



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

VOLUME III, ISSUE IV
MARCH - JULY, 2023

<https://journal.lexresearchhub.com>

Lex Research Hub
Publications

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PUBLIC POLICY IN RELATION TO CONTRACT LAW

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ABSTRACT

In order to understand public policy pertaining to contract, we first need to understand the definition of the term ‘contract’. A contract is a legally enforceable agreement that governs rights and obligations between the relevant parties. If an agreement is formed wherein the object is deemed unlawful or against the practice of law, then such an agreement is deemed as void by the law as it is against public policy Section 23 of the Indian Contract Act overlaps the freedom of an individual to enter into contracts of their choice. There are some basic elements that are to be mandatorily fulfilled in order for a contract to be enforceable which include the following- Adequate consideration, legality, capacity, Mutual Consent. The term ‘Contract’ plays a significant role in the modern-day life. Most modern-day corporations enter into multi-dollar agreements certified by legal practitioners who set the terms and conditions of their deals, making sure that they do not violate public liberty or policy. Through the topic “Public Policy in Relation to Contract law”, I seek to conduct my research on how public policy decisions impact contract law. Through the course of this paper, I shall be conducting my research on what agreements are deemed as against public policy, how such agreements are in violation of a penal statute and legality of object while forming the agreement. I will specifically be elaborating on the term ‘legality’ and the essential 4 requirements of a valid contract Additionally, I shall be explaining the preceding agreements in consonance with case laws, moreover, I am going to elucidate on the type of contracts that are deemed to be against Public policy. Further, I will be discussing relevant Sections 10-22 of the Indian Contract Act that deal with Agreements or Contracts voidable at the action of either party, whereas Section 23 talks about Contracts that are void due to an unlawful consideration or object of an agreement. Although Public Policy is a very vague term, it means collective welfare of the collective community or society as well as the public policy designed by the government. Thus, the term ‘public policy’ denotes that no contract shall be against the morals or interests of the society.

Keywords- Agreements, Public Policy, Contracts, Legality, Penal statutes

I. PUBLIC POLICY

The term public policy in this context denotes the legal maxim ‘*Ex Turpi Causa Non Oritur Actio*’ which means that ‘no man shall be permitted to profit from his own wrong’. While some contracts are deemed to be wholly unlawful- (*See Alice Mary Hill v William Clarke*¹), the degree of illegality in each contract varies from the several considerations that are considered to be unlawful in the eyes of the law. While adjudicating the suit, the courts usually pay attention to the remoteness of connection between the contract in suit and the illegality of the consideration or of the conduct of the parties involved in the suit in question. In many cases, the preceding illegality would prevent the relief of persons who victims of fraud or oppression are, or who are intended to be protected by the law which makes the contract illegal. For example, in order to establish the right to restitution, a plaintiff must prove the circumstance under which he/she conferred the benefit. This consequently means that the plaintiff must put the contract into evidence, and if the contract were unlawful on its face, then it would be established that the plaintiff in question was in *pari delicto*, irrespective of the circumstances of the formation of contract and the purpose of the law prohibiting it.²

Common law prohibits certain contract kinds, making them ostensibly unlawful. The first step in understanding this area of law, which has been shrouded by considerable mental uncertainty, is to identify the guiding idea behind the concept of illegality, if at all feasible. Judges in former times had the attitude that they would not permit any transaction that, in their opinion, was harmful to society. Such beliefs suggest that the judges were committed to establishing and upholding a concept of public policy. Being vague, the claim that the judges were only committed to establishing and upholding the concept of public policy is vague and unsubstantiated. Modern judges have in reality adopted a more pragmatic perspective on this area of the law and come to the conclusion that the so-called illegitimate contracts can be divided into two categories based on the degree of harm they are intended to do. Some agreements outrage practically every notion of public policy because they are so blatantly antithetical to society's interests, while others do not go

¹ Alice Mary Hill v William Clarke IRL (1905) 27 All 266

² Walter Gellhorn. ‘Contracts and Public Policy’ (1935), 35 Colum. L. Rev. 679

against fundamental moral principles but instead solely serve social or economic expediency. Their division into two classes is significant because of the varied effects that each class has.³

According to Section 10 of the Indian Contract Act,⁴ “*all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with lawful object, and are not hereby expressly declared to be void*”⁵ In order to do that, we need to understand the premise behind how some agreements are deemed as unlawful by the law. Following are the instances and examples wherein an agreement is deemed unlawful.⁶

- An agreement to sell or transfer appointments to public posts or seats in public institutions hampering the rights of a deserving candidate is against public policy as it derives administrative posts of meritoriousness (*See Sushil Kumar Yadunath Jha v Union of India*⁷)
- An agreement made to deprive two consenting adults of their right to marry shall be deemed unlawful and void
- Restraint of Personal Liberty: Personal liberty is guaranteed under Article 21 of the Constitution. As a result, an agreement causing restraint to personal liberty is unlawful under law. In the case of *Sitaram Deokaran v. Baldeo Jairam*,⁸ an agreement in which a party agreed to serve at Rs. two per month for a period of one hundred twelve months was declared as void. Also, in the case of *Harwood v. Millers Timber & Trading Co*,⁹ an agreement between borrower and money lender and in which he could not change his employment, residence or accept reduction in salary without his permission was declared as void.
- No contract shall restrict any individual or a party from professing a trade or profession of their choice. Any contract preventing so is not only against public liberty but also against

³ Naman Verma, ‘Public Policy in Contracts: Recent Trends’, LAWCTOPUS.COM, <https://www.lawctopus.com/academike/public-policy-contracts-recent-trends/> <accessed 1 November 2022>

⁴ Indian Contract Act at § 10

⁵ *Id*

⁶ Devm, ‘Public Policy under Section 23 of Indian Contracts Act’, JUSCORPUS.COM <https://www.juscorpus.com/public-policy-under-section-23/#:~:text=In%20Section%2023%20of%20the,the%20applicability%20of%20this%20article.> <accessed 1 November 2022>

⁷ Sushil Kumar Yadunath Jha v Union of India [1997] 5 SCC 536

⁸ Sitaram Deokaran v. Baldeo Jairam AIR 1958 MP 367

⁹ Harwood v. Millers Timber & Trading Co (1917) 1 KB 305

public policy. There are certain exceptions to this- In the case of goodwill of business is sold, the buyer shall not be allowed to establish a similar business

- **Stifling Prosecution:** The term stifling prosecution signifies the process of making money out of crime and it is considered as abuse of law. In the case of *Veerayya v. Sobhanandri*,¹⁰ a person entered into agreement for taking back the charge of S. 420 of Indian Penal Code, 1860 against the accused. It was observed that since the offence was compoundable, permission of court is required and hence the agreement was declared as void. Also, in the case of *Ouseph Poulo v. Catholic Union Bank Ltd.*,¹¹ two parties entered into an agreement to discontinue the criminal proceedings on a certain consideration, it was held that these kind of transactions are opposed to public policy.
- No suit can be initiated against anyone to recover the claims won or losses incurred by wage of wager on an uncertain event. (*See Gherulal Parikh v Mahadeodas Maiya and ors*¹²)
- Moreover, in the case of *Central Inland Water Transport Corporation Ltd. V Brojo Nath*,¹³ the Supreme Court held **Rule 9 of Service Discipline and Appeals of 1979 frames by the corporation empowering that such a clause in the service agreement between persons having gross inequality of bargaining power was completely unreasonable and against public policy and therefore void under Section 23 of the Indian Contracts Act.**

II. LEGALITY

According to legality of object, an agreement between sides is legally valid if a sensible third party who is not a contracting entity makes and accepts an offer. As far as contract law is concerned, except when it is expressly prohibited by law, the recognition and the object of a contract can be legally binding. They are deceptive in every way. Because of the object's essence and consideration, the law's intent is thwarted. It is also possible to contract for any service if it does not violate any principles. Regarding the object of the contract and its dimension of legality, the

¹⁰ *Veerayya v. Sobhanandri*, (1937) 1 MLJ 489

¹¹ *Ouseph Poulo v. Catholic Union Bank Ltd* AIR 1965 SC 166

¹² *Gherulal Parikh v Mahadeodas Maiya and ors* 1959 AIR 781

¹³ ***Central Inland Water Transport Corporation Ltd. V Brojo Nath*** 1986 AIR 1571

exception may include a breach of contract that has illegal intentions such as killing or causing harm to a person. Whether expressed orally or in writing; or explicitly or implicitly, any promise or agreement can be referred to as a covenant. If referring to covenants in a more technical sense, they are agreements between two or more people signed and sealed in writing. For example, one party promises to perform something for the other or pledges to refrain from doing something. However, regard is required in an assumpsit, not in a covenant enforced in equity courts without consideration. *In pari delicto* is a Latin phrase for "in equal fault" and is frequently used in contract and tort law. As an equitable defense, it states that the plaintiff cannot recover damages for a wrong they participated in. As a result, courts are hesitant to grant relief to complainants with a history of misconduct. Contributory irresponsibility and comparative negligence are closely related, but *in pari delicto* is a separate concept. As a general rule, joint tortfeasors that are not in *in pari delicto* may be supposed to receive compensation from the other party. It also is possible that the clean hands' concept could further limit the prize of equal and fair remedies if either scenario's tortfeasor violated some equitable norm. A covenant not to contend, also known as a non-compete agreement, is an accord in which one party agrees not to compete with the other entity in a defined location for a predefined timeframe. Workplace contracts and business acquisition agreements may contain a non-competition provision. For example, if a duo decides to open a candy shop together, they must sign this type of agreement.¹⁴

In order for a contract to be enforceable, legality along with offer, acceptance, consideration (lawful in nature) and capacity form an essential basis for a valid agreement. Legality of the contract between parties is a legal agreement where obligations are mutually agreed upon and that the law can enforce. Some states consider the element of consideration to be an acceptable substitute. There are potential remedies when a breach of contract happens such as reliance damages, general damages, specific performance, and consequential damages. Since contracts are legal, the parties can count on the law to enforce them. When a contract meets the legal requirements, it is legally enforceable. An agreement usually entails the exchange of goods, services, or money, or the promise of any of these. Although most oral contracts are legally binding, some contracts may require additional formalities

4 Requirements for a Valid Contract

¹⁴ *Id* at 2

Requirement 1. Offer

Every legal contract begins with a verbal or written offer from one party to another, and written agreements prove that a contract exists. To constitute an offer in a legal sense there must be a proposal which, upon acceptance by the offeree and compliance with its conditions, will result in an agreement without further act of the offeror. Acceptance of such an offer by the party to whom it is made signifies his entry into the proposed agreement and if the conditions of the offer and the requirements of law are satisfied a contract is formed.¹⁵

The offer is a proposal for a relationship's terms. It can also include any number of rights, obligations, warranties, and conditions that the parties must meet.

An offer does not become formally valid until received by the intended counterparty, also known as an offeree. The offeree has the option to revoke or counter the offer before accepting it.

Before the offeree accepts the offer, the offeror can withdraw it. A counteroffer will cancel the original offer, preventing the offeree from accepting it later.

Requirement 2. Consideration

According to Section 2(d) “When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise”¹⁶

An exchange of consideration must occur for a contract to remain valid. Consideration may be a vague, difficult-to-define concept, and this assertion is due to consideration presenting itself in different ways.

Depending on the scope of the transaction and the parties' motivations, consideration can take various forms. In a contract, consideration is the sum of each party's rights and obligations.

The following are examples of common types of consideration: Money, Actions, Restrictions

¹⁵ Indian Contract Act 1872 at § 2(B)

¹⁶ Indian Contract Act 1872 at § 2(D)

The consideration must also be mutual, which means that each party must carry out the contract's terms.

Requirement 3. Acceptance

Acceptance is the third component of a valid contract. Acceptance can be verbal or written, just like an offer.¹⁷

For most cases, acceptance necessitates some form of action on the part of the offeree. In other words, a party's inaction, silence, or other passiveness as evidence of contract acceptance will not suffice.

Conditional acceptance is possible in some contracts. Acceptance that creates a valid agreement through a party's performance is possible in some cases.

Requirement 4. Intent

The final element of a contract is that the parties must mutually agree upon the terms. Intent is each party's awareness of and willingness to comply with the agreement. Intent as an element of a promise or offer or contract. The view has been expressed that an agreement is an expression by two or more parties of assent in regard to some present or future performance by one or more of them" and that a contract is formed by an expression of mutual assent of the parties to a promise or set of promises, actual intent to make the contract not being necessary except in certain cases in which law does require actual intent.¹⁸

On the surface, this may appear to be an unusual requirement. However, in written agreements, questions of intent and whether the parties had an actual "meeting of the minds" arise frequently.

III: TYPES OF CONTRACTS AGAINST PUBLIC POLICY

Some Contracts that are formulated by the parties involved are inherently illegal from the start. Such situations usually arise when a contract is deemed to be outrageous to public morality,

¹⁷ Indian Contract Act 1872 at § 2(B)

¹⁸ Victor Morawetz, *The Elements of a Contract* (1925) 11 American Bar Association 87

whether it is against social, legal, or economic expedience. As a result, the law has classified some contracts that are deemed ‘illegal’ from the start-

- **A Contract to the prejudice of the Public Safety**

Detrimental contracts within the meaning of this statement are those which tend either to benefit an enemy country or to disturb the good relations of a country with another. Contracts which are made in time of war must clearly react upon a contract made with an alien enemy by a person subject to such country since it may result in injury to such country. If such a contract is made during a time of peace with a person who later turns out to be an enemy because of the start of a war and if it involves having relations with the enemy nation or is in any other way objectionable from the perspective of public policy, it is immediately revoked insofar as it is still in effect. Contracts that are executed with an enemy citizen are not deemed to be illegal until and unless it is against public policy. For example, an Indian citizen who serves in the navy enters into a contract with a Pakistani admiral providing him with important information about the purchase of special naval ships by the Indian Navy. This contract will be deemed as void in a court of law as it is against public policy.¹⁹

- **A Contract Prejudicial to the Administration of Justice**

Any contract that hampers or damages the administration of justice within the course of ordinary course of prosecution of a case or that delays the execution of a decree shall be deemed to be void in the eyes of the law. For example, an agreement to withdraw divorce proceedings, or an agreement by a witness not to give evidence or only to give evidence for one side.²⁰

- **A Contract that tends corruption in public life**

Any contract that tends or incentivizes corruption in a public office is illegal in eyes of the law. This is because such a contract that stimulates a public officer to act corruptly and contrary to the values assigned to their position that is as a result in violation of public policy. For example, An

¹⁹ *Supra* note, at 3

²⁰ *Supra* note, at 3

agreement to bribe a member of the Parliament to influence a decision is void (*See Rattan Hira Chand v Askar Nawaz Jung*²¹)

- **A Contract to commit a crime, a tort or fraud from a third party**

An agreement between two individuals that may lead to the commission of a crime or tort will be deemed as void. As well as this, any contract devised with the aim of defrauding the third party will be categorised as void as well. For example, Ramesh who hold an influential position, in return for a sum of money, promises to recommend Virat to a public post to fire/expel Rohit who is working under that post. (*See Brown Jenknison and Co Ltd v Percy Dalton Ltd*²²)

IV. DOES THE VIOLATION OF PENAL STATUES COURTESY OF A CONTRACT DEvised AGAINST PUBLIC POLICY ATTRACT TORTIOUS OR CRIMINAL LIABILITY?

It is a well settled rule that contracts that are in violation of public policy are will not be enforced if it in violation of a penal statue. In the modern-day law, statues, that are formulated by the legislature define/denote what acts are regarded as anti-social, that is, against public policy and public welfare. As a result, the lawmakers, and the decision makers (in this case the judges), could penalise the assailant from the wide range of penalties at their disposal. Unfortunately, it is also true that penal statues fail to cover all the acts that might be violated in the future as no law can predict a crime that has not been committed yet. Acts thought to be undesirable can be discouraged by law by imposing penalties such as tortious liability or by the withdrawal of protection of legal process in the form of enforcement of claims. But the preceding course of action was deemed to be contradictory by the law as when the legislature only decided to enforce one sanction with what it regarded as public interest, the courts realised the problem of how the compliance of one sanction negated the desirability of also utilizing another. When, however, the circumstances of a case brought very terms of a controlling statute or, at least, so nearly w of its words as to make the relationship plain, the judiciary encountered an even more perplexing problem- No longer could

²¹ Rattan Hira Chand v Askar Nawaz Jung 1991 SCR (1) 327

²² Brown Jenknison and Co Ltd v Percy Dalton Ltd (1957) 2 QB 621

they attach a penal sanction to what had not been otherwise denominated a crime. This means that a person in contradiction to a statute, continued to invade a person's privacy by clicking someone's photograph without their consent would not be guilty of misdemeanour, no matter how strongly the court felt such action was merited punishment.²³

With regards to the subject of contracts, the Courts have failed to come up with a blueprint to deal with substantial issues wherein the penal statutes have violated. The main reason behind this is the fact that legislature while formulating and adopting a legal statute has rarely had in mind the problems of contract law that may arise later. It is usually assumed criminalizing something acts as a deterrent in law. Usually, this imagination of terming something as a crime has helped the general public at large. Despite this, the courts have long speculated whether the legislature intended the contracts to be termed as void when they ran afoul of laws which penalized some act of the contractors, but which said nothing concerning enforcement of the bargain.²⁴ Some courts have relied on the principle that imposition of penalty upon one who disobeyed a statutory command was equivalent to a legislature prohibiting all contracts relating to acts of disobedience. Other courts have undertaken the process of differentiating their decisions according to whether the contracts in question related to *mala prohibita or mala in se*-that acute distinction between *mala in se* and *mala prohibita*; has no sort of an occasion to have any meaning to it, accordingly it has none. Other distinctions, which contradicted statutes for revenue purposes has also been made. For example, statutes made for the welfare of the public; but the difficulty of drawing the line between one type and the other, invalidates the effectiveness of any distinction that the court may seek to make and in any event it is unrealistic to say that the legislature intended or that it did not intend that contracts should be held invalid if in violation of such statutes.²⁵

CONCLUSION

This paper started out by giving an outline of everything that was going to be covered. Firstly, this paper draws a brief summary of what public policy and explains the relevant sections. The paper then goes on to explain the principle of illegality of contract by the virtue of various case laws. It explains how while adjudicating the suit, the courts usually pay attention to the remoteness of

²³ Walter Gellhorn. 'Contracts and Public Policy' (1935), 35 Colum. L. Rev. 679

²⁴ *Id*

²⁵ *Supra* note at 23

connection between the contract in suit and the illegality of the consideration or of the conduct of the parties involved in the suit in question. Secondly, this paper has elucidated on the type of agreements that are against public policy (specifically invoking Section 10 of the Indian Contract Act 1872). In order to make this part clearer, this paper has tried to couple the agreements against public policy with illustrations about the same. Thirdly, the paper gives a vast outline about the concept of Legality in contracts. To explain the topic in more concise terms, the paper elaborates on the various essential elements of a valid contract in order to draw a respectable line and distinction between a valid contract and an invalid contract. The four essential conditions being offer, acceptance, consideration, intent. Lastly, coming to the fourth part of the paper, this paper describes the opinion and discretion of various judges while adjudicating cases relating to violation of a penal statute. The paper seeks to make a distinction on how the legislature did not keep the idea of penal penalty in mind while formulating a statute, and as a result, violations of an invalid contract sometimes only lead to invocation of tortious liability and as a result, courts and judges are still searching for a blueprint when it comes to adjudicating cases of ‘violation of penal statute’, the conundrum being: what is the adequate penalty in case of violation of a statute and in what sphere shall it be categorised- civil or criminal.