

PART I – INTRODUCTION TO CONTRACT LAW

I OVERVIEW OF CONTRACT LAW

A Formation

Contract formation requires:

- 1 *Agreement*
 - One party must **accept** an offer made by the other party
- 2 *Consideration*
 - Each party must provide **consideration** to the other party
- 3 *Intention*
 - Each party must have the intention to create **binding legal obligations**
- 4 *Certainty*
 - The rights and obligations of each party must be **complete** and **certain**

B Parties to the Contract

The doctrine of privity of contract operates to exclude persons who are not parties to the contract from being able to enforce (or being forced to perform) obligations within it.

To prevent unfair or absurd results, a number of principles have arisen with the effect of conferring certain rights to third parties in certain situations (eg, estoppel, agency).

D Construction

There are two types of contractual terms:

- 1 *Actual*
 - Terms intended by the parties
 - Usually expressly stated
 - Rules of incorporation act to include additional terms either by notice or by the parties' previous dealings
- 2 *Implied*
 - To prevent having to expressly include generic and commonly used terms in every contract, certain fundamental terms are implied by law
 - Specific implied terms may also be inferred from the fact situation

E Contract Theory

There are several contractual paradigms used to explain what a contract is, and why contracts give rise to binding obligations.

1 *Classical contract theory*

- Contract is an expression of the joint will of the parties
- Contracts are self-imposed obligations
- Parties should be free to create their own private law
- The state's responsibility should be to create a civil infrastructure in which parties are free to contract, and to enforce private contracts when called upon

2 *Promise theory*

- The binding force of contract is due to the moral obligation to keep promises
- Charles Fried: the promisor invokes a moral convention that gives the promisee grounds to expect the promised performance¹

3 *Consent theory*

- Randy Barnett: contract's moral force is due to the contracting parties' consent to transfer their legal entitlements²
- Contract enforcement is justified because the parties have consented to the enforcement of the promise

4 *Economic analysis - contract law is necessary to promote economic efficiency*

- Prevents opportunistic behaviour by enforcing contractual obligations
- Reduces transaction costs by providing a base set of rules governing commercial interactions
- Elucidates matters about which parties have not expressly agreed
- Addresses market failures (eg, misinformation, improper pressure)

5 *Critical Legal Studies*

- Contract law is a body of incoherent, contradictory rules that serve to mask the socio-political considerations underlying agreements and transactions
- This ideological function of contract perpetuates a legal order that protects the interests of the more powerful party

6 *Feminist analysis*

- The ideology of contract and its representation of women has negative effects thereupon; many contracts are not as consensual as they are portrayed
- Contract reflects masculine values (abstraction and disregard for cooperation)
- The law fails to address substantive inequality between genders

7 *Relational contract theory*

- Contracts are representative of social relationships
- Considerations such as whether a party chooses to enforce their rights of enter into an agreement are influenced by external social factors (eg, trust, reputation)
- Macneil: contract focuses too strongly on individual transactions, ignoring the larger context in which the relationship exists³

¹ Fried, Charles (1981), *Contract as Promise: A Theory of Contractual Obligation*.

² Barnett, Randy, 'A Consent Theory of Contract' (1986) 86 *Columbia law Review* 269.

³ Macneil, Ian, 'Contracts: Adjustment of Long-term Economic Relations under Classic, Neo-classical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854.

- The principles of contract should evolve to reflect external, relational aspects

8 *Contract as regulation*

- Collins: contract regulates markets and exchanges through private law⁴
- Rights of performance and enforcement are given to the parties themselves, unlike government-enforced public regulation

⁴ Collins, Hugh (1999), *Regulating Contracts*.