Lord Toulson Memorial Lecture 2025

The Role of Judges in the Rule of Law and the Promotion of International Flourishing: a Case Study

Lord Hodge, Deputy President of the UK Supreme Court

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I am very honoured to be asked to give the lecture this year in memory of a dear colleague and friend, Roger Toulson.[1]

This evening, I wish to describe a question of law and a series of cases in which Roger Toulson was deeply involved as a way of illustrating one aspect of the judicial role in upholding the rule of law. But first, I will look more broadly at the judicial role.

Judges have often spoken of the value of certainty in the law. Just over 250 years ago the great Chief Justice, Lord Mansfield, stated that what commercial people wanted most of all was that the legal rules governing business were certain.[2] It is not just business that wants certainty; we all need to have confidence that the rules by which we live in society and organise our lives are clear, certain and predictable. That assists lawyers to give advice with confidence and facilitates the resolution of disputes.[3] In short, with competent legal advice you can know where you stand. That is also why the rule of precedent and the principle of stare decisis are so important and why the Supreme Court uses its power to depart from prior rulings with great circumspection.[4]

In his great work, 'The Morality of Law', Lon Fuller formulated eight desiderata for a legal system, including that legal rules should be general and not ad hoc, that they should be clear, and not retroactive, that they should be published, and that law should not be changed too frequently or suddenly.[5]

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[1] I am very grateful to my judicial assistant, Poppy Mulligan for her assistance in preparing this lecture.
[2] *Vallejo v Wheeler* (1774) 1 Cowp. 143, 153.
[3] *Chandler v State of Trinidad and Tobago* [2023] AC 285, [64].
[4] *Knauer v Ministry of Justice* [2016] AC 908, [23]; See also *JTI Polska sp oo v Jakubowski* [2024] AC 621, [36]-[44] (Lord Hamblen).
[5] Lon L. Fuller, *The Morality of Law* (rev edn, Yale University Press 1964).

No one would doubt that predictability is a very important quality in the law. But the common law develops incrementally as the courts apply rules or principles of law to new and often unforeseen circumstances. It is often possible for lawyers to agree on how established and predictable legal rules are to be applied to new facts, or, in the absence of agreement, for a judge to apply them. That is standard fare of legal practice. Those cases do not come near the Supreme Court. But what does a judge of that court do if he or she thinks either that the common law is too uncertain – for example because judges have made the rules too complicated by creating exceptions in order to achieve just results - or that the law has taken a wrong direction and is causing injustice?

My case study is the doctrine of illegality in the law of contract, tort and unjust enrichment.

In a judgment written before he joined the Supreme Court, Lord Toulson stated that, '*[t]he doctrine of illegality in the law of contract is knotty. This is a mild way to describe it. It is one of the least satisfactory parts of the law of contract*.'[6]

Lord Toulson worked hard to bring clarity to this area of law during his career, initially as Chairman of the Law Commission where he oversaw the development of recommendations in this area, to the Court of Appeal where he offered his reasoning and analysis in judgments and finally, to the Supreme Court, where after a series of cases, the issue was finally settled in *Patel v Mirza*[7] where Lord Toulson wrote the opinion of the majority - aptly illustrating the old adage, 'lose battles, but win the war.'

Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances.[8] In this lecture, I hope to provide context to the evolution of the defence of illegality, the competing theories of how it should be applied and how Lord Toulson successfully proposed a way forward that sought to provide clarity and bring to the forefront the public policy interests that underpin this principle.

Historical context

English law has a long-standing repugnance for claims founded on the claimant's own illegal or immoral acts.[9] This principle was famously articulated by Lord Mansfield in 1775 where he

[6] *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338, [43].
[7] [2016] UKSC 42.
[8] ibid [2].
[9] *Les Laboratoires Servier v Apotex Ltd* [2014] UKSC 55, [13].

stated in the judgment of *Holman v Johnson*[10] that, 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'[11] *Holman v Johnson* involved a claim for payment of the price of goods which were to be illegally smuggled from France into England. The defendant pleaded the defence of illegality, arguing that he could not be compelled to pay for the goods in circumstances where the plaintiff was aware that the goods were purchased with the intention to commit an illegal act (smuggling). In this case, the defence failed as the demand for payment was not founded upon an illegal act because the plaintiff was not directly involved in the smuggling.

This relatively simple proposition became one of the most heavily litigated rules of the common law.[12] Case law developed throughout the 18th century on the application of the defence of illegality and different approaches and exceptions were applied. By the end of the 20th century, there was a wealth of inconsistent authority on this point.[13] For example, distinctions were made based on the type of goods or services purchased,[14] or the level of participation by the plaintiff in the illegal or immoral act.[15] The central reason for this fragmentation was that judges examine each case on its individual facts and circumstances, which can lead to inconsistency in how the principle is applied. This issue came to the attention of the House of Lords in 1993 through the case of *Tinsley v Milligan*.[16]

Tinsley v Milligan

The facts of *Tinsley v Milligan* are well known. Miss Tinsley and Miss Milligan each contributed to the purchase of a home; however, it was vested only in Miss Tinsley's name. This allowed Miss Milligan to make dishonest benefit claims to the Department of Social Security. The parties fell out and Miss Tinsley served a notice to quit on Miss Milligan, seeking possession of the property. Miss Milligan counterclaimed for a declaration that the property was held on trust for both parties in equal shares.

[10] (1775) 1 Cowp. 341.
[11] ibid [343].
[12] *Les Laboratoires Servier v Apotex Ltd* [2014] UKSC 55, [61].
[13] ibid.
[14] Comparison can be made between the decision in *Holman v Johnson* (1775) 1 Cowp. 341 and *Pearce v Brooks* (1865-66) L.R. 1 Ex. 213. In both cases, the plaintiff had knowledge of the illegal or immoral purpose of the contract but in *Holman* the defence of illegality did not apply, whereas in *Pearce* it did. In *Patel v Mirza* [2016] UKSC 42, [4], Lord Toulson hypothesises that the difference between the cases was the type of goods supplied.
[15] *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 Q.B. 340, 348.
[16] [1994] 1 A.C. 340.

The Court of Appeal decided in favour of Miss Milligan by applying the 'public conscience' test which asks whether it would be 'an affront to the public conscience' to grant the relief that she claimed. The House of Lords also decided in favour of Miss Milligan but rejected the 'public conscience' test. Instead, the House of Lords explained that title to property may pass under an unlawful transaction; but that the court would not assist an owner to recover their property if they are required to rely on their own illegality to prove their title. This became known as the 'reliance' test. In order for Miss Milligan to assert title to the property, she was required to show that she had contributed to the purchase of the property and that there was a common understanding that she was a joint owner. Miss Milligan was able to assert her title without relying on the underlying motivation behind registering the property in Miss Tinsley's name, meaning that she did not have to rely on her illegal actions.

In a dissenting opinion, Lord Goff emphasised that he did not think it appropriate for the courts to reform the law by introducing such a discretion. He favoured a strict rule that would have defeated a claim 'tainted' by the claimant's illegal purpose. This would have meant that Miss Tinsley retained Miss Milligan's money, therefore receiving a reward despite being culpable. In his concluding remarks, Lord Goff urged the Law Commission to carry out a full inquiry for consideration by the legislature.[17]

The Law Commission

The Law Commission conducted a comprehensive review of the law of illegality and published a series of proposals across 4 consultation papers from 1999 to 2010,[18] to address the 'unsatisfactory features' that were observed.[19] The initial consultation papers suggested that the law be reformed through legislation, however this was met with criticism and a new path forward had to be devised.

Lord Toulson was the Chairman of the Law Commission from 2002-2006 and 'engaged fully in the search for a satisfactory statutory solution.'[20] Lord Toulson's contribution to the work of the Law Commission was gracefully summarised by Hugh Beale, Professor of Law at the University of Warwick.

[17] ibid 364.
[18] Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP 154, 1999); Law Commission, *The Illegality Defence in Tort* (Law Com CP 160, 2001); Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP 189, 2009); Law Commission, *The Illegality Defence* (Law Com 320, 2010).
[19] *Patel v Mirza* [2016] UKSC 42, [10].
[20] S. Green and A. Bogg, *Illegality after Patel v Mirza* (Hart Publishing 2018) [v].

> ‘Sir Roger clearly often felt that [legislative] reform … was unnecessary. Indeed, he seemed so often to question whether our proposals were necessary or worthwhile that I once wondered whether he understood the meaning of the phrase “law reform.” Soon I discovered, however, that I had been much mistaken. Any reluctance on his part to contemplate the sometimes complex proposals was no more than a sign of the robust common sense that he brought to the job of Chairman, and his firm belief that, within an appropriate statutory framework, judges could and should be trusted to use their own common sense, wisdom and knowledge to develop the law in the right way to cover unforeseen circumstances, and to correct their errors when justice demands it.’[21]

The Law Commission analysed the problems with the illegality defence in four categories: complexity, uncertainty, arbitrariness and lack of transparency.[22] Their criticism was centrally focused on the way that decisions were reached, rather that the outcomes being unsatisfactory. They observed that, generally, the courts had managed to avoid unduly harsh outcomes but this was achieved by inventing exceptions to the rules or straining the application of rules to ensure that a just result was achieved on the facts of each specific case.

As the Law Commission continued to work towards a legislative solution, the common law continued to evolve. By 2010, the Law Commission observed that recent case law in this area had brought about the improvements that they had identified as necessary, for example, judges were making the law clearer and more certain by explaining the policy reasons that underlay their decisions.[23] Therefore, the Commission concluded that the law should be left to develop through case law, rather than legislative reform.

ParkingEye Ltd v Somerfield Stores Ltd

The Court of Appeal later followed and supported the approach advocated by the Law Commission.[24] Sitting then as a Court of Appeal judge, Lord Toulson advocated for a flexible approach that allowed judges to consider underlying policy factors in cases of illegality. In the judgement of *ParkingEye Ltd v Somerfield Stores Ltd,*[25] Lord Toulson summarised his position as follows:

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[21] ibid.
[22] *Patel v Mirza* [2016] UKSC 42, [23].
[23] Law Commission, *Illegality Defence Report* (Law Com 320, 2010), [1.8].
[24] See *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593 and *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338.
[25] [2013] QB 840.

> ‘Rather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for the reasons articulated by it.
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> This is not to suggest that a list of policy factors should become a complete substitute for the rules about illegality in the law of contract which the courts have developed, but rather that those rules are to be developed and applied with the degree of flexibility necessary to give proper effect to the underlying policy factors.’[26]

The UK Supreme Court

The defence of illegality came to the UK Supreme Court in a string of cases from 2014 to 2016. The first two of these cases were *Hounga v Allen*[27] and *Les Laboratoires Servier v Apotex Ltd.*[28] Both cases were heard by the Supreme Court in 2014 by different panels of 5 justices.[29] Unfortunately, each panel adopted a different test for determining the applicability of the illegality defence.

The different approaches can be broadly categorised as the ‘strict’ and ‘flexible’ approaches. The strict approach favoured the ‘reliance test’ in *Tinsley v Milligan*, whereby if you could prove your claim without relying on the illegal or immoral act, you were entitled to recovery; otherwise, you were not. This was the approach chosen in *Les Laboratoires Servier v Apotex Ltd*. The flexible approach favoured consideration of multiple factors, including the purpose of the public policy that underlies the prohibition, whether it would enhance the purpose to allow the claim and considerations of proportionality. This approach was followed by the majority in *Hounga v Allen*.

Hounga v Allen

Hounga v Allen was rightly described by the Employment Tribunal as ‘*one of the saddest cases’* to have come before the tribunal.[30] The case was raised by Miss Hounga, a 21-year-old Nigerian national who was brought to the UK by the Allen family in January 2007, when she was only 14 years old. Miss Hounga was promised the opportunity of attending school or

[26] ibid [52]-[53].
[27] [2014] UKSC 47.
[28] [2014] UKSC 55.
[29] *Hounga v Allen* was heard on 31 March and 1 April 2014 (judgment given on 30 July 2014) and *Les Laboratoires Servier v Apotex Ltd* was heard on 10 June 2014 (judgment given on 29 October 2014).
[30] *Allen v Hounga, Hounga v Allen* [2011] 3 WLUK 958, [6].

college, receiving board and lodging, in addition to earning £50 a month for completing domestic work for the family. Pursuant to arrangements made by the Allen family, Miss Hounga arrived in the UK with a false identity, posing as a member of the Allen family and she was granted a visitor's visa for 6 months. Over the next 18 months, Miss Hounga lived and worked illegally in domestic service for the Allen family, predominately taking care of their 3 young children.

During her time in service to the Allen family, Miss Hounga was subject to serious physical abuse by Mrs Allen. Miss Hounga reported that she was regularly hit, slapped, kicked in the stomach and head, compressed by the neck (making it difficult for her to breathe) and her head banged off the wall while she was called 'an animal'.[31] Miss Hounga testified that on one occasion Mrs Allen pushed her to the floor and threatened her with a knife because biscuit crumbs had been left on the floor after the children had eaten.[32] Mrs Allen threatened that if she reported the ill-treatment or was even noticed by the authorities, she would be imprisoned, as she was not legally allowed to remain in the country.

In July 2008, following a heated altercation, Mrs Allen dismissed and forcibly evicted Miss Hounga from their home. With nowhere left to go, Miss Hounga was discovered wandering around a car park and was taken into the care of social services.

Miss Hounga brought claims against the Allens in the employment tribunal for unfair dismissal, breach of contract and unpaid wages. These claims were dismissed on the ground that her contract of employment was unlawful.[33]

However, Miss Hounga also brought a statutory race discrimination claim which the Employment Tribunal upheld, finding that she had been dismissed because of her vulnerability in consequence of her immigration status.[34] This was eventually appealed to the Court of Appeal, who held that her complaint failed due to the illegality of her contract of employment.[35] The Supreme Court was asked to decide in what circumstances should the defence of illegality defeat a complaint by an employee that an employer had discriminated against them by dismissal.

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[31] ibid [19].
[32] ibid [20].
[33] *Patel v Mirza* [2016] UKSC 42, [74].
[34] ibid [75].
[35] *Allen v Hounga* [2012] EWCA Civ 609.

Lord Wilson wrote the majority judgment (with whom Lady Hale and Lord Kerr agreed). Lord Wilson considered the 'highly problematic' application of the illegality defence in claims of tort, citing issues that had arisen with the application of the reliance test and the inextricable link test.[36] Instead, Lord Wilson emphasised that the illegality defence rests upon the foundation of public policy. Therefore, the question for the court to ask was, 'what aspect of public policy founds the defence?' and then, 'is there another aspect of public policy to which application of the defence would run counter?'[37] Concern to preserve the integrity of the legal system was a helpful rationale of the policy founding the defence.

In relation to the first question: on the facts of this case, the policy considerations did not weigh against the appellant. By receiving compensation for injury to feeling, Miss Hounga was not profiting from her illegal conduct, compensation would not permit evasion of criminal penalty, and it didn't appear to encourage those in her position to enter into illegal employment contracts. In fact, conversely, defeating the award would appear to encourage those in Mrs Allen's position to enter into illegal contracts and discriminate against those employees with impunity.

On the second question: the court considered the public policy against trafficking and remarked that if this was not a case of Miss Hounga being trafficked by the Allen family, then 'it was so close that the distinction did not matter for the instant purpose.'[38]

The approach of Lord Wilson became authority for the flexible approach to the application of the illegality defence. Whereby considerations of public policy were relevant in determining the application of the defence of illegality.

Lord Hughes (with which Lord Carnwath agreed) concluded that the appeal should be allowed, but for different reasons. Lord Hughes argued there was an insufficiently close connection between Miss Hounga's immigration offences and her claims under the tort of discrimination to sustain the illegality defence.[39] These matters merely served as context for the tort that was committed. Further, the UK's obligations regarding trafficking should not be read across to provide a separate or additional reason for Miss Hounga to recover damages for discrimination.

[36] *Hounga v Allen* [2014] UKSC 47, [25], [28]-[29].
[37] ibid [40].
[38] ibid [52].
[39] ibid [58]-[59].

Meanwhile, another panel of the Supreme Court was deciding *Les Laboratoires Servier v Apotex*.

Les Laboratoires Servier and another v Apotex Inc

Les Laboratoires Servier ('Servier'), a French pharmaceutical company, held a number of patents for perindopril erbumine, a drug used to treat hypertension and cardiac insufficiency. Apotex Inc ('Apotex') are a Canadian pharmaceuticals group that specialise in the manufacture and marketing of generic pharmaceutical products.

A number of patents had been granted to Servier for the perindopril erbumine compound. In Europe, patent protection for the compound had expired but Servier retained a UK patent for the crystalline form of the compound. However, in 2006, Apotex began to import and sell generic perindopril erbumine in the UK.

In response, Servier obtained an interim injunction against Apotex, to prevent import and sale of the drug in the UK. A condition of the grant of this interim injunction was that Servier would compensate Apotex for any loss caused by the interim injunction, should it be determined at a later date that it should not have been granted.

In 2007, the High Court held that the UK patent was invalid, meaning that Apotex was entitled to compensation from Servier.[40]

Meanwhile, the same parties were litigating in Canada over alleged infringement of Servier's Canadian patent over the drug. In 2008, the Canadian courts found that the patent was valid and Apotex were infringing it.[41]

This all came to a head in the UK, when Servier were called upon to pay damages to Apotex and asserted the defence of illegality. Specifically, Servier asserted the *ex turpi causa* defence, which allows a defendant to resist a claim which is founded on the claimant's own illegal or immoral act. Servier argued that it would be contrary to public policy for Apotex to recover damages for being prevented from selling a product in the UK whose manufacture in Canada would have been unlawful.

[40] *Les Laboratoires Servier v Apotex Ltd* [2014] UKSC 55, [4].
[41] ibid [5].

The court unanimously dismissed Servier's appeal holding that the infringement of the Canadian patent by Apotex did not constitute 'turpitude' for the purposes of the *ex turpi causa* defence. Writing the majority judgment, Lord Sumption followed the decision in *Tinsley v Milligan* where the court rejected the 'public conscience' approach on the ground that it imported a discretionary element into what was in reality a rule of law. 'Turpitude' involves a breach of public law of the state or in some cases public policy. The grant of a patent gives rise to private rights, the infringement of which does not engage the public interest and therefore does not give rise to the *ex turpi causa* defence.[42]

Lord Toulson agreed with the majority that the appeal should be dismissed but came to that conclusion for different reasons. Lord Toulson thought it appropriate that public policy considerations were taken into account when determining the application of the defence of illegality – as had been recognised by the majority in *Hounga v Allen* a few months before.[43]

In concluding his remarks, Lord Toulson foreshadowed the battleground to come, expressing that 'it may be necessary to re-analyse *Tinsley v Milligan* in a future case.'[44]

Competing theories

As Lord Neuberger described, the tension in these cases primarily lies 'between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case.'[45]

If the priority is predictability, then a rule or principled approach is favoured. However, by that approach, outcomes that appear unfair or unjust will not prevent operation of the rule. Whereas, if a fair outcome is prioritised above coherence and clarity, then a flexible approach is more attractive.

This tension can be neatly summarised by the contrasting opinions of Lord Sumption and Lord Toulson in *Servier*. Lord Sumption observed that the strict approach is 'bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits.'[46] Thus, 'the practical operation of the law in this field will often produce disproportionately harsh consequences.'[47] Whereas Lord Toulson concluded that it was

[42] ibid [30].
[43] ibid [57]-[62].
[44] ibid [64].
[45] *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; reported as *Bilta (UK) Ltd v Nazir* [2016] AC 1, [13].
[46] *Les Laboratoires Servier v Apotex Ltd* [2014] UKSC 55, [13].
[47] ibid [18].

appropriate to adopt a flexible approach which allows the decision maker to 'proceed carefully on a case by case basis, considering the policies which underlie the broad principle.'[48]

At the end of 2014, the court was openly divided. Each side passionately entrenched in their interpretation of the illegality defence. However, 'in the midst of chaos, there is also opportunity.'[49]

Jertivia SA v Bilta (UK) Ltd

In *Jetivia SA v Bilta (UK) Ltd,*[50] a panel of seven justices was convened to address the application of the defence. I had not been involved in the debate on illegality until this appeal, but the remaining six Justices had all sat in either *Hounga* or *Servier.* The sharp division in opinion was evident and it was unclear whether a unified way forward could be found.

Bilta (UK) Ltd was compulsorily wound up and its liquidators initiated proceedings against its two former directors and Jetivia SA, a Swiss company. The claim alleged that the former directors and Jetivia had engaged in an 'unlawful means conspiracy' to injury Bilta by a fraudulent scheme. The conspiracy alleged was that the former directors caused Bilta to enter into a series of transactions relating to European Emissions Trading Scheme Allowances (commonly referred to as 'carbon credits') with various parties, including Jetivia. These transactions constituted a species of VAT fraud known as 'carousel fraud'.[51] The liquidators (on behalf of Bilta) sought damages in tort from each of the defendants, compensation based on a constructive trust and contribution under s.213 of the Insolvency Act 1986, which authorises payment of a contribution to the assets of a company if in the course of winding up it appears that the company's business has been carried on for a fraudulent purpose.

Jetivia applied to strike out the claim on a number of grounds, including that they were bound to defeat the claim by application of the defence of illegality. They argued that Bilta's claims were barred due to the criminal nature of the conduct of the company, whose function, under the command of the directors who controlled it, was essentially to serve as a vehicle to defraud the Revenue. The lower courts dismissed the strike out application.[52]

[48] ibid [57].
[49] Attributed to Sun Tzu, *The Art of War*, but difficult to vouch.
[50] *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; reported as *Bilta (UK) Ltd v Nazir* [2016] AC 1.
[51] ibid [4].
[52] ibid [5].

The Supreme Court unanimously dismissed the appeal.[53] In relation to the illegality defence, we considered that illegality could not be raised by Jetivia as a defence against Bilta's claim because the wrongful activity of Bilta's directors and shareholder could not be attributed to Bilta in these proceedings. Despite the unanimity of the ultimate decision, the jurisprudential division within the court was boldly apparent from the judgment.

Both Lord Toulson and I favoured a flexible approach. We said that the defence of illegality has always been developed by the courts on the grounds of public policy, so the nature of a particular claim and the relationship between parties serve as relevant context when determining a claim.[54] In this case, the public interest engaged is that directors of an insolvent company owe fiduciary duties to the company's creditors. Axiomatically, this requires that the law should not allow directors to escape liability when acting for their own gain, at the expense of the creditors and in breach of their fiduciary duties. To allow that to occur would undermine the integrity and effectiveness of the law. The central proposition is that, if the appeal were allowed, the defence of illegality would undermine the rule of law, re-enforced by an Act of Parliament, which existed to protect the creditors in this case.

Lord Sumption staunchly took an opposing view, asserting that the defence of illegality is a rule of law, independent of any judicial value judgment. The fact that the illegality defence is based on public policy does not entitle a court to reassess the value or relevance of that policy on a case by cases basis.[55] Crucially, he emphasised that '[i]t is not a discretionary power on which the court is merely entitled to act, nor is it dependent upon a judicial value judgment about the balance of the equities in each case.'[56]

Lord Neuberger (Lord Clarke and Lord Carnwath agreeing) and Lord Mance all considered that while it was important to address the proper approach to the defence of illegality, this was not the appropriate case.[57] The submissions were primarily focused on attribution, rather than the spectrum of views on the defence of illegality. In order to resolve this difficult and controversial issue, the court required to consider and hear full arguments on this topic.

<u>Patel v Mirza</u>

[53] ibid [219].
[54] ibid [129].
[55] ibid [99].
[56] ibid [62].
[57] ibid [15].

The appropriate case arose in 2016, where Lord Neuberger convened a nine-Justice panel to resolve the issue authoritatively in the case of *Patel v Mirza.*[58]

The claimant, Mr Patel, had entered into a contract with the defendant, Mr Mirza, whereby Mr Patel would transfer £620,000 to Mr Mirza, who would use those funds to bet on the price of shares in The Royal Bank of Scotland ('RBS'), using insider information. Mr Mirza expected to obtain inside information from contacts within the RBS about an anticipated government announcement that would affect the share price. The use of inside information to deal in shares constitutes the offence of insider dealing contrary to s.52 of the Criminal Justice Act 1993.

Further to their agreement, Mr Patel transferred the funds to Mr Mirza, however, the inside information was not forthcoming and, consequently, the trading did not occur. Mr Patel sought repayment of the sums transferred, but Mr Mirza refused.

Under the normal rules of unjust enrichment, the claimant would be entitled to repayment because there was no consideration for the funds transferred as the claimant received nothing in return. However, when Mr Patel sued for repayment, Mr Mirza asserted the defence of illegality.

At first instance, the illegality defence succeeded, with the trial judge applying the reliance rule set out in *Tinsley v Millgan*.[59] As Mr Patel could not make out his claim without relying on the illegal contract to which he was party, his claim for repayment necessarily failed. However, the Court of Appeal upheld the claim applying an exception to the doctrine of illegality known as the *locus poenitentiae* doctrine (which translates to 'place of repentance'). This exception applies if a party voluntarily withdraws from an illegal scheme before its commission. The Court of Appeal held in this case that Mr Patel could bring himself within this exception because the scheme was not executed.[60] Dissatisfied with this result, the defendant appealed to the Supreme Court.

We concluded that Mr Patel was entitled to his money back – on the basis that returning the money brought both parties back to the position they were in before the transaction took place and avoided the unjust enrichment of Mr Mirza were he to retain the money paid.

Lord Toulson, drawing upon case law, academic opinion, and the suggestions of the Law Commission, proposed a multi-factorial, policy-based approach, which prevailed by a majority

[58] *Patel v Mirza* [2016] UKSC 42.
[59] ibid [14].
[60] ibid [14]-[15].

of 6:3, with the President, Lord Neuberger, supporting Lord Toulson's approach as authoritative guidance.

In his own words, Lord Toulson's summarised his approach as follows:

> '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.'[61]

This framework does not mean that the court approaches the decision in an undisciplined way. It simply acknowledges that the public interest is best served by a principled and transparent assessment of considerations identified, rather than the application of formal approach capable of producing unjust or disproportionate results.

The evolution of the defence of illegality is fiendishly intricate, with elaborate and intermingled theories, and passionately held views. As academics and lawyers grapple with the defence of illegality in the wake of *Patel*, new considerations may evolve. We may not have heard the last of it. But it gives me great pleasure to know that this area of law now has the coherence, for which Lord Toulson advocated for consistently.

Conclusion

At the start of this lecture, I emphasised the importance of certainty and predictability in the law. I adhere to that view. Clear rules are important both domestically and in international law. Bright line rules set boundaries; people should be able to know where they stand. But that is not the whole picture.

It is increasingly recognised that economic prosperity both at home and internationally is linked to the rule of law, the strength of a state's institutions, and the public's respect for those

[61] ibid [120].

institutions. The 2024 Nobel Prize winning economists, Daron Acemoglu and James Robinson, in a ground-breaking work entitled 'Why Nations Fail',[62] demonstrated a clear association between them. Intuition suggests that the association is not coincidental but causal, perhaps in both directions.

The judicial task is to articulate, interpret and enforce legal rules, whether statutory or of the common law. It is also to clarify and develop the common law in the face of economic, technological and social change. In a democracy, perhaps in many other societies, the rule of law depends upon the consent of the public in the long term. That means that legal rules should not be perceived to give rise to injustice.

Lord Sumption, in a short but entertaining speech at his valedictory, took a swipe at 'multi-factorial' judicial decisions which he characterised as allowing a judge to decide the case as he or she wants. In many circumstances I share his sympathy for rules of law which contribute to the certainty and predictability of the law. But the history of the doctrine of illegality shows that a bright line rule produced injustice. Maintaining public respect for the law requires judges to remedy injustice where they can, while preserving the coherence of the law and explaining the rational basis upon which judicial decisions are made.

Thank you.

[62] D. Acemoglu and J. A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Crown Publishers 2012).