AN INTRODUCTION TO THE LAW OF CONTRACT

P. S. ATIYAH

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AN INTRODUCTION TO

THE LAW OF CONTRACT

BY

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PREFACE

It is now ten years since the last edition, and twenty since this book was first published. There have been very many changes in the law during this time, so that even the ordinary processes of revising the book to bring it up to date account for a substantial amount of rewriting. But the changes in contract law over these past twenty years go deep, and I have made a start in this new edition in introducing the student to some of the ideas which are today much in vogue, about the crumbling nature of classical contract law, and the tendency of contract law to merge into the broader framework of the law of obligations as a whole. The ideas may seem advanced, but that is no reason why they should be made difficult to understand, or written about in a complicated fashion. I have therefore kept in mind the essential purposes of the Clarendon Law Series, and tried to write of these matters in as simple and intelligible a way as possible. Altogether, a substantial revision has been necessary, and few pages have gone unchanged. I have deleted the chapter on Capacity and the concluding chapter on the Future of the Law of Contract to make more room for the matters I wanted to develop. The latter deletion may seem slightly curious, but I have written of these questions at length elsewhere, and in any event, many of the questions appropriate to that subject are now in effect incorporated in the text.

P.S.A.

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I

THE DEVELOPMENT OF THE MODERN LAW OF CONTRACT

1. THE FUNCTION OF THE LAW OF CONTRACT

THE law of contract is part of the law of obligations, that is to say it is concerned with obligations which people incur to others as a result of the relations and transactions in which they become involved. Broadly, this is a part of private law, in the sense that obligations of a public character, such as constitutional or political obligations, are not normally thought to be part of the law of obligations. Public bodies can, it is true, enter into ordinary contracts, and thus submit themselves to the ordinary law, but the broader duties of such bodies do not fall within the scope of the law of obligations as commonly understood. So also, the criminal law is not conceived by lawyers to be part of the law of obligations. The criminal law does, of course, impose duties on citizens, and these duties are in a sense legal obligations. But the duties are not owed to anyone in particular, and their enforcement normally rests with the police and other public bodies. By contrast the law of obligations deals primarily with duties owed by some members of the public to others, and these obligations are exclusively enforceable by the persons to whom they are owed. A person who has been the victim of a crime can complain to the police, who will investigate, and if they feel it appropriate, prosecute the offender. But a person who wishes to complain of a breach of an obligation owed privately to him, such as a breach of contract, must enforce his rights in the Courts without the assistance of any public authority.

Obligations arise from a variety of sources, and they may be classified in various ways. They could, for example, be classified according to the social relationships from which they arise. Thus one could distinguish between obligations owed by a person to members of his family, obligations between neighbours, obligations arising from the employment relation-

ship, and so on. But in the law it has been traditional to treat the basic distinction as that between obligations which are self-imposed, and obligations which are imposed on the citizen from outside. Broadly speaking, the law of contract is that part of the law which deals with obligations which are self-imposed. Other important parts of the law of obligations are the law of torts (which broadly is concerned with civil injuries and wrongs) and the law of restitution (which broadly is concerned with the obligation to pay for benefits received where there has been no contract to pay for them). As will be seen later, these distinctions are by no means clear cut, and one of the most striking phenomenon of modern times has been the gradual blurring of the lines between the law of contract and other parts of the law of obligations.

Since the law of contract is, then, primarily concerned with self-imposed obligations, its very existence naturally presupposes a society and a legal system in which people have the right to choose what obligations they wish to assume. In very primitive societies, the role of contract has generally been found to be small, because obligations are normally thought to arise from custom and status, rather than from free choice. Equally, in modern collectivist societies, where the State is all-powerful, and individual rights of free choice are less respected, the role of contract law may be less significant, at least in practice. But in Western democratic societies, where more extensive rights of free choice are traditionally respected, the law of contract has played a larger role. In the development of the English common law, contractual ideas came into greater prominence from the sixteenth century onwards, as the greater freedom and individualism of post-reformation England was becoming established. No doubt the law has been influenced by a considerable number of factors, but it is probably no exaggeration to say that two of these factors have been of far greater importance than any others. These are the moral factor and the economic or business factor.

Although one of the first lessons which a law student must learn is that law and morality are distinct, it is none the less true that the law reflects to a considerable extent the moral standards of the community in which it operates. This has been especially true of England where moral standards have been,

until very recently, almost identical with Christian standards, and where the persons responsible for the development of the law have, almost without exception, been devout Christians. It is therefore not surprising to find that behind a great deal of the law of contract there lies the simple moral principle that a person should fulfil his promises and abide by his agreements. This not to say that early English law translated this moral principle into a legal rule, for it was not, in fact, until the late sixteenth century that we acquired anything resembling a general law of contract, and when this came it was mainly under the impetus of the business or economic factor.

With the economic and social development of modern societies the need for a law of contract becomes far more pressing for at least two reasons. In the first place the division of labour, which is such a fundamental feature of modern societies, creates a constant or increasing demand for the transfer of property from some members of the community to others and for the performance of services by some members of the community for others. The legal machinery by which these transfers of property and performance of services is carried out is broadly speaking the law of contract.

The second reason why economic development creates a greater need for an adequate law of contract is the growth of the institution of credit. The emergence of a complex credit economy means that in the process of transferring property and performing services, people have perforce to rely to a far greater extent than before on promises and agreements. A moment's reflection is enough to show to what extent this is true, not only in commercial matters, but in all walks of life. A person's bank account, his right to occupy his house if rented or mortgaged, his employment, his insurance, his shareholdings, and many other matters of vital importance to him, all depend for their value on the fact that, in the last analysis, the law of contract will enable him to realize his rights. In the striking phrase of Roscoe Pound: 'Wealth, in a commercial age, is made up largely of promises.'[1] This is the reason why the development of the law of contract, both in England and elsewhere, has been so largely associated with the development of commerce.

[1] *Introduction to the Philosophy of Law*, p. 236.

2. THE CLASSICAL LAW OF CONTRACT

Although much of the English law of contract has roots going back to the Middle Ages, most of the general principles were developed and elaborated in the eighteenth and nineteenth centuries. These principles, and, perhaps even more, the general approach of the Courts to contractual questions, may not improperly be referred to as the traditional, or classical theory of the law of contract. Although the law of contract has undergone some fundamental changes in the twentieth century, it is quite impossible to understand the modern law without some knowledge and appreciation of the background and orgins of the classical law.[2]

It is imperative, at the outset, to recall that the eighteenth and nineteenth centuries were the heyday of theories and natural law and the philosophy of *laissez-faire*, and many of the judges, who were largely responsible for the creation of the law of contract during this period were, like most educated men of the time, very considerably influenced by current thought. To the judges of the eighteenth century theories of natural law meant that men had an inalienable right to make their own contracts for themselves, and to the judges of the nineteenth century the philosophy of *laissez-faire* similarly meant that the law should interfere with people as little as possible. To these judges the function of the civil law was laregly a negative one. Its main object was to enable people to 'realize their wills', or, in more prosaic language, to leave them to get on with their business, to lead their own lives unhampered by governmental interference, and so forth. The law was not concerned to limit the power of contracting or to interfere between the contracting parties in the interests of justice, but merely to assist one of them when the other broke the rules of the game and defaulted in the performance of his contractual obligations. In other words the judge was just a sort of umpire whose job it was to respond to the appeal 'How's that?' when something went wrong. As applied to the law of contract these ideas meant encouraging almost unlimited freedom of contracting, and thus the shibboleths 'freedom of contract' and 'sanctity of contract' became the

[2] The subject is dealt with at great length in my *The Rise and Fall of Freedom of Contract* (Oxford, 1979).

foundations on which the whole law of contract was built. As late as 1875 one of the greatest judges of the nineteenth century, Sir George Jessel, declared that, 'if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice'.[3]

It is desirable to avoid over-simplification. Not all judges in nineteenth-century England were enthusiastic adherents of freedom of contract. But, at any rate, after 1830 or thereabouts, *laissez-faire* ideology did have a significant influence on the development of contract law. In particular, many equitable doctrines enforceable in the Court of Chancery, and designed to protect those who entered into foolish and improvident bargains, began to be whittled away by the judges. The paternalism of eighteenth-century judges was largely repudiated by their nineteenth-century successors. It is worth noting that this rejection of paternalism was actually part of a reform movement which was closely allied to the political movement towards democracy. It was the reformers of the 1830s who proclaimed their faith in individualism, their belief that the mass of the people could be trusted to look after their own interests, whether in the market place, or at the hustings.

Like most shibboleths, that of 'freedom of contract' rarely, if ever, received the close examination which its importance deserved, and even today it is by no means easy to say what exactly the nineteenth-century judges meant when they used this phrase. At least it may be said that the idea of freedom of contract embraced two closely connected, but none the less distinct, concepts. In the first place it indicated that contracts were based on mutual agreement, while in the second place it emphasized that the creation of a contract was the result of a free choice unhampered by external control such as government or legislative intereference.

To say that contracts are based on agreement, or mutual assent, is a statement which, even today, would command general assent. Very many, perhaps most contracts *are* created as a result of the agreement of the parties, at all events, as to the

[3] *Printing and Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. at p. 465.

essentials. Nevertheless, some qualification of the bare statement that contracts are based on agreement is necessary. It is one of the most fundamental features of the law of contract that the test of agreement is objective and not subjective. In other words, it matters not whether the parties have really agreed in their innermost minds. The question is not whether the parties have really agreed, but whether their conduct and language are such as would lead reasonable people to assume that they have agreed. Thus the decision of the jury in the classic case of *Bardell* v. *Pickwick* was probably correct because Mr Pickwick's language was, to put it at the lowest, capable of being understood by a reasonable person as a proposal of marriage, although nothing could in fact have been further from his mind. The objective approach of the law to nearly all questions of agreement, assent, or intention in the law of contract was established beyond dispute by the end of the classical period, although not without a fairly severe struggle on the part of some of the judges, notably Lord Bramwell. These judges sometimes flirted with the idea that a genuine agreement, or a meeting of minds—*consensus ad idem*—was necessary for the formation of a contract, and traces of their influence are still to be found in parts of the law.

In what we have said so far the classical law of contract differs little from the modern law, although the objective approach has been intensified with the passage of time. But the classical law did not stop short at this point. So great was the emphasis on agreement and the intention of the parties, that the judges of the nineteenth century tended to elevate the law of contract into the central position in the law of obligations as a whole. This led to two related developments. First, there was a reluctance to impose obligations on those who had not voluntarily assumed them. The law of torts and the law of restitution thus remained relatively undeveloped during this period. And secondly, where obligations *were* imposed there was a tendency to treat them as contractual. So, for example, the judges denied that they had any power 'to make a contract for the parties'. Similarly, they attempted to express the great bulk of the actual rules of the law of contract as depending on the intention of the parties. In other words, when a dispute arose between the parties to a contract, the judges frequently dealt with the case as though the solution

to the dispute depended on the intention of the parties. By adopting this line the Courts felt that they were not imposing legal rules on the parties, but were merely working out the implications of what the parties had themselves chosen to do. Just as John Locke had argued that political obligations derived their legitimacy from the social contract to which the people gave an 'implied assent', so the judges argued that private obligations often depended on private contracts to which they could find an 'implied assent'.

Of course, there were certain overriding legal rules which could never, in any sense, be said to depend on the intentions of the parties, such as the rules relating to the contractual capacity of persons below full age, and the rules relating to illegal contracts, but there were, and are, a great many other rules which the Courts preferred to regard as based on the intentions of the parties. The following matters, for instance, were (and to some extent still are) traditionally regarded as dependent on the intention of the parties: the question whether the parties have entered into a contract at all; the question whether an agreement should have validity as a legal contract; the interpretation of the language used by the parties, and the question whether statements made by them should be treated as contractual; the legal results of the contract, even where the parties did not expressly state what those results were to be; and—perhaps most extraordinary of all—the law of what country was to govern the contract.

Now in one sense it was (and to a lesser extent still is) true to say that the bulk of the actual rules of the law of contract was based on the intention of the parties, because in most cases it was open to the parties to vary or exclude the operation of these rules by express agreement. To take a simple example, the duties of the seller of goods in respect of the quality of the goods sold could be varied, or excluded altogether, if the parties expressly agreed to do so, though this is no longer always so today. To this extent, therefore, it was perfectly true to say that these rules were dependent on the intention of the parties. What is far more doubtful, however, is whether the classical law was right in treating these rules as based on the (presumed) intention of the parties where there was no express agreement dealing with the questions covered by them. So also, the