for any particular purpose or otherwise howsoever as the court in its discretion thinks just.

The Courts need to adopt a policy-based approach to avoid the stern application of illegality doctrine. The starting point for Ugandan Supreme Court is to overhaul the decision in *Makula International Ltd Cardinal Nsubuga* as *bad law* for the private law of contract, tort and unjust enrichment because of its unprincipled focus on the *result of* illegality as opposed to the policy-based approach which calls for analytical framework of the process to illegality. Nevertheless, the *Makula International case* may still be suitable for illegalities arising from breaches of Civil Procedure. Therefore, the courts should refrain from the general blanket application of the *ratio* in the *Makula International Limited* without considering other policy considerations in private law except where illegality arises from breach of civil procedure.

The article agrees with the notion that the illegality defense is not aimed at achieving a just result between the parties and that it is necessary to ensure that the defense only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it⁵⁷.

⁵⁷ Les Laboratoires Servier v Apotex Inc [2012] EWCA Civ 593, Etherton LJ

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