

'Intention to Create Legal Relations': A Contractual Necessity or an Illusory Concept

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ABSTRACT

'Intention to create legal relations' forms the basic ingredient of any valid contract in many jurisdictions around the world. The paper argues that such requirement is neither required nor is purposeful if any particular jurisdiction has 'Consideration' as the basic requirement to prove the formation of validly formed contract. The paper postulates that 'consideration' in itself is, and should ideally be, indicative of such intention. Therefore, as far as common law countries are concerned, 'consideration' in itself should be capable of dealing with the intention of the parties and there should not be any separate requirement of proving an 'intention to create legal relation'. By natural corollary, the requirement to prove such 'intention' can be justified in countries where 'consideration' is not a requirement for a forming a valid and legally enforceable contract. The paper, while dealing with the proposed postulations, also deals with the difference in presumption with regard to such intention while dealing with contractual relations that arise in domestic set-up as differing from those arising in a commercial set-up.

Keywords: Contract Law, Intention to Create Legal Relations, Domestic Contracts, Contract Law Theories, Consideration

1. Introduction

The requirement of 'Intention to create legal relations' constitutes one of the most significant conditions of a valid contract in many jurisdictions around the globe—both developed and developing. Allegedly, Contract Act, being an Act governing relations between private parties, cannot be interpreted in the court of law without giving much weightage to the intention of the parties forming such contract. To prove the existence of 'intention to create legal relations' in addition to prove the existence of 'consideration' becomes quite burdensome at times. English Law specifically requires the existence of 'intention to create legally binding contract' for enforcing a contract despite the existence of 'consideration' for the contract. The main argument of this paper is that 'consideration' in itself is, and should ideally be, indicative of such intention. Therefore, as far as common law countries are concerned, 'consideration' in itself should be capable of dealing with the intention of the parties and there should not be any separate requirement of proving an 'intention to create legal relation'. By natural corollary, the requirement to prove such 'intention' can be justified in countries where 'consideration' is not a re-

quirement for a forming a valid and legally enforceable contract. This will hold good for the countries based on civil law system. But the requirement of proving such intention in common law countries have been criticised by scholars and require immediate action by the legislature and judiciary.

It is pertinent to note that there is a divide between the common law countries where the western countries e.g. U.S and U.K. require the establishment of 'intention to create legal relations' in addition to the existence of 'consideration', but emerging economies like India and China does not require it.

Moreover, to decide whether such an intention is present in a particular agreement between the parties, the court starts with initial presumptions depending upon whether the agreement is originating in a domestic set-up or is it purely a commercial transaction. Disentangling domestic influence from the commercial transaction becomes difficult in some situations due to increasing interaction between the familial relations and commercial relations, thereby blurring the distinction between domestic contracts and commercial contracts. This takes away the logic for having different presumption in such

extricable situation. Besides, 'intention' itself is a deceptive concept as the real intention might never come to the knowledge of the interpreter and in such situations the dilemma of how to gather the existence or non-existence of such intention haunts the very decision based on it. Another problem arises when parties to the contract comes from different social and cultural background and, therefore, perceive differently in a given situation. This problem of different perception is even more complex than the problem arising in the case of manipulative human tendencies. The author is conscious of the fact that the courts, in different jurisdictions, have dealt with such issues differently. The paper, however, is based more on the theoretical argument of whether 'intention to create legally binding relations' is worthy enough to be regarded as a separate requirement for contract law? Or else can it be considered a part of the requirement of 'consideration' because consideration to a large extent indicates intention of the party from whom it is moving.

2. Why Contract Law: An Inquiry into Contract Law Theory

'I cannot marry you' said the English boy. 'But you promised me that you will marry me' pleaded the girl. 'Promises are made to be broken' answered the boy. 'But what about the time I invested in this relationship?' asked the girl. It feels quite obnoxious to think of the fate of such conversations that make people helpless when a promise is broken or an obligation remains unfulfilled. One wonders at times that why contract law, as existing in some countries e.g. U.K., that has the ability to hold anyone responsible to pay 2 dollars for a cup of coffee, leaves the boy (in the illustration) free from any obligation. What is so peculiar about domestic/personal relations that keeps them out of courts' interference and rather make them go unattended and disregarded, even though the damage can be much more than in case of any commercial breach of promise?

This is not a rarest of the rare cases that takes one to the dilemmatic situation of rival contract theories. Such a perplex question has been talked quite a lot by the scholars interested in the theory of contractual intention and ancillary subjects.

That brings us aptly to discuss briefly the primeval question of contract law theory, *i.e.* why contracts are enforced? Different theories have divergent views to deal with this question. 'Will theory' of contract law maintains that commitments are enforceable because the promisor has "willed" or chosen to be bound by his commitment." According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of

respect." [1] Since the theory is will based and is binding because the parties freely assumed the contractual obligations, the enforcement will not be morally justified unless the person subjected to the performance obligation has made a genuine commitment. This draws the attention of the enforcer to the subjective intention of the promisor at the time the promise was made. However, such situations sometimes lead to a dilemma where the contract interpreter or enforcer has to choose between the subjective intention of the promisor and the expectations of the promisee from such a promise. If the secret direction of the intention, said every man of sense, could invalidate a contract, where is our security? And yet a metaphysical schoolman might think, that where an intention was supposed to be requisite, if that intention really had no place, no consequence ought to follow, and no obligation be imposed [2].

It is pertinent to note that under the will theory the contract is enforceable because it is intended by the parties out of their free will. But how far the theory is going to provide appropriate results when objective intention differs from the subjective intention? The law enforces obligations which parties appear to have assumed rather than those which they have actually assumed. The scope of voluntary undertaking (consent) is further stretched to include implied and even imputed promises and so may be taken 'far beyond anything remotely close to what the parties had in mind [3].

Another theory explaining the enforceability of contracts is the theory of private autonomy. The principle of private autonomy "simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations." [4] Autonomy theory argues that people should be free to make worthwhile choices. Another theory is that of consent which stands for the proposition that a contract is a product of wilful interacting individuals. All the above stated theories require, theoretically at least, the exercise of free will and manifestation of intention for undertaking certain obligation. The rule, as stated in *Rose and Frank Co v. JR Crompton & Bros Ltd* [5], is 'to create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.' But not in the real world the will is so 'free' and the intention is so explicitly manifested. A person's will may be influenced by the limited experiences he encounters in his life and it might also depend on the perceptions being shaped due to the surrounding circumstances. An illustration will help explaining the point more clearly: An Indian went to a Singaporean hotel and ordered a vegetarian pizza. When it was served, he noticed with surprise that it had sea food in it. The pizza which was non vegetarian as per Indian standards

was a perfectly vegetarian pizza according to Singaporean experience. Notably, both the Indian and the hotel owner were willing to perform the contractual obligation but both had different perceptions of a vegetarian pizza. How will the contract law theories or the courts enforcing contract law principles deal with such situations is not very clear.

The very justifications for not enforcing the familial contracts, as provided by courts in various cases, are based on fallacious premises. In *Balfour case* [6], Lord Atkin stated that domestic contracts are not contracts as the parties did not intend that they should be attended by legal consequences. But this applies even to the commercial transactions like in the coffee case illustrated earlier. Many a times the parties do not contemplate legal consequences unless the other party commits breach.

However, with the changing times and changing dimensions of familial relations, this attitude towards social agreements seems to have changed. Freeman classifies *Balfour v Balfour* [6] as a 'Victorian Marriage' and sees the marriage of today 'less regulated' and 'more dependent upon individual choice.' For him 'Marriage has become a 'personal rather than a social institution.' He pleads for a change in the treatment of presumptions in domestic spheres [7].

Noteworthy, there are many laws which interfere in domestic relations between parties and thereby witness the most personal arrangement which the human beings try to protect from outside intervention. Legislations regarding Family Law, Divorce Act, Succession Act, etc, are some illustrative pieces of legislation. Considering the changing nature of domestic/social relations, the court should not differentiate the intention that the parties had in mind while dealing in their personal or commercial matters. Therefore, the traditional practice of shifting burden of rebuttal of the presumption of 'intention to create legal relations' in such contracts is unreasonable and lacks justifiable basis.

Relational contract theorists argue that commercial relationships 'are not governed by contractual intentions, but reflect a variety of influences, including social norms and the norms of conduct that develop within the relationship' [8]. More often than not, the parties do provide for, in detail, all the contractual terms and consequences that will flow from a particular transaction. In such cases it is grossly unreasonable to go into the question of what the parties intended at the time they entered into a contract. In both types of arrangements, domestic as well as commercial, asking what the parties intended at the time of contracting may be 'an utterly unreal question, since in all probability the parties did not consider the question at the time of the inception of the agreement' [9].

In both commercial and family arrangements, rela-

tional contract theory indicates that the parties are more concerned with the preservation of ongoing relationships than with the availability of legal sanctions. In both types, at the outset of the arrangements the parties may not subjectively consider it likely that contract law will control or regulate their arrangements. They may instead rely on social or relational norms to do the job. Relational researchers have demonstrated that in business relationships, as well as family relationships, 'co-operation without reference to legal entitlements is normal' [10]. In both commercial and family agreements, the long-term nature of the relationship and related agreement impedes the ability to settle finally all terms at the time of contract formation. Therefore, to draw a demarcation on the basis of different intention prevailing in the minds of the parties is ill founded.

Analysing the changing scenario prevailing in modern day domestic set up and considering the drastic transformation in the way people perceive their relationships, it is apparent that dividing line between the domestic and commercial contracts is shrinking. People are becoming more and more commercial even in familial relations and security of transaction is becoming a matter of priority. In such situation the legal requirement of the parties' intention to be contractually bound continues to impede the enforcement of family contracts. The distinction between commercial contracts, which are presumptively enforceable, and family contracts, in which intention must be proved, cannot be justified. The very reasons for which the different presumptive intention theory evolved between commercial and domestic contracts become otiose. If the requirements of consideration and agreement are thought to be inadequate to distinguish enforceable from unenforceable arrangements, then a more appropriate method needs to be devised to achieve this purpose than one which is ostensibly focused on a fictitious inquiry as to party intention, and which actually masks an anachronistic and inappropriate judicial sentiment [11].

3. Intention: Objective or Subjective

After focussing on different theories of why contracts are enforced and then placing 'intention to create legal relations' in each of those theories, the next discussion should aim at analysing various standards (objective and subjective) used by English Courts while finding whether such intention exists or not. This part of the paper will examine the different approaches employed by courts while dealing with the issue of 'intention' in any particular contract. What intention do the courts take into account while dealing with different situations before them—the 'subjective' intention or the 'objective' intention? In *Merritt v. Merritt* [12], Lord Denning held "...

the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard this agreement as intended to be legally binding?" Also in *Smith v Hughes* [13] it was decided that a person's conduct with regard to the quality of the subject matter proposed by the other party is determined by the reasonable man regardless of the person's actual intentions.

However, Courts usually try to cloth the doctrine of intention using the objective intention hypothesis. One is generally bound to do what a reasonable interpretation of one's behaviour implies and not to what he had in mind. If one party has a secret intention then that intention is void. The objective test of intentions is one of the rules of engagement necessary to protect the integrity of the contracting process and to prevent its abuse. Holding parties to the objective standard not only prevents them from reneging on their undertakings but also gives them strong incentives to take care not to misrepresent their own intentions (even innocently) nor to misinterpret the intentions of others and also extends the practice beyond ongoing relationships where it would otherwise not exist [14].

Having discussed the policy justification for courts' favouritism of objective intention over subjective intention, one should not forget that such a choice of objective over subjective intention might not always lead to equitable justice to the parties. Some philosophers argue that autonomy theory leads to social justice but what about the justice to the parties. When the whole contract revolves around party autonomy and party chosen obligations then why under the garb of objectivity the subjective interpretation is suppressed. It is true that objective standard prevent parties from reneging on their undertaking but when the promisor never intended to undertake the obligation, which though objectively arise in the facts and circumstances of a particular case, objective standard is too burdensome. At times it is quite probable that the parties perceive different meaning for the same set of words. This is most common when parties belong to different cultural set up and cross cultural differences that influence their take on different situations.

In some cases there is also another problem of how and when a contract is said to be formed. The presence of consideration is often indicative of the intention to create legal relations, though there are situations where the presumption of the intention can be rebutted, thus determining that there is no contract and no legal liability. Additionally the courts require 'intention to create legal relations' as an essential ingredient apart from the establishment of other prerequisites to prove the validity of any contract and rely on the presumptive intention theory.

The next section deals with the different presumptions that the courts use depending upon whether the contract is a domestic contracts and commercial contracts *i.e.* whether the parties are placed in a domestic set-up or whether they are related to each other in a commercial set-up.

4. Presumption of 'Intention'—Domestic v. Commercial Contracts

This part illustrates the difference in presumption which is employed by the courts while dealing with the question of intention in cases of contracts arising in domestic set-up as opposed to those arising in commercial set-up. In domestic agreements, for example those made between husbands and wives and parents and children, there is presumption of no intention to create legal relations and no intention that the agreement should be subject to litigation. In contrast to this, there is a rebuttable presumption in commercial agreements that the parties intend to create legal relations. While there are conflicting legal authorities on whether specific facts involving familial relations result in binding and enforceable agreements, it seems settled that in domestic agreements there is a rebuttable presumption that the parties do not have intention to create legal relations. However the problem arises when the contract is formed in such intermingled circumstances that it is not clear whether the transaction is purely domestic or whether it is commercial. The most common example that will illustrate this situation is found in many Asian countries *i.e.* family businesses. Suppose the nephew is asked by his uncle to look after the accounts of the business, can the nephew take the uncle to the court for the sum of money due for services? Yet another example can be nephew attending the professional tutorial classes conducted by uncle. Can the uncle make the nephew pay under the law of contract? The uncle may as a matter of fact prove his case and make the nephew pay for the tuition provided but the catch in the situation is that if we take the traditional presumption theory of 'no intention to create binding legal relations in domestic/social contracts, the promisee (uncle) is unnecessarily burdened to rebut the presumption.

In the era of modern contract law theory, the distinction between the public and private and between the market and the family seems quite otiose [11]. Even if we take the husband-wife cases, in the past, brides and grooms traditionally promised to "love, honour and cherish" as part of a lifetime commitment. But these days, high divorce rates and a healthy scepticism now affect our notions of romance, and more precise statements about a couple's obligations may be needed.

As stated earlier, the court, in *Balfour v Balfour* [6],

held that the agreement was a purely social and domestic agreement and therefore it was presumed that the parties did not intend to be legally bound. Similarly in *Jones v Padavatton* [15], the court held that the agreement was purely a domestic agreement which raises a presumption that the parties do not intend to be legally bound by the agreement. In the latter case the daughter left her secured job relying on the promise made by the mother. If the promise cannot be enforced where is the security of transactions? Under the cover of domestic relations the promisor can exploit the promisee without any obligation enforceable in the court of law by the promisee against the promisor. The court could have reached the same decision and decided the case in favour of the mother on the ground that the daughter could not perform effectively her part of the obligation, since she could not complete her studies. But the court seems to have chosen the easy way out of denying the presence of any intention to create legal relations. But why the promisee should be taxed so heavily for relying on the promise made by the close family member? Even if we look at the domestic contracts involving husband and wife one can easily make out the clear serious intention when the promise is being made but just because the parties are in amity and have cordial relations, the promisee is burdened to prove the intention to create a legal transaction. If the parties can show the presence of offer, acceptance and consideration, there should not be a separate requirement of proving intention to create legal relations. It is very difficult to even show the consideration in such cases because of the nature of consideration is quite different from the apparent economic consideration present in the commercial transactions. What if a husband promises to give a monthly allowance of \$ 300 to his wife in return of the wife promising to leave her job and take care of the house? The courts will not enforce such a promise holding that it's too personal and familial to be dragged in the court of law. Or even if the court enforce, the wife have to undertake the burden of proving the intention to create binding legal relations. Just because the promise was made when parties were happily living with each other resolves the husband, prima facie, from performing his promise. What about the wife who sacrificed her career relying on the husband's promise. Why the courts have to look into the external factors of how happy or cordial the marital relations were? Ironically it is only when the parties are in complete harmony that the husband will realise and acknowledge the worth of the sacrifice being made by the wife. Once they are on the verge of separating, why will he pay the wife for promises she kept throughout the matrimony.

Contract law is about giving effect to the promises made by the parties exercising their free will and auton-

omy. The court does not have to go into the obscure question of whether parties contemplated that they can go to the court to get their promises enforced. If I walk into the cafe and order a coffee, it will neither occur to me nor to the cafe owner that we are binding each other in a legally binding relationship unless one of us fails to perform. And even if it occurs or we foresee such a consequence of dealing for a cup of coffee, is this promise more serious than the one made between the husband and wife which led the wife to leave her job. In domestic contracts, parties are most unlikely to have considered the question of enforcement of their agreement at all, so proof of an actual intention or lack thereof, is impossible in almost all cases. Requiring proof of intention imposes a considerable impediment to the enforcement of non-commercial contracts, which carries with it attendant risks and costs [16]. Husbands and wives in the basic family home pattern often have divergent interests which have not always been appreciated by the courts.

While discussing the dilemma that one might reach in certain cases where it is difficult to assume the presumption against the 'intention of creating legal relations', S Hedley [17] gave an interesting example in following words:

"The fallacy to be avoided consists of asking the question 'whether there is a contract?', but forgetting that a court is almost invariably faced with a particular claim based on an alleged contract. The perspective given by the claim made alters everything. Take variation of the classic academic conundrum in this area: Jack and Jill agree to go out to dinner and to split the bill. By asking the academic question 'Is there a contract?' we are immediately in the realm of the abstract. If however we approach the matter from a practical standpoint, we must know what claim is being made. If Jill is suing Jack because Jack has refused to go to dinner at all, the arguments against liability are compelling. Surely, Jack cannot be taken as giving an outright commitment to go to dinner—what if he is ill, or they cannot agree on a suitable restaurant? But imagine that the two already had their dinner, for convenience Jill pays the bill in full, but Jack subsequently refuses to pay in half. The perspective changes. It is no longer obvious that the contract cannot be enforced."

It is ironic that contract, treated in the market context as the most appropriate vehicle for regulation of private arrangements between individuals, is not regarded as an enforceable mechanism for regulating private arrangements between individuals within the home [11]. The 'apparent intentions' of the parties are no more than a smokescreen for policy choices about the relationship between law and the private, domestic sphere, which seem based on unsophisticated assumptions about what is

'natural' in that context [9].

Keeping the above stated analysis in mind, it appears that the line dividing the presumption of intention to create legal relation in domestic and commercial contracts is illusory and is often used by the courts to give effect to numerous policies under the guise of estimating the parties' contractual intent. Having thus reached the conclusion that no such demarcation should be considered relevant in the contract law, one encounters an obvious question, which does not, though, have an obvious answer. Whether the requirement of intention to create legal relations is indeed required and whether it serves any purpose different from the other requirements e.g. offer, acceptance and consideration? Though, theoretically it is easier to postulate that a promise made within the domestic setting or between family members raises presumption of 'no intention' to create legal relations and commercially the presumption of presence of such intention, this supposition creates more problems and only confuses the whole state of affairs. The author, therefore, strongly feels that the presumption starts from the basic fallacy and it should be done away with in light of the changing nature of 'familial' relationships.

5. 'Intention' and/or 'Consideration'

As laid down earlier that many countries have recognised 'intention to create legal relations' as separate requirement for enforcing an otherwise valid contract. English law is the best example in that category, which requires this along with the tri-requirement of offer, acceptance and consideration. This part of the paper will focus on the correctness of such an approach by looking from a theoretical as well as practical standpoint. Professor Samuel Williston [18] in the U.S. have criticised this view emanating in England. He opined that the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract [19]. The insistence on a requirement of intention in addition to the other elements of a validly formed contract (offer, acceptance, consideration) is unnecessary. This view has been taken not only by Williston in U.S. but also Hepple [20] in the UK. Hepple argues that the problems with this area derive largely from a failure to take account of the particular approach to consideration adopted by Lord Atkin in *Balfour v. Balfour*. Hepple argues that many domestic agreements may involve mutual promises, 'and yet not be contracts because the promise of the one party is not given as the price for the other'. In other words, the concept of the bargain is central to the test of enforceability of contracts under English law and the vital elements in the identifi-

cation of a bargain are offer, acceptance and consideration. These three elements should be treated together as indicating bargain. Thus an analysis which tries to separate out agreement (that is, offer and acceptance) from consideration is missing the point of why the courts started looking for evidence of these three elements in the first place [21].

'This separation of agreement from consideration... has resulted in a fundamental point being overlooked. This is that the common law recognised at an early stage that usually parties do not define their intention to enter into legal relations. Consequently, the fact that they have cast their agreement into the form of bargain (offer, acceptance, consideration) provides an extremely practical test of that intention. This test of bargain renders superfluous any additional proof of intention [20].

Accordingly, Hepple regards the court as falling into error in trying to identify an additional element of intention in the cases such as *Ford Motor Co Ltd v. AEF* [22]. The intention requirement requires the manifestation of objective intention. The argument in effect introduces a rule of formality into the formation contracts. The formal requirements become not writing, or signature, but offer, acceptance and consideration. The parties who fulfil these basic elements will be deemed to have made a bargain, unless proved otherwise.

It is important to note here that many jurisdictions do not recognise 'intention to create legal relations' as a separate requirement to enforce an otherwise valid contract. India [23] and China are good examples where there is no separate requirement of proving the intention to create legal relations. It is inferred from the other elements that are present. The element of intention in contract law is vague and lacks certainty as to what it requires actually to prove its presence or absence by a particular party.

6. Conclusions

The discussion on the subject of 'intention' as one of the important ingredient of a valid contract is well debated by not only scholars but also courts. The paper has attempted to unfold the various aspects spinning around that discussion. The paper strongly argues for abandoning the requirement of proving 'intention to create legal relations' in case of countries that requires the existence of 'consideration' for forming a valid and enforceable contract. Therefore, in case of common law countries, where consideration is one of essentials of a valid contract, the requirement of proving 'intention to create legal relations' should not be pressed upon. The consideration in itself can be taken as a proof strong enough to indicate the presence of intention of forming a legally binding contract. Professor Williston pointed out this proposition stating that the common law does not require any po-

sitive intention to create a legal obligation as an element of contract....A deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability [18].

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