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THE EFFECT OF ILLEGALITY IN
THE LAW OF CONTRACT:
SUGGESTIONS FOR REFORM

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I. *The Problem Stated.*

Shrouds of doubt surround the effects of illegal contracts in the common law system. While the general effect of illegality is apparently clear: "illegal contracts will be denied judicial cognizance", confusion has enveloped this general rule. In the first instance, it is unclear just when this general rule should apply. Disagreement therefore arises as to when a contract constitutes so gross an abuse of public policy, so serious an infringement of good morals or so direct a violation of legislative policy as to warrant a finding of illegality.

Similar confusion surrounds the judicial method of determining the effects of illegal contracts. For common law courts must choose among a variety of circuitous tests of illegality which include: an examination of the degree of illicit activity; a reflection upon the "innocence" or "guilt" of the contractors; an analysis as to whether contractors are able to present their pleadings in a technical manner that does not rely upon illegality; and an

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examination of dubious Roman law maxims in order to ascertain whether the conduct of the contractors fell within the ambit of the Roman law classification of illegality. Each judicial method, involving different standards of measurement, may therefore lead to different legal results.

However, an even more fundamental issue arises out of this examination of illegal contracts, namely whether common law judges should utilize their discretion in evaluating normative public policies or whether they should adhere to strict legal rules governing the effects of illegality.

It is proposed to embark upon a critical examination of each of these issues in order to highlight the value of the different judicial approaches towards the effects of illegality. The strengths and weaknesses of the common law methods will be contrasted with a further hybrid jurisdiction, namely the South African legal system, for three reasons. Firstly, South African judges provide a useful analysis of the common law approaches due to the English law influence upon the South African legal system in the last two centuries. Secondly, the Roman law origins of the South African legal system tend to explain the significance of Roman maxims governing illegality in a more intensive manner when compared to the historical approaches adopted by conventional common law tribunals. Finally, the resort by South African courts to an informed judicial discretion in determining the effects of illegal agreements has received significant attention in pure common law jurisdictions, thereby providing a useful fulcrum for innovation.¹

¹ Common law sources will be drawn mainly from English and American jurisdictions (henceforth referred to as Anglo-American law). Canadian and other Commonwealth jurisdictions will also be consulted where appropriate.

For significant comments on illegality and the effect of illegal contracts in the common law in general, see: Glanville Williams, *The Legal Effect of Illegal Contracts* (1942), 8 Camb. L.J. 51; Grodecki, *In Pari Delicto Potior Est Conditio Defendentis* (1955), 71 L.Q.Rev. 254; Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract* (1972), 30 Camb. L.J. 144; Fridman, *Illegal Contracts* (1957), 3 L.J. 107; Furmston, *The Analysis of Illegal Contracts* (1966), 16 U.T.L.J. 267; Tremear, *Annotation—Contracts* (8 III G-2-300)—*Illegality as Affecting Remedies* (1913), 11 D.L.R. 195; Gellhorn, *Contracts and Public Policy* (1935), 35 Col. L. Rev. 679; Note, *In Pari Delicto: The Consumer's Best Friend* (1969), 30 Ohio St L.J. 332. For further American sources, see footnote 82, *infra*.

On the link between the hybrid (Anglo civilian) South African and pure common law systems of contract, see Wessels, *The Law of Contract in South Africa* (2nd ed., 1951); Hahlo and Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (1960); de Wet and Yeats, *Die Suid-Afrikaanse Kontrakreg en Handelsreg* (3rd ed., 1964).

For the influence of South African law upon the enactment of legislation governing illegality in New Zealand, see footnote 94, *infra*.

For comparative law discussions on the effects of illegality in contract, see: *Comparative Law: Common v. Civil Law: Illegal and Immoral Contracts*, [1954]

II. When is a Contract Illegal?

Before one can consider what the effect of illegality in a contract is, the prior question must be answered: when in fact is a contract illegal? The most consistent view maintained by the Anglo-American and South African courts and authorities is that a contractual arrangement which is contrary to public policy (*contra res publica*),² contrary to good morals (*contra bonos mores*)³ or expressly or implicitly prohibited by the legislature, is illegal.⁴ This, South African courts contend, is the product of Roman and Roman-Dutch law and consequently, the relevant and appropriate test to be used by judges in the determination of this preliminary question.⁵ Anglo-American courts have also customarily adhered to

Wis. L. Rev. 146; D. A. McConville, *Illegality and the Consideration in Favour of Contractus* (1962), 11 Int'l. & Comp. L.Q. 855; de Vries and Galston, *Materials for the French Legal System* (1969); Rabel, *The Conflict of Laws: A Comparative Study* (2nd ed., 1960); Sabbath, *Denial of Restitution in Unlawful Transactions* (1959), 8 Int'l. & Comp. L.Q. 486, 689; Szladits, *Illegality of Prohibited Contracts: Comparative Aspects*, in XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema (1961), p. 221; van Gerven, *The Concept of Provisional Validity: The Doctrine of Nullity Refined*, in 2 *Jus Privatum Gentium: Festschrift Für Max Rheinstein* (1969), p. 505.

² See Wessels, *op. cit.*, footnote 1, s. 463; *Kiely v. Dreyer*, 1916 C.P.D. 606. See too the following American cases: *Whitten v. Whitten* (1974), 303 So. 2d 238; *East Coast Moving and Storage, Inc. v. Flappin* (1974), 355 N.Y.S. 2d 525; *Fitzsimmons v. Eagle Brewing Co.* (1939), 107 F. 2d 712. The English position is represented by: *Beresford v. Royal Insurance Co. Ltd.*, [1938] A.C. 586; *Holman v. Johnson* (1775), 1 Cowp. 341. See too *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65.

³ Wessels, *op. cit.*, footnote 1, ss 461, 582; Wille's *Principles of South African Law* (6th ed., 1970), p. 324. See *Shepstone v. Shepstone*, 1974 (1) S.A. 411. For the English position see *Jones v. Randall* (1774), 1 Cowp. 37; *Benyon v. Nettlefold* (1850), 3 Mac. & G. 94; *Ayerst v. Jenkins* (1873), L.R. 16 Eq. 275. Also *Prokop v. Köhut* (1965), 54 D.L.R. (2d) 717 (B.C.). For American references see: *Otis v. Freeman* (1908), 85 N.E. 168, 199 Mass. 160; *McDonald v. Born* (1903), 97 N.W. 693, 135 Mich. 177; *Harlow v. Laclair* (1927), 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

⁴ See *Nieuwahuys v. Schoeman's Estate*, 1927 E.D.L. 266; *Colonial Banking and Trust Co., Ltd. v. Hill's Trustee*, 1927 A.D. 488. For American references see: *King v. Moorhead* (1973), 495 S.W. 2d 65; *E. L. Burns Co. Inc. v. Cashio* (1974), 302 So. 2d 297; *Board of Education of the City of Chicago v. Chicago Teachers Union, Local 1, American Federation of Teachers* (1975), 326 N.E. 2d 158. For Anglo-Canadian cases on this issue see: *J. M. Allan (Merchandising) Ltd. v. Cloke*, [1963] 2 All E.R. 258; *Ailion v. Spiekermann*, [1976] 2 W.L.R. 556 (Ch.); *Curragh Investments Ltd. v. Cook*, [1974] 3 All E.R. 658 (Ch.); *Shaw v. Groom*, [1970] 1 All E.R. 702 (C.A.); *Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch.); *Montreal Trust Co. v. C.N.R.*, [1939] A.C. 613, at p. 627, [1940] 1 W.W.R. 293, [1939] 3 All E.R. 930, 50 C.R.T.C. 1, [1939] 3 D.L.R. 497.

⁵ For an examination of the Roman law position with respect to agreements against public policy, see Dig. 2.14.7.7 and Voet, 2.14.16. See Dig. 28.7.15 and Grotius, 3.1.42, with regard to agreements *contra bonos mores*. On the adoption of the Roman law classification in South African law, see the following cases:

this classification, implicitly recognizing that the traditional Roman law categories are still relevant in modern day society.⁶

A. *The Changing Content of Illegality.*

The prime weakness in the adoption of general maxims to govern illegal and immoral contractual arrangements is the absence of clarification as to what meaning should be attached to such broad and general notions as "good morals" and "public policy". Roman and Roman-Dutch writers put forward general definitions. Agreements were said to be *contra bonos mores* "if they offend our conscience, or sense of what is right".⁷ An agreement was described as contrary to public policy if "it opposed the interests of the State or of justice, or of the public".⁸

Yet, even if such broad definitions are still valid today, the court is obliged to acknowledge that content must have varied during the course of history in accordance with changes in social, political, cultural and consequent legal values. To impute a too rigidly defined content to the classification of illegality would deny to the legal system the capacity to advance and bend to face new situations. Professor Lee, commenting on the changing concept of illegality, stated:⁹

In all mature legal systems the principal heads of illegality are much the same. But since social progress brings with it new conditions and fresh abuses, the illegality of one age will not be identical with the illegality of another. Accordingly the categories of unlawfulness in contract are not in modern law quite the same as they were in Roman law or in the Roman-Dutch law of the Eighteenth Century.

This view was clearly illustrated by the traditionalist Roman-

Conradie v. Rossouw, 1919 A.D. 314; *Continental Bakery (Pty.) Ltd. v. Giannakakis*, 1956 (4) S.A. 324 (W); *Reynolds v. Kinsey*, 1959 (4) S.A. 50 (F.C.); see too *Robinson v. Randfontein Estate G.M. Co. Ltd.*, 1925 A.D. 173, at p. 204.

⁶ See *Lowe v. Peers* (1768), 4 Burr. 2225, at p. 2233, per Aston J.; *Collins v. Blantern* (1767), 2 Wils. 341, at p. 350, per Wilmut, L.C.J.; *Girardy v. Richardson* (1793), 1 Esp. 13, per Lord Kenyon; *Holman v. Johnson*, *supra*, footnote 2, at p. 343.

See too the following American cases: *Thorpe v. Carte* (1969), 252 Md. 520, 250 A. 2d 618, per Hammond, J.; *Mayer Drilling Co. v. Alton V. Phillips Co.* (1970), 2 Wash. App. 600, 468 P. 2d 1008; *Grim v. Cheatwood* (1953), 208 Okl. 570, 257 P. 2d 1049.

⁷ Dig. 2.14.7.7. Also Voet, 2.14.16 and Wessels, *op. cit.*, footnote 1, s. 463.

⁸ Dig. 28.7.15. See further Grotius, 3.1.42 and Wessels, *op. cit.*, footnote 1, s. 461.

⁹ R. W. Lee, *An Introduction to Roman-Dutch Law* (5th ed., 1953), p. 234. See too Lord Devlin, *The Enforcement of Morals* (1965), preface, essays 6 and 7; H.L.A. Hart, *Law, Liberty and Morality* (1963); Troy Duster, *The Legislation of Morality* (1970); Lord Radcliffe, *The Good Samaritan and the Law* (1966); *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment in Altruism and Helping* (Macauley and Berkowitz ed., 1969).

Dutch and South African authority, Aquilius (Mr. Justice van den Heever) who presented examples of public policy and good moral notions which no longer apply in modern law, or have the opposite content.¹⁰

In the United States, two particular cases highlight the increasing social consciousness evident in modern legal systems. The decisions in *Shelly v. Kraemer* and *Brown v. Board of Education of Topeka*¹¹ readily illustrate that the force of changing social values can erode the foundations of the old system and produce, as Marx and Engels would have it, the synthesis of the new order.¹²

The courts, however, do not always exhibit the willingness to follow novel sociological innovations. Thus, although gambling constitutes a widely accepted social practice, its existence is disfavoured by the law.¹³ Similarly, monopolistic business procedures are practiced extensively within the financial community in spite of anti-trust enactments which declare such conduct to be legally reprehensible.¹⁴

¹⁰ 1941 S.A.L.J. 337, at p. 349. See *Green v. Fitzgerald*, 1914 A.D. 102 where, due to a shift in public policy, the crime of adultery was abrogated and was thereafter restricted to being merely a ground for divorce. See also: *Wilson v. Carnley*, [1908] 1 K.B. 729, at p. 738, per Vaughan Williams L.J.; *Atty. Gen. of Australia v. Adelaide S.S. Co.*, [1913] A.C. 781 (P.C.). See cases in footnote 11. Also John Waite, *Public Policy and Personal Opinion* (1921), 19 Mich. L. Rev. 265.

For the influence of changing public policies and standards of morality in the development of English and American jurisprudence, see *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220, esp. at pp. 266-269, per Lord Simonds, at pp. 274-282, per Lord Reid; U.S. Government Commission on Obscenity and Pornography (1970), pp. 169-309. But see, *D.P.P. v. Bhaywan*, [1970] 3 All E.R. 97, at pp. 104-105.

¹¹ (1948), 68 S. Ct. 836, 334 U.S. 1; (1953), 347 U.S. 483 respectively. For an English case hereon see *Beresford v. Royal Insurance Co. Ltd.*, *supra*, footnote 2; *Gray v. Barr, Prudential Assurance Co. (Third Party)*, [1971] 2 Q.B. 554, [1971] 2 W.L.R. 1334.

¹² Marx and Engels, *Manifesto of the Communist Party* (1848); and Engels, *On Historical Materialism* (1892) in Marx and Engels, *Basic Writings on Politics and Philosophy* (Feuer ed., 1959).

¹³ See: 6A Corbin on Contracts (1962), s. 1482; Cheshire and Fifoot's *Law of Contract* (8th ed., 1972), p. 296; Anson's *Law of Contract* (23rd ed., 1969), p. 307; Annotation, *Recovery of Money or Property Lost Through Cheating or Fraud in Forbidden Gambling or Game* (1955), 39 A.L.R. 2d 1213; Note, *The Doctrine of Illegality and Petty Offenders: Can Quasi-Contracts Bring Justice* (1966), 42 Notre Dame Lawyer 46.

¹⁴ See Gibson, *South African Mercantile and Commercial Law* (2nd ed., 1966) for reference hereon. Also *Sherman Act* (1890), 26 Stat. 209, as am. 15 U.S.C., ss 1-7; *Clayton Act* (1914), 38 Stat. 730, as am. 15 U.S.C., ss 12-27.

When, therefore, should a court be willing to recognize legally justifiable changes in the content of "illegal", "immoral", or "public policy" value systems? The dilemma faced by jurists attempting to make such a determination clearly focuses on the problem of choosing the correct sociological and legal foundations upon which such a decision can be based.

In the first instance, it may be useful for courts faced with this task to seek out the more traditional classifications. In ancient Roman law certain forms and degrees of immoral conduct were considered illegal. The distinction between this historical approach and that which has emerged in the modern age is that recent classifications of immorality are no longer identical in content or structure to the immorality of past eras.¹⁵ However, the modern law can, at least in general terms, draw upon the ancient systems for guidelines and structural continuity.¹⁶

Secondly, the court must examine the form of changing social values and, more importantly, the extent to which such variations should result in legal reform. Clearly, it may be that some social practices are better left to their own informal processes.¹⁷ This is ideally exemplified by the modern industrial community whose behaviour is dictated somewhat by market forces and dynamics within the trade. Where immoral business practices prevail, retaliation, boycotts, or loss of goodwill may follow. Even if such business practices can find no practical justification, social sanctions may still displace the need for judicial intervention. Indeed, the judge must be willing to restrict his legalistic evaluations of "immorality" where a more appropriate and perceptive social process is able to regulate the potentially deleterious contractual design.

Thirdly, the tribunal must determine whether, by using the decision-making process, it will be able to adequately reflect upon and translate into appropriate legal form the changes in social and moral values. It is at this particular stage that the judge's own jurisprudential inclination assumes a primary importance.

¹⁵ *Supra*, footnotes 10 and 11.

¹⁶ See Aquilius, *op. cit.*, footnote 10, pp. 337-338. This acceptance of the general Roman law classification of illegality is evidenced by the continued judicial resort to the categories of "illegality", "immorality", and "public policy". See *infra*.

¹⁷ Stewart Macauley, *Non-Contractual Relations in Business: a Preliminary Study* (1963), 28 *Am. Sociological Rev.* 55. Also Richard E. Speidel, *Contract Law: Some Reflections upon Commercial Context and the Judicial Process*, [1967] *Wis. L. Rev.* 823; Addison Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, [1967] *Wis. L. Rev.* 833; Fridman, *Contract Law in America* (1965), p. 198; Lord Devlin, *Samples of Lawmaking* (1962), ch. 2.

For example, a jurist schooled in the positivist approach would strongly assert the value of strict legal precedent.¹⁸ Lord Mansfield once commented:¹⁹

[The courts] have no rule to go by but their affections and wishes. . . . To be free is to live under a government of law. Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law or, . . . no certain administration of law to protect individuals, and to guard the State.

The strict rule-oriented approach compels the judge to place his faith in the prevailing "law" of illegality. Immoral behaviour is only relevant when it fails to conform to strict, clear and certain legal rules and principles. Beyond this, changes in social needs and interests are merely normative values outside of judicial cognizance, except where translated by legislation into additional legal rules.

Conversely, a realist or social behaviourist would assume that rules are, by their very nature, ambiguous since no legal rule can purport to anticipate and encompass every conceivable future eventuality with absolute certainty. This view, therefore, would hold that it is the duty of the decision-maker to rectify past injustices by modifying the rules of illegality to indicate changes in social values.²⁰

In both the South African and Anglo-American legal systems there has been increasing resort to the realism embodied in judicial discretion as a basic means of effectuating legal modifications which reflect changes in social realities. In *Jajbhay v. Cassim*, the leading South African case on the issue of contractual illegality, Chief Justice Stratford remarked that:²¹

The court should approach the matter [of illegality] from the point of view as to whether public policy was best served by granting or refusing the plaintiff's claim.

¹⁸ For a discussion of the positivist or analytical jurisprudential school of thought see: J. Austin, *The Province of Jurisprudence Determined* (Hart ed., 1954); H.L.A. Hart, *Positivism and the Separation of Law and Morals* (1958), 71 Harv. L. Rev. 593; Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart* (1958), 71 Harv. L. Rev. 630; H. Kelsen, *The Pure Theory of Law*, Part I (1934), 50 L.Q. Rev. 474, Part II (1935), 51 L.Q. Rev. 517.

¹⁹ *Rex v. Shipley* (1784), 4 Doug. 73, at p. 170, 99 E.R. 774, at p. 824.

²⁰ For a discussion of the Anglo-American realist and social behavioral school see: O. W. Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457; R. Pound, *A Theory of Social Interests* (May 1921), in 15 *Papers and Proceedings of the American Sociological Society* 16; K. Llewellyn, *Some Realism about Realism* (1931), 44 Harv. L. Rev. 1222; K. Llewellyn, *Using the Newer Jurisprudence* (1940), 40 Col. L. Rev. 581.

²¹ 1939 A.D. 535, at p. 542. But see, *contra* the remarks of Aquilius, *op. cit.*, footnote 10, p. 340. See also the comments of deWet and Yeats, *op. cit.*, footnote 1, at p. 79; Wessels, *op. cit.*, footnote 1.

It was, therefore, in the "best service . . . of public policy . . ." that Stratford sought to evaluate prevailing standards of morality, private interests and government policies.²²

Similarly, the Anglo-American tradition, whose fundamental concept of "freedom of contract" was founded upon the economic and philosophical notions of *laissez-faire* and utilitarianism, now increasingly propagates the process of judicial intervention into the general contractual regime. Anglo-American judges have often asserted their right to overrule the strict parameters of the contract on grounds of "changed circumstances" (*rebus sic stantibus*), duress, undue influence, fraud, unconscionability and public policy.²³

However, it is in the realm of illegality and its effects that Anglo-American courts have, as we shall perceive, been most unwilling to incorporate changing socio-economic results into legal form.²⁴ In this regard, strict legal positivism has induced some common law courts to place primary faith in traditional doctrines of law that allow for only limited changes in legal content.²⁵

B. The Public Policy Concept.

Notwithstanding the criticisms discussed above,²⁶ the Anglo-American and South African legal traditions draw heavily upon a concept of "public policy" in determining the existence and effects

²² Cf. pp. 7, 10 and footnote 38, *infra*.

²³ For a discussion on judicial "intervention" within the private contractual regime on these varied legal and moral grounds, see: Williston, *Freedom of Contract* (1921), 6 Cornell L.Q. 365; R. Pound, *Liberty of Contract* (1909), 17 Yale L.J. 1; Kessler, *Contracts of Adhesion — Some Thoughts about Freedom of Contract* (1943), 43 Col. L. Rev. 629; Wilson, *Freedom of Contract and Adhesion Contracts* (1965), 14 Int'l & Comp. L.Q. 172; Fridman, *Freedom of Contract* (1967), 2 Ottawa L. Rev. 1; Dewey, *Freedom of Contract: Is it Still Relevant?* (1970), 31 Ohio St. L.J. 724. See too *Engbloom v. Blakeman*, [1930] 2 D.L.R. 824 (B.C.C.A.).

²⁴ For an instructive case which illustrates this issue see: *Joseph Triner Corp. v. McNeil* (1936), 2 N.E. 2d 929, 363 Ill. 559, 104 A.L.R. 1435. See also: *Groome v. Freyn Eng. Co.* (1940), 28 N.E. 2d 274, 374 Ill. 113, and the comments of Bamwell L.J. (citing Cave J.) who stated: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy". *Mogul S.S. Co. v. McGregor*, [1892] A.C. 25. See too: *Wilson v. Carnley*, *supra*, footnote 10; Chitty on Contracts (21st ed., 1955), p. 480; *Richardson v. Mellish* (1824), 2 Bing. 229, esp. at p. 252; *Fender v. St. John Mildmay*, [1938] A.C. 1 (H.L.).

²⁵ Cf. *infra* and footnote 24, *supra*.

²⁶ *Supra*, footnote 24.

of an illegal contractual relationship.²⁷ The precise meaning of the term has, however, confused judges in all three legal systems.²⁸

Public policy is, in essence, a two-edged sword.²⁹ The traditional Roman law identified public policy with society as a whole.³⁰ The interests of the community, in turn, were allied with the maintenance of order within the Roman state. Immoral activity was deemed to be in contravention of the "societal" interest, while action contrary to statute breached the "state" interest. Thus, a public policy methodology arose as a judicial device at a time when "societal" and "state" interests demanded that the courts deter illegal arrangements.³¹ Public policy in this generic sense was deemed to override the purely private interests of the parties.

This traditional methodology has been repeatedly adopted in both the South African and Anglo-American courts. The result has been to deny to the parties the relief sought if they have neglected to enter into the contract with "clean hands". Accordingly, the contractors suffer the consequences of their actions and are forced to remain in the position which each was in before entering the court. In this way the court itself maintains "clean hands" and by so doing, denies relief to those persons who were guilty of being parties to an agreement which was contrary to public policy.³²

²⁷ See Winfield, *Public Policy in the English Common Law* (1928), 42 Harv. L. Rev. 76; Shand, *op. cit.*, footnote 1; John Waite, *op. cit.*, footnote 10; Lloyd, *Public Policy* (1953), chs 1 and 7.

²⁸ On the uncertainty of the ambit and boundaries of public policy notions see: *Pittsburgh, C.C. & St. L. R. Co. v. Kenney* (1916), 115 N.E. 505, at p. 507, 95 Ohio St. 64, at p. 67, quoted and applied in *Snyder v. Ridge Hill Memorial Park* (1938), 22 N.E. 2d 559, 61 Ohio App. 271; *Allen v. Commercial Cas. Ins. Co.* (1944), 37 A. 2d 37, 131 N.J.L. 475, 154 A.L.R. 834; *Yin v. Sam (PC) (Mal)*, [1962] 2 W.L.R. 765; *Re Millar*, *supra*, footnote 2.

²⁹ This statement, in fact, represents an oversimplification of the issue, for the two-edged character of public policy is itself centrally divided. There are, first, the public policy notions which must be considered with direct reference to the private and societal interests in striking down reprehensible relations. Secondly, both these public policy considerations must be set against the general interests which underlie the notion of freedom of contract. See the statement of Sir George Jessel in *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462. See also *Diamond Match Co. v. Roeber* (1887), 13 N.E. 419, 106 N.Y. 473.

³⁰ For discussions hereon, see *Collins v. Blantern*, *supra*, footnote 6; *Scott v. Brown, Doering McNab and Co.*, [1892] 2 Q.B. 724; *Grant v. Collet* (1883), 4 N.L.R. 32.

³¹ *Ibid.*

³² For English cases descriptive of this position see *Collins v. Blantern*, *supra*, footnote 6; *Scott v. Brown, Doering McNab and Co.*, *supra*, footnote 30.

For a more recent discussion see *Ashmore, Benson, Pease and Co. Limited v. A. V. Dawson Ltd.*, [1973] 2 All E.R. 856 (C.A.).

For American case law hereon see: *Ritter v. Mutual Life Insurance Company of New York* (1898), 169 U.S. 139; *New York Football Giants v. Los Angeles*

The "clean hands" doctrine must not be allowed to operate without paying due regard to the equities between the contracting parties. Thus the "state interest" may, in some circumstances, be overridden by the private interests of the contractors. Were the position otherwise, the paradoxical situation evident in some American courts would prevail. In *Perma Life Mufflers v. International Parts Corporation*³³ for instance, the court held, notwithstanding the plaintiff's knowledge of and acquiescence in an illegal arrangement, that he was still entitled to recover damages in furtherance of the legislative policy directed against anti-trust arrangements. The apparent result of this decision is to encourage a party to maintain a distinctly illegal arrangement on the assumption that overriding "state" policies will lead to a remedy in his favour. This rigid judicial conception of public policy, therefore, results in the court having "unclean hands" where it fails to recognize the fundamental importance of notions of private justice and the need to deny relief where the claimant attempts to take unwarranted advantage of a general public policy.

This conflict and ensuing injustice results from an attempt to give effect to the contractual equities where the state, societal and inter-party interests are clearly contradictory. For example, if the court should grant relief where a contract contravenes a criminal statute, the judge may risk condemnation for failing to acknowledge the overriding legislative design dictating against criminal behaviour.

Similarly, were the tribunal to uphold the equities arising from the illegal agreement, "too much uncertainty [could] thus be injected into contractual relations".³⁴

In this fashion the triumph of strict legal positivism has been

Chargers Football Club (1961), 291 F. 2d 471; *West Los Angeles Institute for Cancer Research v. Mayer* (1966), 366 F. 2d 220, cert. denied (1967), 385 U.S. 1010; *Cox Feedlots, Inc. v. T. V. Hope* (1973), 498 S.W. 2d 436.

See too *Fairweather v. McCullough* (1918), 43 D.L.R. 525 (Ont. C.A.); *Johnson v. Musselman*, [1917] 2 W.W.R. 444, 28 C.C.C. 165, 37 D.L.R. 162, at p. 163 (Alta C.A.).

³³ (1968), 392 U.S. 134. Note, *In Pari Delicto: The Consumer's Best Friend*, *op. cit.*, footnote 1; *Whitten v. Whitten*, *supra*, footnote 2, where it was maintained that a contract which is against public policy is a "contract in fraudem legis". Similarly, in *Weil v. Neary* (1929), 278 U.S. 160, an agreement was struck down as contrary to public policy even though the result of the agreement was clearly beneficial to the estate of the deceased. A similar "overriding public policy" approach was adopted in the South African case of *Rall v. Bester*, 1946 S.A.L.J. 40, at p. 52. For a clear judicial statement on the conflicting character of public policy see the South African case of *Levy v. Katz*, 1914 W.L.D. 88, at pp. 91-92.

³⁴ Gellhorn, *op. cit.*, footnote 1, at p. 695. *Angers v. Gauthier*, [1924] S.C.R. 479, [1924] 4 D.L.R. 1035.

assured. Judicial discretion, as a reflection of social morality, has developed a subservience to the "rule" dictated by overriding legislative enactments which condemn illegal arrangements.³⁵ Accordingly, Anglo-American cases contain only limited reference to a justice-oriented public policy. In *Holland v. Sheehan* the court stated:³⁶

Public policy requires of courts of equity protection from unjust and unconscionable bargains, though no statutory authority be granted by legislation.

However, the availability of these equitable processes was restricted to "statutory, common and judicial decisions",³⁷ thus confining the court's discretion to precedent. This effectively denied the possibility of widening the narrow scope of public policy to include an equity discretion.

Ironically, the historically bound South African legal system has been predominantly unhindered by this restrictive conception of public policy. In *Jajbhay v. Cassim* the court held that "the overriding consideration of public policy . . . does not disregard the claims of justice between man and man".³⁸ Relief favouring a

³⁵ See, e.g., E. N. Griswold, *Government in Insurance of the Law—A Plea for Better Publication of Executive Legislation* (1934), 48 Harv. L. Rev. 198; W. W. Cook, *Certainty in the Construction of the Law* (1935), 21 A.B.A.J. 19. Lord Bowen aptly expressed this general judicial hesitancy to tamper with the so-called "Plain Meaning" of enacted legislation as follows: "These canons [of judicial construction] do not override the language of a statute where the language is clear: they are only guides to enable us to understand what is inferential. In each case the Act . . . is all-powerful, and when its meaning is unequivocally expressed the necessity for rules of construction disappear and reaches its vanishing point." In *L.N.W. Ry. v. Evans*, [1893] 1 Ch. 16, at p. 27. However, Lord Bowen failed to acknowledge that statutory language is often ambiguous. Legislatures may express themselves unclearly in a literal sense. Furthermore, the legislators may fail to envisage the changing ambit of circumstances to which the policy of the enactment was intended to apply. See J. Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1; Max Radin, *Statutory Interpretation* (1930), 40 Harv. L. Rev. 863.

Nevertheless, courts are faced with an onerous task in determining the nature and content of legislative policies. Inherent in the character of legislation is the requirement that decision-making take place through a body of committees and legislative members, each of whom may have distinctly different policy conceptions. Thus, courts are frequently required to exercise a discretion in determining the justifiable scope and application of the legislative purpose. For an excellent analysis hereon, see Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tent. ed., 1958), pp. 1242 *et seq.*

³⁶ (1909), 108 Minn. 362, at p. 367, 122 N.W. 1, at p. 3. See too *Reiner v. North American Newspaper Alliance* (1932), 259 N.Y. 250, 181 N.E. 561.

³⁷ *Holland v. Sheehan*, *supra*, footnote 36, at p. 3.

³⁸ 1939 A.D. 544. For common law courts who have also considered equitable remedies in determining the effects of illegality, see *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney* (1918), 95 Ohio St. 64, at pp. 68-69, 115 N.E. 505, at p. 506; *City of Leesburg v. Ware* (1934), 113 Fla. 760, 153 So. 87, at p. 89; *George White & Sons v. Jashansky*, [1917] 2 W.W.R. 173, 10 Sask. L.R. 81, 34 D.L.R. 271.

disadvantaged contractor was thus assured, even though the contract itself might contravene state policy and constitute an illegal arrangement. The South African legal system has, therefore, recognized that in some instances the general public policy of "clean hands" must subserve to a judicial policy of individualized justice and equity.

The future of the Anglo-American notions of public policy depends on a host of interrelated variables, one of which is the continually changing character of the judicial process. Should common law courts persist in their acceptance of the narrow literal interpretation of statutes,³⁹ it is likely that violations of the formal letter of an enactment will strengthen the judicial "clean hands" approach towards contracts. Furthermore, overriding "state" interests, literally construed, will necessarily rule out judicial resort to "justice between man and man".

This "pseudo-logical or textbook approach"⁴⁰ is, however, merely one method of statutory interpretation which may be used by the common law courts to evaluate "state" policy and legislative intent. Since the *Heydon* case in England, Anglo-American judges have attempted to construe legislation so as to "suppress the mischief, and advance the [statutory] remedy".⁴¹ Thus, notwithstanding the equitable interest of the contractors themselves, common law courts should look to the statutory intent or purpose in order to gauge whether, and to what extent, the public policy embodied within the statute was specifically designed to suppress contractual illegalities. In this way a court may render the appropriate weight to a statute according to a soundly evaluated and authoritative method of interpretation. Thereafter, where the statu-

³⁹ See *L.N.W. Ry. v. Evans*, *supra*, footnote 35; *Joseph Triner Corp. v. McNeil*, *supra*, footnote 24; *Siegelman v. Cunard White Star Ltd.* (1955), 221 F. 2d 189 (C.A.). See in general: Maxwell, *Interpretation of Statutes* (1969); Holmes, *Theory of Legal Interpretation* (1899), 12 Harv. L. Rev. 417; Lord Evershed, *The Changing Role of the Judiciary in the Development of the Law* (1961), 61 Col. L. Rev. 761; Plucknett, *Statutes and Their Interpretation*; J. Willis, *op. cit.*, footnote 35, at p. 23; Max Radin, *op. cit.*, footnote 35; J. M. Landis, *A Note on Statutory Interpretation* (1930), 43 Harv. L. Rev. 886.

⁴⁰ W. Friedmann, *Law and Social Change in Contemporary Britain* (1951), p. 239.

⁴¹ (1584), 3 Co. Rep. 76. *Heydon's* case is subject to criticism because it limits "statute" to the role of modifying the inadequacies of the common law. In the modern era, statutes create new law rather than merely add to or qualify common law principles. Nevertheless, the "purpose-oriented" method of statutory construction embodied in *Heydon* has been widely accepted in the Anglo-American world. See *Seaforth Court Estates Ltd. v. Asher*, [1949] K.B. 481, at pp. 498-499; *Magor and St. Mellons Rural District Council v. Newport Corporation*, [1952] A.C. 189, at pp. 190-191; *Assam Railways v. C.I.R.*, [1935] A.C. 445, at pp. 457-459. See too footnote 39, *supra*.

tory purpose fails to compel an absolute judicial "clean hands" approach, the court can independently exercise an informed discretion on the justiciability of equity-oriented contractual relief.⁴²

III. Are There Degrees of Illegality?

The traditional Roman law distinguished between agreements *malum in se* (*turpis*) and agreements *malum in propria* (merely *injusta*).⁴³ The distinction between these two forms of illegality lay in the degree of "wrongfulness" associated with them. An agreement *malum in se* was one which was severely affected by this moral and legal element of "wrongfulness". The courts, therefore, adopted a strict "clean hands" approach and refused to consider the merits of the contractual situation.

In contrast, agreements *malum in propria* were not seen as immoral, but merely illegal. This peculiarity allowed the court to become involved in the dispute without the risk of shading its untarnished record.⁴⁴

This distinction raised substantial difficulties in the conventional legal systems, for it was unclear as to what theoretical and practical criteria differentiated the one classification from the other. As a result Bentham remarked:⁴⁵

That acute distinction between *mala in se* and *mala prohibita*, which being so shrewd and sounding so petty, and being in Latin, has no sort of an occasion to have any meaning to it; accordingly it has none.

Today in fact, the distinction represents a mere historical anomaly

⁴² This judicial discretion, often dubbed as judicial "filling in the gaps", has acquired increasing significance within the modern Anglo-American tradition. See Lord Denning M.R. in *Gallie v. Lee*, [1969] 2 Ch. 17, at p. 37; Lord Denning, *The Need for a New Equity* (1952), 5 Curr. Leg. Prob. 1; Lord Evershed, *Impact of Statute on Law of England* (1956), 42 Proc. of Brit. Academy 261; Lord Evershed, *op. cit.*, footnote 39, at p. 789.

But see *contra*, Lord Salmon in *Gallie v. Lee*, *supra*, at p. 49; Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law Com. 21, Scot. Law Com. 11, 1969).

The discretionary method of interpretation referred to as "teleologic" has also been adopted into civilian legal systems. See O. Ekelöf, *Teleological Construction of Statutes* (1958), 2 Sc. St. in Law 77; but see *contra*, F. Schmidt, *Construction of Statutes* (1957), 1 Sc. St. in Law 158, at p. 170.

⁴³ 1946 S.A.L.J. 40, at p. 52; Wessels, *op. cit.*, footnote 1, p. 205; *Fitzsimmons v. Eagle Brewing Co.*, *supra*, footnote 2; J. Bentham, *Comment on The Commentaries* (Everett ed., 1928), p. 80; Notes, *The Distinction Between Mala Propria and Mala in Se in Criminal Law* (1930), 30 Col. L. Rev. 74. See too *Clark v. Hagar* (1894), 22 S.C.R. 510.

⁴⁴ The Romans did not likewise provide that a contract *ex injusta causa* was void and unenforceable. See, in particular, the discussion on the Roman law maxims, *infra*.

⁴⁵ J. Bentham, *op. cit.*, footnote 43.

which has been jettisoned from both the Roman-oriented South African, and the common law legal traditions.⁴⁶

The Roman law classification which distinguished between these two situations, namely illegality and immorality, would undoubtedly force the conventional judge to rigid, even arbitrary decisions on issues of morality. Nevertheless, it is firmly contended that there is still scope in all legal systems for due consideration of degrees of illegality. Indeed, if a judicial system purports to grant relief to any illegal arrangements, the character of the illicit act is of fundamental importance.

Most attempts at incorporating these determinations within judicial decisions have, however, met with only limited success in Anglo-American and South African jurisdictions. Although the *Jajbhay* court clearly sought to establish the relevance of giving due consideration to degrees of turpitude, subsequent decisions have failed to follow that case with any logical consistency.⁴⁷

The degree of turpitude, it is suggested, should be viewed in the following way. Firstly, the extent of immorality involved should merely be one consideration relevant in balancing the germane interests and policies that will be determinant of the significance of the contractual relationship. As Gellhorn justifiably contended, the court must be concerned not only with the character of the act, but the judge must also reflect upon the effect which the act will produce.⁴⁸ Therefore, an act of limited turpitude might still warrant judicial condemnation because it has the incidental effect of severely undermining a prevailing state policy.⁴⁹

Secondly, it is imperative that courts not adopt unbending classifications and rules in relation to the degrees of morality, public policy and illegality. To do so would only lead to inequitable

⁴⁶ See *Gibbs v. Consolidated Gas Co.* (1889), 130 U.S. 398; *American—La France & Foamite Industries v. Arlington County* (1937), 192 S.E. 758; *McManus v. Fulton* (1929), 278 P. 126, 85 Mont. 170, 67 A.L.R. 670.

⁴⁷ See the following cases: *Padayachey v. Labese*, 1942 T.P.D. 10; *Thornycroft v. Vas*, 1957 (3) S.A. 754 (F.C.); *J. M. Allan (Merchandising) Ltd. v. Cloke*, *supra*, footnote 4; *Belvoir Finance Co. Ltd. v. Stapleton*, [1970] 3 W.L.R. 530.

⁴⁸ Gellhorn, *op. cit.*, footnote 1.

⁴⁹ For example, an export trade contract containing a minor omission in the export declaration, might nevertheless be struck down on account of stringent legislation directed against trading with the enemy. See: *The English Trading With The Enemy Act*, S.R. and O. (1939 and 1945); J. Dundas White, *Trading With the Enemy* (1900), 16 L.Q. Rev. 397; Diamond, *The Effect of War on Pre-Existing Contracts Involving Enemy Nationals* (1944), 53 Yale L.J. 700. For similar developments in the United States, see the *Trade Expansion Act* (1962), 76 Stat. 872; Clubb, *Dismantling Trade Barriers: Implementation of the Trade Expansion Act*, [1965] U. Ill. L.F. 366; Davis, *The Regulation and Control of Foreign Trade* (1966), 66 Col. L. Rev. 1428.

and imperceptive results. Each decision must be carefully evolved from its particular factual framework. In this way, having been reasoned on an informed basis, judicial decisions which involve notions of public policy and morality will acquire a greater sense of credibility.⁵⁰

A. *Intention of the Parties.*

The ancient Roman and Roman-Dutch authorities held that parties to an illegal contract did not actually "intend" to create a binding relationship. Those institutional systems, therefore, raised intention primarily as a fictitious presumption which suggested that contractors to an illegal arrangement did not enter into the agreement intentionally, since no one can sensibly be regarded as intending a "civil impossibility". In this way the Romans allied contracts void for illegality with those void for impossibility.⁵¹

This fiction, however, has generally failed to survive in modern legal systems.⁵² Instead, these conventional legal orders have developed a complex body of law surrounding illicit intention where the legal result has depended upon the form and severity of the turpitudinal design and purpose.

In the Anglo-American and South African traditions, a party who knowingly and purposefully entered into an unlawful arrangement was denied any form of judicial assistance. The courts held that by entering into the illegal arrangement, the contractor had assumed the risk of nullity and should thereby suffer the consequences of his own wilful acts.⁵³

⁵⁰ See Hughes, *Law, Reason and Justice* (1969); Ladd in Friedrich, *Rational Decision* (1964), p. 126; Levy, *Introduction to Legal Reasoning* (1956); Stone, *Legal Systems and Lawyers' Reasonings* (1964).

See also: Lord Devlin, *op. cit.*, footnote 9; Goodhart, *English Law and the Moral Law*, Hamlyn Lectures (1953).

⁵¹ See D.44.7.31; Brunnerman, *ad. D.45.1.7*; Ortolan, Vol. 3, s. 1357; D.45.1.137-6.

⁵² On the unsuitability of legal fictions in the law of contract in general, see Lon L. Fuller, *Legal Fictions* (1930-31), 25 Ill. L. Rev. 363; N. Isaacs, *The Law and the Facts* (1922), 22 Col. L. Rev. 1; R. Pound, *Mechanical Jurisprudence* (1908), 8 Col. L. Rev. 605.

⁵³ See *Cowan v. Milbourn* (1867), L.R. 2 Ex. 230; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Edler v. Auerbach*, [1950] 1 K.B. 359; *Pearce v. Brooks* (1866), L.R. 1 Ex. 213; *Woolman v. Glenswick* (1905), 26 N.L.R. 379; *Bezuidenhout v. Strijdom* (1885), 4 E.D.C. 224; *Austin v. Morrall and Others* (1905), 22 S.C. 67; *Grant v. Collett*, *supra*, footnote 30; *Prokop v. Kohut*, *supra*, footnote 3.

Also: *California Raisin Gr. Ass'n v. Abbott* (1911), 117 P. 767, 160 Cal. 601; *People v. Corica* (1942), 130 P. 2d. 164, 55 Cal. App. 2d 130; *Higgins v. Fitzgerald* (1929), 164 N.E. 812, 266 Mass. 176; *Shelletani v. Valentine* (1945), 53 N.Y.S. 2d 127, 184 Misc. 77, mod. 269 App. Div. 568, 56 N.Y.S. 2d 210, *aff'd* 71 N.E. 2d 450, 296 N.Y. 161; *Restatement of Contracts* (1932), s. 598, p. 607.

Nonetheless, the major problem faced by those conventional courts related rather to determining the effects of different shades of illegal intent. Where the parties entered into an agreement which was, on its face, in contravention of statute or the common law, the courts maintained their position by denying all forms of judicial assistance to the defaulting contractors. Such blatant and intended violations of law were deemed reprehensible, and an inexcusable encouragement to act openly in defiance of a legal edict.⁵⁴

Common law courts, however, displayed differences of opinion in cases where the subject matter of the contract was to be used for an illegal object or purpose.⁵⁵ Here the issue was considerably more acute when compared to the singular instance where the contractual instrument itself displayed evident illegality.

Two extreme manifestations of intention displayed the parameters of the judicial approach in relation to an illegal contractual purpose. Thus, where an illegal object was apparent, common law courts adopted a "clean hands" approach and denied any form of contractual relief.⁵⁶ Conversely, an innocent party, who neither intended the illicit object nor even knew of the illicit design, was allowed full recovery and in certain circumstances, even damages.⁵⁷

The most acute difficulty surrounding "intent" in illegal contracts lies, therefore, in the grey area between these two extremes. It is submitted that, although the presence of an illegal or

⁵⁴ The majority of cases deal with loans of money for the express purpose of accomplishing an illegal object. The general rule is that if the loan is made expressly for an illegal purpose, the loan is void. However, this general rule does not appear to apply where the object to be accomplished is merely unenforceable rather than actually illegal.

See *Goldstein v. Nochomowitz*, 1914 O.P.D. 95; *Whittet v. O'Connor* (1918), 39 N.L.R. 376, and the recent English case *Ashmore, Benson, Pease and Co. Ltd. v. A. V. Dawson Ltd.*, *supra*, footnote 32.

⁵⁵ See *Pearce v. Brooks*, *supra*, footnote 53, where the plaintiff hired out his brougham in a legal manner, but was nevertheless denied recovery due to his knowledge that the carriage might be employed by the hirer for an illicit object, namely prostitution. For discussion hereon, see M. P. Furmston, *op. cit.*, footnote 1, at p. 307; G. H. Treitel, *The Law of Contract* (4th ed., 1975), pp. 319-320. See further *Waugh v. Morris* (1873), L.R. 8 Q.B. 202; *Lightfoot v. Tenant* (1796), 1 B. and P. 551, 126 E.R. 1059; and *supra*, footnote 53; *Miller v. Wall*, [1933] 2 W.W.R. 574, 41 Man. R. 325, [1933] 4 D.L.R. 422 (C.A.).

⁵⁶ See *Holman v. Johnson*, *supra*, footnote 2, at p. 343.

⁵⁷ See *Mason v. Clarke*, [1955] A.C. 778, at pp. 793,805; *Municipal Metallic Bed Mfg. Corp. v. Dobbs* (1930), 253 N.Y. 313, 171 N.E. 75, 68 A.L.R. 1376; *Stacy v. Brothers* (1919), 93 Conn. 690, 107 A. 613; *Holtzman v. Israel* (1915), 194 Ill. App. 474; *Federica v. Murray* (1950), 101 N.E. 2d 813; *Citizens N. Bank v. McDonald* (1914), 83 S.E. 389, 116 Va. 834. See too Goff and Jones on Restitution (1966), p. 291.

immoral intention is highly significant as a justification for a denial of a contractual remedy, the solution should not lie in an automatic choice between these two distinct poles, namely, non-relief in the event of "intent" and absolute relief where "innocence" prevails. Rather, the solution must arise from a factual investigation where the form and extent of relief will vary in accordance with a range of variables. These variables include the degree of culpable intention and general public policy deterrence considerations.⁵⁸ Thus, a serious infringement of public policy might warrant an absolute denial of judicial assistance to either party though the claimant might have displayed only a secondary and subsidiary illicit intention or objective.⁵⁹ Conversely, an act of severe immorality might nevertheless cause only a minor violation such as to still warrant judicial relief.

The significance associated with these contrasting variables reveals that any rigid conception of contractual intention, standing alone, cannot serve to provide a final, immutable and fair judicial result. Further evaluation remains necessary in order for the court to reach rational and factually perceptive determinations.

B. Severance.

Common lawyers have repeatedly had to consider whether a contractual relationship could be judicially recognized in some altered form, even though the contract was tainted with a degree of immorality and illegality. The Anglo-American and South African legal traditions accept the general principle that courts should attempt to uphold contracts rather than strike them down. This doctrine assumes that contractual expectation should be respected, rather than disappointed by an excess of judicial intervention into the sphere of private endeavour. In this way the normal flow of commercial transactions is encouraged and facilitated.⁶⁰

⁵⁸ See *National Bank & Loan Co. v. Petrie* (1903), 23 S. Ct. 512, 189 U.S. 423, 47 L. Ed. 879; *Furman v. Furman* (1942), 34 N.Y.S. 2d 699, 178 Misc. 582, aff'd 30 N.Y.S. 2d 516, 262 App. Div. 512, 40 N.E. 2d 643, 287 N.Y. 772; *Belkin v. Belkin* (1963), 243 N.Y.S. 2d 995; *Adams-Mitchell Co. v. Cambridge Distrib. Co.* (1951), 189 F. 2d 913, at p. 926 (C.A.); *McCormick v. Life Insurance Corp. of America* (1957), 308 P. 2d 949, at p. 952, 6 Utah 2d 170; *Marshall v. LaBoi* (1954), 270 P. 2d 99, 125 Cal. App. 2d 253.

⁵⁹ *Supra*, footnote 49.

⁶⁰ See *Henrietta Mills v. Commissioner of Internal Revenue* (1931), 52 F. 2d 931 (C.C.A.); *Continental Copper & Steel Industries v. Bloom* (1953), 96 A. 2d 758, 139 Conn. 700; *Temple v. Clinton Trust Co.* (1948), 62 A. 2d 690, 1 N.J. 219; *Joubert v. Enslin*, 1910 A.D. 37; *Scottish Union and National Insurance Co. Ltd. v. Native Recruiting Corp. Ltd.*, 1934 A.D. 465; *Katze v. Frenkel and Co.*, 1929 A.D. 418. All three legal systems reflect this respectful contractual intention in the following rule of construction, namely, *ut res magis valent quam pereat* (that the contract should rather be given effect than be struck down). See *Black's Law Dictionary* (Rev. 4th ed., 1968), p. 1714; and, *The Effect of Contract on Only Partial Illegality* (1934), 33 Mich. L. Rev. 278.

Accordingly, the courts have adopted the principle of severability. That is, where a contract is viewed by the court as containing both legal and illegal policies, and severance is possible, the court may eliminate the illegal portions and enforce the remainder.⁶¹

In order for contractors to gain the benefits of the principle of severance, certain conditions must be satisfied. First, the promise must be of a variety which may be severed. Thus, English courts have maintained that there can be no severance of promises which are substantially criminal or immoral. In such cases, the entire arrangement is denied judicial cognizance.⁶²

Secondly, the court will only sever an illegal promise where this can be achieved simply by eliminating specific contractual language, without affecting any further change to the contractual wording which remains.⁶³

Finally, the court will refuse to sever the illegal promise where to do so would textually alter the meaning or context of the remaining contractual provisions. In these cases severance is impossible and consequently, the entire agreement will constitute an illegality.⁶⁴

⁶¹ See Treitel, *op. cit.*, footnote 55. See the following American and English references: *Ailion v. Spiekermann*, *supra*, footnote 4; *Spector v. Ageda*, *supra*, footnote 4; *Re Davstone Estates*, [1969] 2 All E.R. 849 (Ch.); *Camp Concrete Products v. Central of Georgia Ry. Co.* (1975), 215 S.E. 2d 299; *Cox Feedlots, Inc. v. T. V. Hope*, *supra*, footnote 32; *Schara v. Thiede* (1973), 206 N.W. 2d 129; *Alston Studios, Inc. v. Lloyd V. Gress & Assoc.* (1974), 492 F. 2d 279; *Garbutt Business College v. Henderson*, [1939] 4 D.L.R. 151, esp. at pp. 171-172, 178 (Alta C.A.); *Brooks-Bidlake v. A.G.B.C.*, 63 S.C.R. 466, [1922] 3 W.W.R. 9, 66 D.L.R. 475, *aff'd* [1923] 1 W.W.R. 1150, [1923] A.C. 450, [1923] 2 D.L.R. 189 (P.C.).

⁶² See *Bennett v. Bennett*, [1951] 1 K.B. 249, at p. 254; *Kuenigl v. Dommersmarck and Another*, [1955] 1 Q.B. 515; *In re Greene* (1931), 45 F. 2d 428 (D.C.N.Y.); *Manson v. Curtis* (1918), 223 N.Y. 313, 119 N.E. 559.

⁶³ See *Mason v. Provident Clothing and Supply Co. Ltd.*, [1913] A. C. 724; *T. Lucas & Co. Ltd. v. Mitchell*, [1972] 1 W.L.R. 938; *Sherman v. Pfeifferkorn* (1922), 241 Mass. 468, 135 N.E. 568; *Katz v. Newman* (1925), 97 N.J. Eq. 284, 127 A. 255.

⁶⁴ *Goldsoll v. Goldman*, [1915] 1 Ch. 292; *Attwood v. Lamont*, [1920] 3 K.B. 571; *McMullen v. Hoffman* (1899), 174 U.S. 639, 19 S. Ct. 839, 43 L. Ed. 1117.

South African courts have, in general, adopted the English law of severance in view of the dearth of Roman and Roman-Dutch authorities hereon. See *Eastwood v. Shepstone*, 1902 T.S. 303; *Middleton v. Carr*, 1949 (2) S. A. 374; *New United Yeast Distributors v. Brooks*, 1936 T.P.D. 296; *Empire Theatres v. Lamor*, 1910 W.L.D. 289; *Gopal v. Cohen*, 1946 T.P.D. 283; *Jones v. Siebert*, 1948 (1) S.A. 1095; *Bhenger v. Alexander*, 1947 (4) S.A. 341 (n); *Jonker v. Yzelle*, 1948 (2) S.A. 944 (T.).

The Anglo-American principle of "consideration" in severance, however, has been avoided by South African courts owing to the absence of a consideration

The principle of severance is, therefore, a convenient judicial instrument which may be invoked to avoid an unnecessarily broad and inflexible concept of illegality. By raising the severance technique, a minor illegality need not invariably result in absolute contractual voidness.⁶⁵

The suitable application of this doctrine, however, depends upon the court's view of the character of the permissible and non-permissible elements of the contract. The question of divisibility will, accordingly, hinge on the judicial construction of the fundamental attributes of illegal promises.⁶⁶

C. *The Pleadings and How to Avoid Liability for Illegality.*

The English legal system, which was founded upon a plethora of complex writs and forms, established a procedural device which a contractor could raise in order to avoid the harsh effects of a judicial determination of illegality. This device would allow the plaintiff to succeed in a contractual action if he could establish his case without directly relying upon the illegality revealed in his contract:

criteria in the dominating Roman-Dutch legal system. See *Conradie v. Rossouw*, 1919 A.D. 314;

The consideration doctrine, frequently invoked in common law illegality suits, provides that a promise cannot be enforced if the whole, or a substantial, part of the "consideration" for the promise is illegal. See *Lound v. Grimwade* (1889), 39 Ch. D. 605; *Walrond v. Walrond* (1858), Johns 18; *Goodinson v. Goodinson*, [1954] 2 Q.B. 118; *Bull v. Pitney-Bowes Ltd.*, [1967] 1 W.L.R. 273; *Wyatt v. Kreglinger and Fernau*, [1933] 1 K.B. 793; *Hazelton v. Sheckels* (1906), 202 U.S. 71, 36 S. Ct. 567; *Koster v. Seney* (1896), 99 Iowa 584, 68 N.W. 824; *Stratton v. Wilson* (1916), 170 Ky. 61, 185 S.W. 522. See also V.S. Dunn, *Illegal Considerations in Negotiable Instruments* (1935), 7 Miss. L. Rev. 282.

⁶⁵ See the following cases which illustrate how certain courts prefer to use the severance principle as a means of upholding contracts where equity and justice so demand. *Kelly v. Kosuga* (1959), 79 S. Ct. 429, 358 U.S. 516, 3 L. Ed. 2d 475, rehearing den. 79 S. Ct. 796, 359 U.S. 962, 3 L. Ed. 2d 769; *Jones v. Gabrielan* (1958), 146 A. 2d 495, at p. 500, 52 N.J. Super. 563.

⁶⁶ The severance principle, insofar as it is used as a manipulative judicial instrumentality, ideally illustrates the realist contentions advocated by Jerome Frank and Karl Llewellyn. See J. Frank, *Law and the Modern Mind* (1930); J. Frank, *Courts on Trial* (1949); J. Frank, *Cardozo and The Upper-Court Myth* (1948), 13 L. Contemp. Prob. 369; K. Llewellyn, *op. cit.*, footnote 20; K. Llewellyn, *The Common Law Tradition* (1960); K. Llewellyn, *Jurisprudence* (1962).

Although each of these realists adopted different philosophies, both advocated that courts tend to reach their decisions based on the individual judge's conception of the facts and the equitable needs of the situation. Rules of law, such as severance, are merely constructive devices invoked by courts in order to reach the most appropriate result. For the origins of this jurisprudential approach, see Holmes, *op. cit.*, footnote 20.

Thus, where a limited interest, such as a bailment or lease, transferred by a contract fraught with illegality, the plaintiff was granted recovery where he was able to frame his action without reliance on the prohibited terms. Similarly, a property owner who relied on his legal title, rather than the illegal bailment or lease, was entitled to judicial relief.⁶⁷

This approach has fallen into some disfavour among Anglo-American jurists,⁶⁸ although the method is still used to obtain a contractual remedy in an otherwise illicit arrangement.⁶⁹

In South Africa, however, the courts totally discounted the procedurally-oriented notion of pleadings used in the common law systems. Judge van den Heever stated the South African point of view:⁷⁰

I see no reason why a technicality such as the form in which the plaintiff frames his action, or that an originally obnoxious relationship has been cast into a new mold [via the pleadings approach], should alter the position. . . . [The] court should refuse to enforce the contract whether the point is taken by the parties or not.

Much of the South African criticism of the English method of pleadings is founded upon a fundamental difference in legal approach. English lawyers are trained to operate within a complex system of pleadings and counter-pleadings. In contrast, South African lawyers place far less emphasis upon technicalities but instead place greater reliance upon the historical substantive and doctrinal law which forms the basis of the South African system.⁷¹

⁶⁷ See hereon, *Taylor v. Chester* (1869), L.R. 4. (Q.B.); *Bowmaker's Ltd. v. Barnett Instruments Ltd.*, [1945] K.B. 65; Hamson, *Illegal Contracts and Limited Interests* (1949), 10 Camb. L.J. 249; Coote, *Another Look at Bowmaker's v. Barnett Instruments* (1972), 37 Mod. L. Rev. 38; Gellhorn, *op. cit.*, footnote 1, at pp. 683-684. See too *Osmack and Domestic Mining Co. v. Stan Reynolds Auto Sales*, [1974] 1 W.W.R. 408, at pp. 416-417 (Alta C.A.); *Clark v. Hagar*, *supra*, footnote 43; *Kirzinger v. Kalthoff* (1964), 46 W.W.R. 547, 45 D.L.R. (2d) 144 (Sask.).

⁶⁸ See Gellhorn, *op. cit.*, footnote 1, at p. 683; Hamson, *op. cit.*, footnote 67, at p. 249; Paton, *Bailment in the Common Law* (1952), p. 34; *Miles v. Watson*, [1953] N.Z.L.R. 958; *Jajbhay v. Cassim*, *supra*, footnote 21, at p. 542; *Schuster v. Guether*, [1933] S.W.A. 19, at pp. 20-21; Howard A. Street, *The Law of Gaming* (1937), p. 79.

⁶⁹ For recent English and American cases see: *Belvoir Finance Co. Ltd v. Stapleton*, *supra*, footnote 47; *Graphilter Corporation v. Vinson* (1975), 518 S.W. 2d 952. Also Colonell

Goodman (1948), 78 F. Supp. 845; *Higgins v. Higgins* (1952), 119 N.Y.S. 2d 103 (Sup.).

⁷⁰ *Schuster v. Guether*, *supra*, footnote 68.

⁷¹ On the modern South African approach see: *Jajbhay v. Cassim*, *supra*, footnote 21, at p. 544. Nevertheless, early South African cases did follow the English pleading system with some success. See, for instance, *Silke v. Goode*, 1911 T.P.D. 989; and *Heilman v. Vorbeek*, 1925 T.P.D. 790. Other South African

Attacks on the common law system of pleadings lodged by Anglo-American lawyers themselves have raised even more realistic and devastating questions as to the suitability of this approach. Eminent English authorities have contended that the pleadings principle "is extremely difficult of application since it is frequently hard to determine whether a plaintiff is relying upon his title, or upon the contractual provisions of the illegal arrangement".⁷² The technically complex pleadings approach thus forces the judge to indulge in the interpretation and construction of ambiguous pleadings within overlapping legal and doctrinal institutions.

Furthermore, the general pleadings approach, by relying totally on the method of formulating pleadings, may ignore the contractual fact situation. Thus, "state" policies and private interests that should realistically influence a judicial determination might be overlooked, thereby subverting the entire purpose of an effective and equitable law of illegality. Accordingly, irrespective of the degree of turpitude and the severity of the criminal or tortious act, a party would be entitled to contractual recovery (or even damages) simply by rephrasing his pleadings so as to avoid reference to the illegal stipulation. Alternatively, a party who might otherwise have been entitled to relief on equitable grounds might be denied such relief simply because his pleadings could not be technically rephrased so as to avoid reliance upon the minor illegality.⁷³

courts severely questioned the applicability of the English pleading system even prior to *Jajbhay*. See *Vuurman v. Universal Enterprises Ltd.*, 1924 T.P.D. 495; *Schuster v. Guether*, *supra*, footnote 68; *Hawthorne v. Van der Linden*, 1942 N.P.D. 36; *Albertyn v. Kumalo*, 1946 W.L.D. 526; *Mamoojee v. Akoo*, 1947 (4) S.A. 733 (N.P.D.).

⁷² See for instance, Anson's Law of Contract, *op. cit.*, footnote 13, p. 362. See too: *Gas Light and Coke Company v. Turner* (1839), 3 Bing. N.C. 666, at p. 677; *Alexander v. Rayson*, [1936] 1 K.B. 169, at p. 186; *Jajbhay v. Cassim*, *supra*, footnote 21, at p. 537.

⁷³ See in particular Gellhorn, *op. cit.*, footnote 1, at pp. 683-684. For further criticisms of formal pleadings see Anson, *op. cit.*, footnote 13, p. 363; and Treitel, *op. cit.*, footnote 55, pp. 331-332. It should be noted, however, that the common law courts will on occasion, of their own motion, invoke the pleadings as a convenient means of denying relief to an arrangement which is contrary to public policy. The pleadings rule is, therefore, used as a manipulative device, not only by the parties to the arrangement, but also by the court itself. See *Oscanyan v. Arms Co.* (1880), 103 U.S. 261, 26 L. Ed. 539; *Ewell v. Daggs* (1882), 108 U.S. 143, 27 L. Ed. 682, 2 S. Ct. 408; *Hartford Fire Ins. Co. v. Chicago R. Co.* (1895), 70 F. 201, 17 C.C.A. 62, 30 L.R.A. 193, *aff'd*, 175 U.S. 91, 44 L. Ed. 84, 20 S. Ct. 33; *Carter-Crume Co. v. Peurrung* (1900), 99 F. 888, 40 C.C.A. 150; *Roberts v. Criss* (1920), 266 F. 296, 11 A.L.R. 698 (C.A. 2nd Cir.); *Tennell v. Ridler* (1826), 5 B & C (Eng.) 406; *Montefiore v. Mendenay Motor Co.*, [1918] 2 K.B. 241, *Lipton v. Powell*, [1921] 2 K.B. 51; *Alexander v. Rayson*, *supra*, footnote 72.

If courts are to continue using pleadings in their treatment of illegality, it is suggested that some considerable refinement of this process is required. The pleadings method should cease to constitute an automatic *carte blanche* whereby a contractor can acquire relief irrespective of his heinous act and the deleterious socio-legal results.

Indeed, it should be recognized that contractual pleadings are simply a convenient and flexible judicial device whereby relief can be granted or denied, rather than a contractual instrumentality which undermines the very purpose of the law. Nor should the pleadings method be permitted to acquire the force of a binding and irreversible substantive rule. Rather the pleadings approach must, in the interests of public policy and private justice, subserve to the relevant contractual circumstances. Accordingly, common law judges should only permit the use of the pleadings approach to protect minor illegalities or inconsequential breaches of public policy from the harsh results of the "clean hands" doctrine of judicial non-intervention.

IV. *The Roman Law Maxims and Their Effect Upon Illegal Contracts.*

A. *Ex Turpe Causa Non Oritur Actio.*

Anglo-American and South African legal systems have all had to resort to the Roman law in their determinations of the effects of illegality. The Roman law maxim *ex turpe causa non oritur actio* was frequently summoned in common law and early South African decisions to justify the denial of judicial enforcement to a contract, as well as to refuse remedial action to either contracting party. The use of this maxim, which literally translated means: No action will arise from a *turpis* cause, was clearly illustrated by Lord Mansfield in *Holman v. Johnson*, where he stated:⁷⁴

The objection that the contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy . . . the principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend aid to a man who found his course of action upon an immoral or illegal act. If . . . the cause of action appears to arrive *ex turpe causa* . . . then the court says he has no right to be arrested. It is upon that ground that the court gives; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. . . .

⁷⁴ (1775), 1 Cowp. 341, at p. 343. For statements made by American courts to a similar effect see: *Gibbs & Sterrett Manufacturing Co. v. Brucker* (1884), 111 U.S. 597; *McConnell v. Commonwealth Pictures Corp.* (1960), 7 N.Y. 2d 465. The American courts, however, tend to place far more reliance upon the policy rationale behind the maxim than upon the *ex turpe causa* maxim itself.

The English courts have given the maxim a broad interpretation: namely, that a court of law is absolutely prohibited from assisting parties to an illegal contract.⁷⁵ This prohibition, therefore, precludes enforcement of the contract, as well as any claim for relief in terms of the illicit arrangement.

South African authorities since *Jajbhay* have contended, through a careful review of the Roman law sources, that the English interpretation of the maxim is too broad. Aquilius, for instance, pointed out that the Roman authorities who coined the maxim specifically referred to a *turpis causa* rather than to an *injusta causa*. This would suggest that the maxim was intended to have a narrower scope than propagated by common law courts. Clearly the Romans intended to restrict the doctrine to cases of turpitude rather than instances of mere illegality and this, according to Aquilius should be the modern construction.⁷⁶ However, not even South African courts have followed this reasoning.⁷⁷ Accordingly, the *ex turpe causa* maxim applies to both illegal and immoral transactions in both Anglo-American and South African law.

Nevertheless, South African courts have found some fault with the English law construction of this maxim. The South African *Jajbhay* court, therefore, held that the *ex turpe causa* maxim applied only to prohibit the enforcement of illegal contracts, but did not extend, as the English judges had maintained, to a judicial grant of remedial relief.⁷⁸

These criticisms of the English approach to *ex turpe causa* fail to necessarily infer that the Anglo-American interpretation should be adjusted to reflect the apparently "true" meaning of the institutional Roman law. Indeed, even South African authorities, the obvious experts on their Roman law heritage, have failed to agree upon the precise ambit of the maxim.⁷⁹

⁷⁵ See *Burns v. Edman*, [1970] 1 All E.R. 886; *Kalembor v. Blue Top Brewing Co.*, [1942] 2 D.L.R. 777 (Ont.).

⁷⁶ See Aquilius, *op. cit.*, footnote 10.

⁷⁷ *Jajbhay v. Cassim*, *supra*, footnote 21, at pp. 348-349; *Bobrow v. Meyerowitz*, 1947 (2) S.A. 885 (T); *Minister of Justice v. Van Heerden*, 1961 (3) S.A. (o); *The Lion Match Co., Ltd. v. Wessels*, 1946 O.P.D. 376; *Mathews v. Rabinowitz*, 1948 (2) S.A. 876 (W); *Thompson v. Van der Linden*, 1942 N.P.D. 295.

⁷⁸ See *Jajbhay v. Cassim*, *supra*, footnote 21, at p. 166. Note, however, that some South African courts have nevertheless used this maxim to justify the grant of contractual adjustments, notwithstanding *Jajbhay*. See, in particular, *Venter v. Vosloo*, 1948 (1) S.A. 631 (E.).

⁷⁹ For example, Bermann argues for a retention of the English law interpretation of the maxim, 1946 S.A.L.J. 50; Wessels accepts the *Jajbhay* position but with reservations in *op. cit.*, footnote 1, pp. 153, 217-218; deWet and Yeats, remarking upon the contrasting interpretations, absolutely rejected the *Jajbhay* interpretation

The *ex turpe causa* maxim, it is suggested, is simply a device, not an absolute rule, whereby courts can rationalize their conclusions in terms of reason combined with doctrinal support. South African courts are, understandably, more preoccupied with strict doctrinal accuracy when compared with judicial attitudes within the Anglo-American system. Consequently, it is important that the *ex turpe causa* maxim assist common law courts to procreate a worthwhile pragmatic judicial methodology, rather than bind the court as if the maxim were substantive law.

This contention was succinctly illustrated in a recent decision of the United States Supreme Court.⁸⁰ There Mr. Justice Black stressed the "inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes".⁸¹ Thus, the general rule that the *ex turpe causa* maxim prohibits judicial indulgence should be narrowly construed in the face of a proper fact situation. In this way the court can reach flexible determinations based on varied equitable and policy-oriented motivations.

B. *The Confusion Surrounding the In Pari Delicto Maxim.*

The maxim *in pari delicto potior est conditio defendentis vel possidentis*⁸² literally translated means: "if (when) the parties are in equal guilt, the defendant or the possessor is in a better position." The rationale behind this maxim lies in the same general public policy considerations which motivated the creation of the *ex turpe causa* doctrine.

Under the *par delictum* rule, however, the defendant is judicially favoured insofar as the court will deny contractual relief to the plaintiff. This judicial result does not arise from the fact that the position of the defendant is more laudable than that of the plaintiff, but stems rather as a result of a general judicial condemnation of illegal contractual relationships. The defendant will merely be the incidental beneficiary of this judicial condemna-

of the maxims as not being in conformity with Roman and Roman-Dutch law, but these eminent authors offered no alternative explanation of the Roman legal position, *op. cit.*, footnote 1, pp. 78-80.

⁸⁰ *Perma Life Mufflers Inc. v. International Parts Corp.* (1968), 392 U.S. 134.

⁸¹ *Ibid.*, at p. 136.

⁸² Note that this maxim is usually referred to as *in pari delicto*. For extensive commentary on this doctrine in the American legal system, see Note, *In Pari Delicto and Consent as Defenses in Private Anti-Trust Suits* (1965), 78 Harv. L. Rev. 1241; Note, *Unclean Hands: The Effect of Plaintiff's Anti-Trust Violations on Anti-Trust Actions* (1965), 113 U. Pa. L. Rev. 101; Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Anti-Trust Suits: an Additional Justification* (1959), 54 Nw. U. L. Rev. 456; Note, *In Pari Delicto: The Consumer's Best Friend*, *op. cit.*, footnote 1.

tion process.⁸³ Hence, the court exercises its discretion to invoke the "clean hands" policy of non-interference.

This maxim has been the cause of considerable controversy, both in terms of its correct interpretation and its practical application. Since *Jajbhay v. Cassim*, South African courts have interpreted the maxim as being contextually distinct from the *ex turpe causa* doctrine. That court maintained that the *ex turpe causa* doctrine applied as an absolute prohibition to judicial enforcement of the contractual arrangement. In contrast, the *par delictum* maxim was to be restricted solely to questions of contractual relief.⁸⁴

In the case of the *par delictum* rule, the South African court suggested that, in the interests of public policy, the strict application of the rule should be alleviated in favour of quasi-contractual remedial relief. This judicial discretion was, in the opinion of the court, an accurate interpretation of the scope of the Roman law maxim.⁸⁵

Anglo-American courts have failed to distinguish between these two maxims. Authorities maintained, for instance, that both maxims had an identical purpose and effect, that is, an absolute condemnation of illegal arrangements according to the "general principles of policy".⁸⁶

⁸³ See, e.g., Lord Mansfield in *Holman v. Johnson*, *supra*, footnote 6, at p. 343. See too *Chettiar v. Chettiar*, [1962] 2 W.L.R. 548.

⁸⁴ *Jajbhay v. Cassim*, *supra*, footnote 21, in particular at pp. 540, 542.

⁸⁵ See *Jajbhay v. Cassim*, *supra*, footnote 21. The Roman Law interpretation of these maxims is, however, somewhat unclear. The majority of Roman and Roman-Dutch law passages, refer only to the *in pari delicto* maxim. See for instance D. 50.17.154 (*cum par delictum est duorum semper oneratus petitur et melior habetur possessoris causa*. Trans.: When two persons have joined together in wrongdoing, the position of the one who claims against the other is always the more onerous, and the case of the possessor is held to be the stronger.) See too D. 12.5.4.3; D. 12.7.5; Grotius, 3.1.43; 3.30.17; Voet, 12.5.2, 4.6 and 11.

However, several Roman law provisions appeared to cover both maxims within the terms of the same section. D. 12.5.1.2: *Quodsi turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest*: But if the position is immoral on the part of the receiver, there can be an action for return of the gift, even where the object is realized. D. 12.5.8: *Porro autem si et dantis et accipientis turpis causa possessorem potiore esse*: and, besides that, if the position of both giver and receiver is that their behavior is immoral, the advantage is with the possessor.

⁸⁶ Lord Mansfield in *Holman v. Johnson*, *supra*, footnote 6: "If . . . the cause of action appears to arise ex turpe causa [from a cause found in turpitude] . . . [then] potior est conditio defendentis [the position of the defendant is the better]." Note that the court makes no reference to *in pari delicto*, but refers solely to the latter half of the maxims. On the implications of this case see: Glanville Williams, *op. cit.*, footnote 51; Grodecki, *op. cit.*, footnote 1. For further comments on these two maxims see: for instance, *Scott v. Brown, Doering, McNab and Co.*, *supra*, footnote 30; *Taylor v. Chester* (1869), 38 L.J.Q.B. 225; *Bone v.*

Thus, the result of this doctrinal assimilation has been to effectively prevent a party to an illicit arrangement from receiving either contractual enforcement or remedial relief. This mode of interpretation has had the unique effect of preventing the common law courts from raising equity-oriented arguments as a means of granting contractual relief.

As previously suggested,⁸⁷ the Roman law maxims are amenable to various interpretations due, in part, to the ambiguity of doctrinal language in an unqualified historical context, and more importantly, to the changing conditions and needs since Roman law times. Notwithstanding the presence of contradictory conventional policies and interests,⁸⁸ the interpretation placed upon these maxims in the common law jurisdictions has rendered them into absolute contrivances whose rigid and unbending policies are directed against any form of illicit activity.

The common law, however, has developed certain means of undermining the rigidities associated with these two doctrines. It has been authoritatively stated that:⁸⁹

... where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and in furtherance of these

Eklees (1860), 29 L. J. Ex. 438; *Fisher v. Bridges* (1854), 3 E. and B. 642, 118 E.R. 1283; *Simpson v. Bloss* (1816), 7 Taunt 248; *Chettiar v. Chettiar*, [1962] A.C. 294, [1962] 1 All E.R. 494 (P.C.); *Parkinson v. College of Ambulance, Ltd.*, [1925] 2 K.B. 1; *Shaw v. Shaw*, [1965] 1 W.L.R. 937; *Fridman, The Law of Contract* (1976), p. 384.

For the American approach hereon, see *Zyther v. Dmochowski* (1938), 302 Mass. 63, 18 N.E. 2d 332 where the court stated "both being *in pari delicto*, neither is entitled to any consideration and the court will leave the parties as it finds them". The judge accordingly viewed the *in pari delicto* maxim as warranting an absolute denial of judicial relief, thereby identifying the two maxims under the same absolute "clean hands" rule. See too *Broom's Legal Maxims* (1939), pp. 497-509.

⁸⁷ See *supra*.

⁸⁸ For criticism hereon, see: Note, *In Pari Delicto: The Consumer's Best Friend*, *op. cit.*, footnote 1.

Indeed, the United States Supreme Court specifically stated: "The doctrine of *In Pari Delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an anti-trust action." This is indicative of a recognition that the rule may be too severe and unbending. See *Perma Life Mufflers, Inc.*, *supra*, footnote 80, at p. 140. But see *Kiefer Stewart Co. v. Joseph E. Seagram & Sons Inc.* (1951), 340 U.S. 211; and *Simpson v. Union Oil Co.* (1964), 377 U.S. 13.

⁸⁹ Lord Mansfield in *Browning v. Morris* (1778), 2 Cowp. 790, at p. 792. See also *Gray v. Southouse*, [1949] 2 All E.R. 1019; *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] A.C. 192; *Brand v. Elledge* (1961), 89 Ariz. 200, 360 P. 2d 213; *Cohen v. Mayflower Corp.* (1955), 196 Va. 1153, 86 S.E. 2d 860.

statutes, the person injured, after the transaction is finished and completed may bring his action and defeat the contract.

Therefore, in appropriate circumstances,⁹⁰ such as the modern day situation of adhesion contracts, a party to an illegal arrangement may be entitled to relief on the grounds that he had little or no influence over the existence or character of the transactional terms and was, accordingly, not in equal guilt.⁹¹

It is, therefore, in recognition of such contractual circumstances that well-entrenched ancient maxims may fail to maintain their traditional validity. The realities of the modern world demand that these general principles and doctrines of law be modified or alleviated, whether directly or by judicial construction, in order that they may be resurrected to once again assume defensible validity and importance. The common law courts have thus responded to these dictates, at least in part, by reducing the all-embracing application of the *par delictum* rule.

V. Suggestions for Reform.

Common law courts have generally adopted two fairly rigid approaches towards illegal contracts: the rule-oriented or doctrinal approach which leads to an almost mechanical judicial condemnation of illegal arrangements, and the technical pleadings approach which allows the contracting parties to gain the benefits of total judicial enforcement.

Neither conclusion is absolutely incorrect. However, each approach is indefensible in certain respects. Both methods place more faith in general principles of law and rules of construction than is justifiable in view of the peculiar characteristics of illegal contracts. Courts frequently ignore that the realities of modern contracting may require a flexible adjustment of the illegal arrangement, rather than an absolute grant or denial of judicial cognizance.

⁹⁰ The following cases illustrate circumstances which courts will consider as relevant to the question of "equal guilt" in an illegal contractual situation: *National Bank & Loan Co. v. Petrie* (1903), 23 S. Ct. 512, 189 U.S. 423, 47 L. Ed. 879; *Furman v. Furman*, *supra*, footnote 58; *Belkin v. Belkin* (1963), 243 N.Y.S. 2d 995; *Stewart v. Wright* (1906), 147 F. 321 (C.A. 8th Cir.), *aff'ing* (1904), 130 F. 905; *Lockman v. Cobb* (1905), 91 S.W. 546, 77 Ark. 279; *Steinberg v. Cohen*, [1930] 2 D.L.R. 916, 64 O.L.R. 545 (C.A.). But *cf. Engbloom v. Blakeman*, [1930] 2 D.L.R. 824 (B.C.C.A.).

⁹¹ Here the argument stems from the fact that a contractor, not in equal guilt, is frequently one who lacks comprehensive freedom to contract. See for instance, David H. Parry, *The Sanctity of Contracts in English Law* (1959); N. Isaacs, *The Standardization of Contract* (1917), 27 Yale L.J. 34; A. Lenhoff, *Contracts of Adhesion and the Freedom of Contract and the Right to Work* (1969), 43 Australian L.J. 300. For further important references hereon see, *supra*, footnote 23, in particular the articles by Williston, Fridman, Wilson and Pound.

Furthermore, these existing approaches give only limited recognition to the fact that the effect of illegality also depends upon informal methods of judicial construction of the contract, rather than exclusively upon generalized extra-contractual rules. For, the result of an illegal contract hinges upon normative, rather than absolute, standards that vary according to the demands of society, time and space.

Finally, the stereotyped judicial conception that illegality may be governed by a single law of contract with constant principles and policies partially ignores the variations in contractual situations. In truth, different contractors have different levels of legal and factual knowledge and possess varying degrees of contractual skill, thereby gainsaying the justification for having a single judicial approach towards the effect of illegality.

A primary suggestion of this article, therefore, is that common law judges should be empowered to exercise a degree of discretion in evaluating the effects of illegality in contract in view of the nominative characteristics of illegality and the needs of different fact situations.

Indeed, this proposition is not a mere flight of academic fancy. The demand that judges be willing to exercise an informed discretion constitutes a significant reverberation of common law realist jurisprudence. The proponents of that theory have argued that judges must interpret agreements, not merely in terms of the literal letter of the contract, but rather in accordance with the broader contractual context, including the interests of justice.⁹² The modern South African approach therefore has distinct jurisprudential credibility in the common law system.

Similarly, legislatures influenced by notions of equity and contractual expediency have increasingly acknowledged the need for judges to use their discretion. Thus, New Zealand legislation authorizes "... the Court [to] . . . grant . . . relief to any party to an illegal contract . . . as the Court in its discretion thinks just".⁹³ Similar judicial discretion is legislatively permitted in Commonwealth jurisdictions in relation to frustrated contracts.⁹⁴

⁹² On Anglo-American realism and social behaviouralism, see *supra*, footnote 20.

⁹³ On the judicial willingness to construct contracts in accordance with discretion, see: Patterson, *Constructive Conditions in Contracts* (1942), 42 Col. L. Rev. 903; Friedmann, *Law in a Changing Society* (1959), p. 115; Fuller, *op. cit.*, footnote 52; N. Isaacs, *op. cit.*, footnote 52; Farnsworth, *Disputes over Omission in Contracts* (1968), 68 Col. L. Rev. 860.

⁹⁴ See The Illegal Contracts Act, 1970. S.N.Z., 1970, c. 129, s.7(1). For discussion on this legislation see, *Illegal Contracts*, Report of the Contracts and Commercial Law Reform Committee (New Zealand, 1969); Furnston, *The Illegal Contracts Act, 1970, An English View* (1972-3), 5 N.Z. U.L.Rev. 151.

Yet, critics have contended that the exercise of judicial discretion will lead to unwarrantable capriciousness in the decision-making process.⁹⁵ In reality, the risk of judicial arbitrariness is significantly reduced in view of the controls inherent within the common law system. Thus, the demand that judges give logical reasons for their decisions achieves both a public scrutiny of the decision-making process and the possibility that unsound judgments will be reversed on appeal. Judicial consistency is maintained by the requirement that courts reflect upon past experiences in the legal system rather than reach their decisions within a proverbial vacuum. Finally, the exercise of judicial arbitrariness is limited by rules of evidence and procedure which require courts to make determinations only after evaluating all relevant evidence, properly elicited and considered.

Greater difficulty is posed by the suggestion that courts are insufficiently equipped to weigh normative public policy considerations which often contradict each other and fluctuate with time.⁹⁶ Yet, even this criticism is rebutted by the attributes of the living common law. For, the fact that courts are constantly exposed to factual situations forces them to develop the "situation sense", necessary to make essentially "non-legal" decisions.⁹⁷ In addition, judicial precedent compels common law judges to reflect upon the significance of previous fact situations. Finally, rules of evidence require that courts give credence to party witnesses, including experts summoned to give testimony on issues of fact.

⁹⁵ See the English Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. VI, c. 40, which established the notion of remedial relief from contractual performance obligations. For discussions on the adoptions of this legislation see: 51 A.L.I. Proceedings (1974); Restatement (Second) of Contracts (Tent. Draft No. 9, 1974); Glanville Williams, *The Law Reform (Frustrated Contracts) Act 1943* (1944); H. C. Gutteridge, *A Review of Glanville Williams' Book on The Law Reform (Frustrated Contracts) Act 1943* (1945), 61 L.Q.Rev. 97; Comment, *Apportioning Loss after Discharge of a Burdensome Contract* (1960), 69 Yale L.J. 1054; J. E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason* (1964), 58 Nw. U.L. Rev. 750. See also Comment (1951), 18 U. Chi. L. Rev. 153; Comment (1948), 46 Mich. L. Rev. 401; L.L. Fuller and W. R. Perdue, Jr. *The Reliance Interest in Contract Damages* (1936-1937), 46 Yale L.J. 52, at p. 373.

See too: Report on the Need for Frustrated Contract Legislation in British Columbia (Project No. 8 of the Law Reform Commission of British Columbia, 1971); David R. Percy, *The Application of the Doctrine of Frustration in Canada in Studies on Canadian Business Law* (Fridman ed., 1971); J. D. Payne, *Reform of the Law of Frustrated Contracts in Saskatchewan* (1960), 25 Sask. Bar Rev. 94; J. D. Falconbridge, *Frustrated Contracts: The Need for Law Reform* (1949), 23 Can. Bar Rev. 43, at p. 469; F. P. Donovan, *Law Reform in Victoria*, [1960] J. Bus. L. 62.

⁹⁶ For arguments in favour of restricting the use of judicial discretion, see Lord Salmon in *Gallie v. Lee*, [1969] 2 Ch. 17, at p. 49; Shand, *op. cit.*, footnote 1.

⁹⁷ See *supra*, footnote 96.

However, the final fetter upon the judiciary lies in their capacity to develop meaningful methods of determining the effects of illegality through the evolutionary process of judicious experimentation and example.

Firstly, courts will increasingly perceive the relevance of state and public policies as well as the individual interests of contractors. Judges who are willing to limit their discretion by carefully scrutinizing legislative policies and standards of morality are therefore able to render informed rather than arbitrary determinations of fact.

Secondly, in scrutinizing each situation, the common law judge will inevitably grow increasingly sophisticated in distinguishing relevant from irrelevant contractual variables. Consequently, while the degree of illegality, the type of contractors, their intention and abilities, are all relevant contractual variables, the particular relevance of each variable will vary according to the peculiarities of the individual contractual context under investigation. In this way, the court will perceive that the presence of contractual duress is of greater significance in an adhesive situation than in a relationship between "equal contractors"; and the baseness of the illegal act will assume more importance where the violation of public policies are the most devastating in effect.

Thirdly, the more our common law judges indulge in factual analysis, the greater will be their ability to develop versatile interpretative techniques suited to individual situations. Courts will appreciate that legislative policies can be assessed by an examination of legislative history, by a careful scrutiny of legislative titles, headnotes and preambles, and by analyzing legislative language in its different contexts.⁹⁸ Similarly, our common law judges have increasingly recognized that contractual intention and conduct can be assessed in a variety of ways: by reflecting upon the literal language of the contract; by examining the contract in its entirety; and by having recourse to inferences reasonably drawn from the circumstances surrounding the arrangement.⁹⁹

Fourthly, the more our courts are willing to recognize the different remedies available in determining the effects of illegality, the more suited are their decisions to the needs of each contractual context. Thus, courts can strike down agreements *in toto* where prohibitory policies outweigh individual interests. Judges can

⁹⁸ For an original discussion on "situation sense", see K. Llewellyn, *Jurisprudence* (1962), pp. 182 *et seq.*

On the judicial duty to make "non-legal" determinations, see Gellhorn, *op. cit.*, footnote 1, at pp. 679 *et seq.*

⁹⁹ On methods of statutory interpretation, see footnote 39, *supra*.

enforce agreements *in toto* where predominating interests of justice between man and man so demand.¹⁰⁰ Or, courts can grant in-between remedial relief in terms of contract, quasi-contract or unjust enrichment where the balancing of policies and interests demand a combination of judicial relief and judicial condemnation.¹⁰¹

In the final instance, the common law judge has the arduous task of recognizing that:

... the law has two great objects: to preserve order and to do justice . . . [so that] . . . The right solution lies in keeping the proper balance between the two.¹⁰²

The existing common law on the effects of illegality largely underscores the justice-oriented approach by stressing the need for order. Illegal contracts are vigorously condemned in the interest of punishing wrongful acts, notwithstanding the harmful effects which such decisions may have upon individual contractors. A purely justice-oriented approach, in contrast, would redress the equitable claims of individual contractors; but would undermine the order necessary to promote an efficacious legal system. Thus, each method suffers the basic weakness of emphasizing only one of two equally valid legal policies, namely, order and justice.

This article suggests that the most suitable judicial approach towards the effects of illegality lies in two complementary directions: firstly, in the recognition that judicial discretion is necessary to the development of just law; and secondly, in tethering this discretion by combining intrinsic common law controls with the needs of each contractual situation. In this way, order is achieved with justice, and justice is able to promote order.

¹⁰⁰ On the different methods of judicial interpretation of contracts, see *supra*, footnote 93.

For general discussions on the expanding interpretative functions of the American judiciary, see O. W. Holmes, *The Path of the Law* in *Collected Legal Papers* (1920), pp. 167-185; O. W. Holmes, *The Common Law* (1881), p. 1; Wiener, *Evolution and the Founders of Pragmatism* (1949); Jaffe, *English and American Judges as Lawmakers* (1970), p. 723; K. Llewellyn, *The Common Law Tradition* (1960), p. 1; Corbin on Contracts (1962), s. 543.

For English authorities to a similar effect, see *supra*, footnote 42.

¹⁰¹ For discussions of the different forms of action recognized in the common law, see 5 Corbin on Contracts (1962), ss 1102 *et seq.*; Woodward, *The Law of Quasi-Contract* (1913); 5 Williston on Contracts (rev. ed., 1937), ss 1460 *et seq.*; Keener, *Quasi-Contracts* (1893); Gutteridge and David, *The Doctrine of Unjustified Enrichment* (1934), 5 Camb. L.J. 204; McCormick's Text on Damages (1935); Crane's Law on Damages (1955); MacNeil, *Power of Contract and Agreed Remedies* (1962), 47 Cornell L.Q. 495.

¹⁰² Per Lord Denning, *op. cit.*, footnote 42.