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Intention to Create Legal Relations and the Reform of Contract law: A Conservative Approach in the Modern Global Era Social Development, Customary Law and Administration of Justice in Nigeria

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Abstract

Intention to create legal relations is one of the essential elements of a valid contract. It is a critical factor in validating a contract alongside offer, acceptance and consideration. Even when an agreement fulfills these three basic elements, failure to prove intent to be legally bound nullifies the contract and justifies the refusal of the justice system to enforce it. It has been argued on one hand that as far as an agreement has met the basic elements of offer, acceptance and consideration necessitating a separate test of intention to create legal relations is inordinate. On the other hand, it has also been submitted that the doctrine should be retained. Through an analytical approach, this paper examines both sides of the contention and resolves in favour of retaining the doctrine. This will enhance commerce; guaranty contracting parties' uninhibited right and freedom to enter into a contract and ensure certainty and stability in the realm of contract in a manner consistent with the requirements of modern global era.

Keywords: Contract law; Intention to create legal relations; Consideration; Administration of justice in Nigeria.

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1. Introduction

Intention to create legal relations also known as "intention to be legally bound" is a doctrine used in contract law, particularly English contract law and related common jurisdictions, including Nigeria (Benue Cement Company Plc v Sky Inspection Nig. Ltd. (2002) 17 NWLR (Pt. 795) 9). The doctrine establishes whether a court should presume that parties to an agreement wish it to be enforceable at law, and states that an agreement is legally enforceable only if the parties are deemed to have intended it to be a binding contract.

Intention to create legal relations is a vital component of a valid and enforceable contract. In every contractual relationship the parties must intend to be legally bound. This implies that the parties are prepared to respect the legal outcome of the contract. This element demonstrates the seriousness that parties attach to the contract, and how its absence would render the contract a simple promise and legally unenforceable.

The essential features of an enforceable contract which are offer, acceptance and consideration have been pivotal to the determination of whether or not a contract is legally enforceable. But then, the debate as to whether contracts can be legally enforceable without a fourth element the intention to create legal relations has persisted. At common law, the necessity of intention is cardinal (Sagay, 1993). Implicitly, all verdicts are founded on that presumption. However, attempts have been made to demystify the importance of the need to prove intention to be legally bound before a contract can be enforceable, provided there is offer, acceptance and consideration. It has been argued that the doctrine of proving intention to create legal relations is one that has outlived its relevance in the wake of the modern global era (Williston, 1957). Gulati suggests that the element of intention is not a contractual necessity but an illusory concept and should be abandoned in the case of countries that the existence of consideration (Gulati, 2011). In the light of this controversy, it is necessary to take a critical look at the doctrine, especially against the backdrop of modern global era and Nigerian customary law which consists of verbal contracts and promises. A better world for the administration of justice in Nigeria is one that ensures individuals do not go scot-free when they breach the terms of strong verbal agreements.

2. Should the Intention Test Wither Away?

A lot has been said by scholars and proponents of the view that intention to create legal relations should be abandoned. Multifarious reasons have been canvassed and illuminating advantages shown. One of such scholars is the distinguished American jurist, Professor Williston (1957). He challenged the popular view in England that holds that intention to create legal relations is an added and essential element to offer, acceptance and consideration. He argued that the intention to create legal relations requirement is alien to common law and is an end product of legal importation from the Continent by scholars in the nineteen century. This point appears to have found enormous support in other sources. He further argued that the intention to create legal relations requirement is superfluous in jurisdictions that have the consideration test but necessary in jurisdictions that do not have the test of consideration as a separate element for the validity of a contract. As such, the intention test only serves the purpose of delimiting the amplitude and plenitude of contract where the consideration test is inexistent. Hear him: "The common law does not require any positive 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" (Williston, 1957).

In the United Kingdom, Hepple (1970) arguing against the continuous retention of the intention requirement posited that a lot of domestic agreements may encompass mutual promises, "and yet not be contracts because the promise of the one party is not given as the price for the other." He further argued that the existence of 'bargain,' which is comprised of offer, acceptance and consideration, is cardinal and of utmost importance in the ascertainment of intention. Put differently, Hepple was of the view that common law recognised that parties do not define their intention to create legal relations. He submitted that a consensus in terms of 'bargain' is indicative of intention and as such, proof of intention is rendered surplus to requirement where 'bargain' has been established. Put simply, where the requirements of offer, acceptance and consideration have been established, they automatically define the intention of parties.

Gulati (2011), another apostle of jettisoning the intention test, argues that intention to create legal relations is an illusory concept that should be abandoned in countries that require the existence of 'consideration' for the formation of an enforceable and valid contract. In his own words: "...in the case of common law countries, where consideration is one of the essentials of a valid contract, the requirement of proving 'intention to create legal relations' should not be pressed upon. The consideration itself can be taken as a proof strong enough to indicate the presence of intention of forming a legally binding contract" (Gulati, 2011).

2.1. Our Response

We contend that the 'offer, acceptance and consideration only' argument does not present a compelling reason to jettison the doctrine of intention to create legal relations. Firstly, there are transactions whose existence or otherwise do not require the presence of consideration. An example of such is a deed of gift. Here, the deed is used to effect the transfer of a right, property or interest in a realty and concomitantly create an obligation binding on the parties. In this respect, no form or shade of consideration is required from a *donee* as the law discards the necessity of consideration and upholds the form of the agreement as extrinsic materialisation of an intention to be bound. Thus, upon delivery, it takes full effect notwithstanding the naked absence of *quid pro quo*. In fact, in civil law jurisdictions the requirement of consideration is not available but this does not detract from the functionality of contract law (Chloros, 1968). We, at this juncture, further argue that the intention test can even render otiose and obsolete the doctrine of consideration. Civil law jurisdictions provide a ready and pragmatic proof of this position.

Secondly, the doctrine of consideration is incapable of filling the gigantic shoes of the doctrine of intention to create legal relations. This possibility is found in instances where consideration is present but the agreement cannot be accorded the force of law as a result of parties to the agreement either expressly or impliedly establishing that they do not contemplate the application of the law to their agreement (Furmston, 1986). And since the law is a respecter of the free will of parties, the presence of consideration will not in any way give rise to a binding agreement. Thus, the doctrine of intention to create legal relations is the breath in the nostrils of a valid contract.

Thirdly, the judicial climate in a number of jurisdictions, for instance, Singapore, has favoured the growth of the 'seed' of intention over that of consideration both in commercial and non-commercial transactions. In the year 2004, the Singapore High Court (In the case of *Chwee Kin Keong v. Digilandmall.com Pte Ltd.* (2004) 2 SLR (R) 594, per Rajah, JC (as he then was)), albeit *obiter*, had this to say in this regard:

> *The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in Williams v. Roffey Bros & Nicholls (Contractors) Ltd. [1990] 1 All ER 512.) No modern authority was cited to me to suggesting an intended commercial transaction of this nature could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship* (para. 139).

In the year 2007, the Singapore High Court (In the case of *Sunny Metal & Engineering Pte Ltd. v. Ng Khim Ming Eric* (2007) 1 SLR (R) 853, per Phang, J.) again, albeit *obiter*, stated that "the doctrine of consideration may be outmoded even outside the context of purely commercial transactions" (ibid para. 29). And in the year 2009, the Singapore Court of Appeal, (In the case of *Gay Choon Ing v. Loh Sze Tie Terrence Peter* (2009) 2 SLR (R) 332, at para. 92-118, per Phang, JC.) while recommending alternatives to the doctrine of consideration, took out time to chronicle its origin, raison d'être and the attendant difficulties associated with it.

3. Intention to Create Legal Relations: A Necessity

The necessity of intention to create legal relations as an added requirement to the validity of a contract cannot be underestimated. In *Rose and Frank Co. v. Jr Crompton & Bros Ltd.*(1923 2 KB 261), it was stated as rule that "to create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly." As an added requirement to the need to demonstrate the existence of an agreement between parties in Nigeria, intention to create legal relations is essential for a valid contract (Okany, 1992). It is indubitable that the Nigerian Courts have consistently held on to the position that an intention to create legal relations is a necessary element of a valid contract (See the following line of cases: *Orient Bank (Nig.) Plc v. Bilante Intl. Ltd.* (1997) 8 NWLR (Pt. 515) 37, at p. 76, paras. B – E, Ratios 1 and 2; *Okubule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 732; *U. A. C. v. Johnson* (1935) 12 N. L. R. 38). It goes without saying that in Nigeria, the mere presence of *consensus ad idem* as well as *quid pro quo* does not declare the coming into effect of a valid contract. In the case of *Nwangwu v. Nzekwu*(1957 2 F. S. C. 36), the Nigerian Supreme Court, speaking through Foster Sutton, F. C. J. held as follows:

> *It is the case that the cardinal presumption is that the parties were presumed to have intended what they have in fact said, so that their words as they stand must be construed, but there is also the common and universal principle that an agreement ought to receive that construction which it language will admit, which will best effectuate the intention of parties, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intention* (1957 2 F. S. C. 37).

Not every agreement reached between parties creates a *legally* binding contract (Liao, 2013). This is irrespective of the fact that one of the parties may have acted on it. For instance, if Asuquo makes a promise to Nkoyo (his mother) to the effect that he will follow her to the Village Town Hall to watch a traditional play; it is evident that the parties do not intend to enter into a *legally* binding contract. Any cost incurred by Nkoyo in the process of relying on Asuquo's promise is not enforceable against Asuquo.

In the Nigerian case of *Mobil Oil (Nig.) Ltd. v. J. M. Johnson,* (1961 1 All N. L. R. 93) the Respondent under the terms of the agreement agreed to operate one of the Appellants company's petrol service stations in Ibadan on what was described as 'dealer basis'. The Respondent was to run the station at the standard set by the Appellant Company. He was to be remunerated on the basis of rebate and commission, and was to employ staff and pay them, subject to the approval of the Appellant Company. Most importantly, it was a term of the contract that 'the station will be given to you upon the firm undertaking that upon receipt of thirty days notice, in writing, by either party, you may leave or be replaced'. The Appellants gave a written notice in July 31st 1956, which was served on the Defendant on 7th August, 1956. On 30th August 1956, the Appellants took possession of the petrol station. The Respondent sued for damages for unlawful entry. The learned trial judge held that the agreement created the relationship of landlord and tenant between the parties and awarded damages to the Respondent for unlawful entry. On appeal, the Supreme Court reversed the judgment and held that the decisive consideration was the intention of parties. Ademola, C. F. J. gave weight to the expressions used in the agreement, and stated that the duty of the court is to arrive at the intention of the parties, by reasonable construction of the terms of the agreement.

4. Intention to Create Legal Relations: A Deceptive Concept?

A lot of dust has been raised about the intention of parties being an illusory concept shrouded in the uncertainty of a make-believe 'objective standard' (Gulati, 2011). Arguments styled in this manner have been tailored to mirror the shortcomings of the objective approach to the ascertainment of contractual intention of parties. The proponents of this school of thought have argued that the objective standard test is too burdensome a concept to adopt as the court may end up imputing an intention a party never intended to undertake (Gulati, 2011). They have also termed it 'manipulative,' (Chen-Wishart, 2009) 'difficult to prove' (Poole, 2006) and a 'legal fiction' (Poole, 2006). While we concede that this line of argument is wholesome for continuous academic development, we submit that the advocacy for subjectivity of intention of parties will lead to uncertainty in the law and make the law dependent on the interpretations of the mind of a party (or parties) to the transaction. This view, we maintain, is unhealthy for stable social development and overall administration of justice.

It is quite interesting to note that the proponents of subjectivism have overlooked an essential point: that the application of the objective standard by the court is not a mechanical or template-like process but a fact, statement and/or conduct-based process. Put differently, it is only from objective and established facts that intention can be inferred. Lord Greene, M. R., validating this position in *Brooker v. Palmer* ((1942) 2 All E. R. 674), beautifully held as follows: "There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind" (*Brooker v. Palmer* ((1942) 2 All E. R. 674at 677).

A promise meant to serve as a foundation of a contract must be of a kind that can be objectively considered as made in contemplation of legal consequences and effects. As such, a mere jest, puff or statements made in a discussion which is not seriously made will not be given a binding effect by the court (Okany, 1992; Sagay, 1985).

At this juncture, we do not hesitate to reel out the possible attractions of the objective standard test. Firstly, it inheres in parties to the transaction, the consciousness that they are not allowed to blow hot and cold; affirm at one time and renege at another time. Secondly, and flowing from the first, it estops parties to the transaction from making a complete mockery of the contracting process under the guise of what they thought in the 'secret pockets' of their minds when they contracted. Thirdly, it establishes a platform where parties are, from the onset, wary of misrepresenting their intentions and/or that of others (Chen-Wishart, 2009).

5. How do Courts Reach an Objective Standard in Unravelling the Intention of Parties? The 'Mind-Based' Approach or the 'Situation-Based' Approach?

The deciding factor in the objective standard test of determining the intention of parties is the situation-based approach. This approach entails an analysis of the facts of the case *vis-a-vis* the language used by the parties where it involves a written contract. This is because according to Lord Dunedin in *Muir Head and Turn Bill v. Dickson* (1905 7 F 68.), "commercial contracts cannot be arranged by what people think in their innermost hearts. Commercial contracts are made according to what people say" (p. 694). Where the contract is not written, the court will look at the facts of the case *vis-a-vis* the conduct of the parties. It completely jettisons the need to reassess the mind of the contracting parties as such a task will lead the court into metaphysical subtleties, mental conjectures, heightened uncertainties and factual speculations, assumptions and/or suppositions. Thus, when the situation-based approach is adopted by the court, the focus is turned on what a reasonable interpretation of one's behaviour evinces. The court in

Smith v. Hughes (1871 LR 6 QB 597), held that the conduct of a person is determined by the reasonable man notwithstanding the actual intentions of the person.

The erudite Lord Denning in *Merritt v. Merritt* (1970 1 WLR 1211), had this to say: "...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?"

6. Cases where the Existence or Otherwise of an Intention to Create Leagal Relations May Arise

6.1. An Instance Where an Intention to be Legally Bound has Been Excluded Either Expressly or Impliedly by Contracting Parties

This category is one of those that determine whether parties agree to be legally bound. The *bindingness* of an agreement of parties may be negatived by the fact that the parties have expressly agreed that their transaction will not give rise to legal consequences (Okany, 1992; Sagay, 1985). A ready example can be seen in a pools promoter's agreement where the parties agree that the transaction will be 'binding in honour only' (See the following line of cases: *Lee v. Sherman's Pools* (1951) W. N. 70; *Jones v. Vernon's Pools Ltd.* (1938) 2 All E. R. 626; *Chagoury (Ambassador Fixed Odd Pools) v. Adebayo* (1973) 2 U. I. L. R. 532; *Buko v. Nigerian Pools Company* (1968) N. M. L. R. 196) or that such an agreement shall not be amenable to the jurisdiction of any court but only binding in honour (See *Rose and Frank Co. v. Crompton Bros.* (1925) A. C. 445; *Jones v. Vernon's Pools Ltd.* (*supra*). Thus, where a person wins the said pool and the promoters default in payment, damages cannot be claimed in a court of law for the failure to honour the said obligation. As such, there is an offer, acceptance and even consideration but the parties do not intend to make their agreement justiciable. They are satisfied in relying on the realm of moral forthrightness in the fulfilment of their agreement. The same effect can be found in a 'gentleman's agreement' (See *Bloom v. Kinder* (1958) T. R. 91).

In the Nigerian case of *Atu v. Face-To-Face Pools Ltd.* (1974 4 U. I. L.R. 131) the Plaintiff brought an action claiming the sum of N3,000.00 as winnings on the Defendants' football coupon, as a result of an all-correct forecast. The Defendants denied liability and relied, inter alia, on the following clause in the document: "...any coupon and any agreement or transaction entered into or payment made by, or under it, shall not be attended by, or give rise to any legal relationship, rights, duties or consequences whatever or be legally enforceable, or the subject of litigation, but shall be binding in honour only."Honourable Justice Oputa, J. (as he then was) held that the parties by accepting that the transaction was binding in honour only, did not intend to create any interest, rights and obligations enforceable at law.

In *T. K. Amadi v. Pool House Group (Nigeria) Ltd. & Anor* ((1966) A. N. L. R. 532), the Plaintiff staked the sum of £1-16s in a football pool ticket which he delivered to the first Defendant for transmission to the second Defendant. The Plaintiff discovered from his copy of the Coupon that he had won a first dividend of £50,009 12s-0d. He claimed this amount from the second Defendant but they denied receiving the Coupon although the first Defendant agreed that they received the coupon and sent it to the second Defendant. On this basis, the Plaintiff brought this action. The first Defendant's defence was that they had discharged their duty as collectors of the Coupon and had despatched it to the second Defendant. The second Defendant's defence was that under the Rules and Conditions, the transaction was binding in honour only and could create no legal relationship and as such is not enforceable in a court of law. Honourable Justice Omololu, J. held that the action was not maintainable because the rules governing the entry, which had been brought to the knowledge of the Plaintiff, had stipulated that the transaction was binding in honour only. The Plaintiff's action was accordingly dismissed.

6.2. An Instance Where the Agreement of Parties is Reached with Respect to a Commercial Transaction

The law, in this category, presumes that parties to a commercial contract intend it to be legally binding on them unless they prove the contrary (See *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 QB 256; *Edwards v. Skyways Ltd.* (1964) 1 All E. R. 494, (1964) 1 WLR 349). In other words, where the agreement relates to a commercial transaction, the courts believe that an intention to create legal relations exists.

6.3. An Instance where the Agreement of Parties is Reached with Respect to a Domestic/ Social Transaction

The prevailing presumption of the law in this regard is to the effect that parties to a domestic agreement do not intend same to be legally binding unless the contrary is proved (Okany, 1992). The jurisprudential rationale for this position appears to be the respect the law has for the sanctity and oneness of family and/or social unit. The law prefers to uphold and save the fabrics of an existing relationship than readily invoke legal sanctions. Put differently, it accords preference to the subject matter involved and the sustenance of the relationship over legal sanctions (Hedley, 1985). In the words of Liao, 'parties enter into domestic/social agreements mainly for the purpose of "*shared* interest" [emphasis original] whereas commercial agreements are generally bargains whereby the parties pursue personal advantages, that is, self-interest of a party' (Liao, 2013). Validating this position, Danckwerts, L. J. in *Jones v. Padavatto* ((1969 2 All E. R. 616 at 620), enthused: "The present agreement or case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid binding agreements."

Thus, domestic agreements between spouses will not generally give rise to legal relations See *Balfour v. Balfour* (1919) 2 KB 571; *Pettitt v. Pettitt* (1970) AC 777; *Spellman v. Spellman* (1961 1 WLR 921) except it is shown that there is lack of amity between the spouses (*McGregor v. McGregor* (1888) 21 QBD 424; *Merritt v. Merritt* (1970) WLR 1121) or serious financial commitment or loss on one side (*Parker and anor v. Clark and anor* (1960) 1 All E. R. 93; *Hardwicks v. Johnson* (1978) 2 All E. R. 935; *Simpkins v. Pays* (1955) 3 All E. R. 10).

7. Hybrid/Mongrel Contracts: How Do We Show Intention in an Agreement that Has Both Domestic and Commercial Colouration?

An intermediate situation may arise where a contract entered into between parties may wear certain characteristics of domestic/social contracts and also, certain characteristics of commercial/business contracts. It is pertinent to note at this point that a lot of dusts have been raised in this regard. Efforts have been exerted to show the futility of the two rebuttable presumptions of law in this regard. It is our position that these attempts to discredit the basic presumptions governing domestic and commercial contracts are, with respect, weightless, uninspiring and hasty.

Firstly, the law has not left this area bare and without guidance. It has provided for unforeseen circumstances. The law, for example, presumes that intent to contract in a domestic/social contract is absent and as such, parties cannot sue or be sued on it except it is shown that there is lack of amity or serious financial commitment/loss on one side. Additionally, the law presumes the presence of intention in commercial/business agreements until the contrary is proved. These presumptions, when placed side by side with objective facts of a case, will lead to necessary conclusion whether a *legally* enforceable contract has arisen in law. It is essential to add that the entire process of discovering the intention of parties in a hybrid/mongrel scenario is not a mechanical venture where mathematical exactitude is the hallmark. Rather, it is a process that calls for great judicial dexterity: an attitude that marries the drive for certainty of the law with the trending need for flexibility.

Secondly, novel or new cases rising and crisscrossing the length and breadth of domestic and commercial contracts can never be left unattended to. The court is expected to consider the rebuttable presumptions of law on the two sides of the coin, avert its mind to the possible exceptions, consider the facts objectively and take into consideration, the words used by the parties and/or their conduct in the transaction. The judges are not expected to throw their hands in the air and plead paucity of precedents, neither are they expected to bow ceaselessly to the weather of the day, but to the climate of the season. They are expected to be innovative! Lord Denning, M. R., speaking on a similar situation in *Gouriet v. Union of Post Office Workers,* (1982 A. C. 435) summed it beautifully as follows:

> *Whenever a new situation arises which has not been considered before, the judges have to say what the law is. In so doing, we do not change the law. We declare it. We consider it on principle and then pronounce upon it. We declare it. As the old writers quaintly put it, the law lies in the breast of the judges (Emphasis ours).*

8. Forms of Contracts Available under Customary Law in Nigeria

It is necessary for us to consider some forms of contracts under customary law in Nigeria before we venture into the argument whether the continuous retention of the element of 'intention to create legal relations' is a necessity. Customary law is the law of the various indigenous peoples of Nigeria, predating other systems of law whose arrival in the country eventually dislocated it Akanbi (2015). It is one of the sources of Nigerian law, and has existed long before the advent of English law (Asein, 1998). It is derived from the custom of the people. A custom refers to a rule, a way of life, a generally accepted behaviour which has been in existence from ancient times and has acquired the character of law in a specific milieu. Nigeria is a heterogeneous society (Nwocha, 2016) and has more than 250 ethnic groups (Oba). It regulates many traditional practices such as marriage founded on native law, divorce, succession and inheritance, chieftaincy and land tenure in rural communities (Olubor).

Customary law in Nigeria is endowed with a number of attributes. It is largely unwritten, flexible and elastic and must be in existence at the material time it is sought to be enforced (*Dawodu v Danmole* (1958) 3 FSC 46). The dynamic quality of customary law was articulated by Osborne CJ in *Lewis v Bankole* (1908 1 NLR 81 where he observed that: "Indeed, one of the striking features of West African native custom, to my mind, is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics." The law can and does change with the times and the rapid development of social and economic conditions.

Received English law and customary law have co-existed in the Nigerian legal system for a long time. However, customary law is not accorded the same status with English law and local legislation. The validity and enforcement of customary law depend on such laws having passed the repugnancy test (Uweru). The contents and values embedded in customary law have to a large extent been eroded by the received English law and local legislation, sometimes resulting in conflicts between them. However, there is a blending of the divergent systems in such a way that litigants can obtain both legal and social justice.Nigerian contract law is predominantly derived from English common law. However, transactions which are unknown to English law or fall short of the requirement of English law are governed by customary law. A handful of these contracts are as follows:

8.1. Barter

This implies a swap system where one commodity is given in exchange for another (Encyclopedia Britannica). Here, the parties identify the commodities, assess them and agree to substitute one for the other. The property in the commodity passes immediately and a good title is acquired. For instance, Essien may irretrievably swap his basket of Oranges for Etim's basin of *Garri*. The contract becomes performed upon the exchange of the said commodities.

8.2. Agistment Agreement

This form of customary contract involves the taking in by a party of the livestock or domestic animal of another party for grazing or upkeep on agreed terms of settlement. The terms of settlement may include the payment of a specified amount of money to the belabouring party and/or the sharing of the eventual off-springs of the animal with the belabouring party in a sharing ratio that is always fixed by custom.

8.3. Mutual Financial Agreement

This is a very notorious form of customary contract that involves the agreement by parties to pool together reasonable amounts of money on a scheduled time basis. The total sum realised at each scheduled time basis is given to a particular party and the cycle of contribution and circular disbursement continues until every party to the agreement receives the agreed sum. This practice is called *esusu* in Yoruba Bascom (1952), *isusu* in Igbo, *adashe* in Hausa Achike (1985) and *etibe* in Efik ethnic group in Nigeria.

8.4. Co-operative Labour Agreement

Under this form of contract the parties agree to come together and provide, as a group, intense labour services to one of the parties on the understanding that the provision of the labour services will circulate evenly around and to the benefit of every other party to the agreement. There is a common understanding that none of the parties will be paid or gratified in any form for services offered in the circular system of co-operative labour. A common example of this shade of agreement is seen in farming activities amongst farmers who own large expanse of land and intend cultivating same within a reasonable time all thanks to cheap labour (Achike, 1985).

Generally transactions governed by customary law are verbal, binding and honoured by the parties as soon as offer and acceptance have transpired. There is no separate requirement for intention to create legal relations. This is not good for commercial transactions as a person who has obtained some benefits under a contract can simply walk away on the flimsy excuse that he did not intend to form a create a legally binding relationship

9. The Place of Intention to Create Legal Relations in Social Development and Administration of Justice in the Modern Global Era in Nigeria

The pontification of Mac Cardie in *Pager v. Claspeil, Stamp & Heacock Ltd* (1924) 1 K. B. 566), resonates as the hallmark for determining whether a particular area of law in the modern global era has fallen into obsolescence, and as such, in need of drastic reform. Here's a taste of its honey:

> *The object of the law is to solve difficulties and adjust relations in social and commercial life.... It must grow with the development of the Nation. It must face and deal with changing or novel circumstances.... And unless it can do that, it fails in its function and declines in its dignity and value* (p. 570).

To better appreciate our position in this section, we will breakdown Mac Cardie's submission above into digestible segments as follows:

(i) The law must aim at resolving complexities in social and commercial transactions;
(ii) The law must be dynamic, flexible and susceptible to the ever-changing trends in the modern era;
(iii) The law must aim at attaining justice and meeting the needs of the teeming populace.

We add a fourth element to the mix: the law must be certain and predictable though not necessarily rigid.

Social development is an investment that is people-driven where the overall wellbeing and growth of the society is connected to the all round success of every individual citizen. It is erected on the common foundation that the individual citizen is key and the success of the society is invariably a reflection of the meaningfulness of the lives of the individual citizens (Economic and Social Inclusion Corporation). Social development connotes change in social institutions and its indices include the provision of legally enshrined rights, better law enforcement, participatory governance, civic activism, inter-group cohesion, interpersonal safety and trust, gender equality and rise of clubs and associations(International Institute of Social Studies).

Raising an issue of great concern, Aje R. Adofikwu commented as follows:

> *As the world of electronic commerce expands, there is an increasing demand for clarity in the rules which apply to participants and their transactions. Uncertainty exists on such matters as whether agreements entered into electronically are enforceable, how the operative terms of online contracts will be determined by courts, what rights parties have to online information and what electronic self-help remedies they may exercise. Much of the demand for the development of a legal framework has come from those who use electronic commerce and want assurances that electronic transactions will be valid and binding, as well as certainty about the rules and remedies that apply to their transactions.*

Nigerian Courts have not relented in their effort to rise to the needs of the modern global era. Honourable Justice Fabiyi, J. C. A (as he then was) in *Ekwenugo v. F. R. N* (2001) 6 NWLR (Pt. 708) 171 at 187) admonished

the judex in the following words: "I have always held the view by which I shall continue to stand that, in reality; judges should strive to operate the law for the attainment of social engineering. It is by so doing that our desire to attain national rebirth and regeneration can become concretised."

Honourable Justice Pats-Acholonu, J. C. A. (as he then was) in *Coker v. U. B. A. Plc* (1997) 2 NWLR (Pt. 486) 226held:

> *I find it difficult not to associate myself from an uneasy feeling that this court (indeed every court) has a great responsibility in not only being clear in the application of the law which will show people doing business with Nigerians but also the world at large that we have a legal system – nay a crop of Judges who can rise above banal sentiment and mete out justice that is to be accorded recognition and respect in all foreign jurisdictions* (p. 234).

We are of the firm view that the better approach in keeping the law in motion with the ever changing social circumstances in the realm of validity of contracts is not to dismember the intention test but to retain it and be more open-minded to novel situations. This attitude of open-mindedness will be displayed in the interpretation, evaluation and conclusions to be drawn from established facts and the attendant probative value to be ascribed to such. Furthermore, the court can be more than ever ready to combat the complex mongrel/hybrid situations if it treads on the path of flexibility in the attainment of certainty and consistency in the law in this regard.

10. Must We Retain the Intention Test in this Era of Fast-Paced Globalization Digitization and Modern Commerce?

We respond to the poser above in the affirmative: 'yes, we must!' Do we abandon the test of intention to create legal relations simply because there are perceived challenges to its functionality or development? Are we saying that the doctrines of offer, acceptance and consideration do not suffer functional and developmental constraints? On the doctrine of offer, we ask: How do we incisively tell when a proposition is certain, definite and equivocal enough to be termed an offer? Is it not just a tool of judicial convenience? Have there not been difficulties still? Have the court been able to clearly define the amplitude and plenitude of the doctrine of invitation to treat? Has the doctrine not been made dependent on a situation basis made up of perceived instances drawn up by the courts? Are the instances closed?

On the doctrine of acceptance, we query: Is the doctrine of acceptance by post not a judicial brainchild that is adopted on the basis of convenience and certainty rather than case-based appropriateness? Have the courts not been applying it to new situations? Has the attempt completely divulged the contorted obscurities that arise in novel circumstances?

On the doctrine of consideration, we also ask: Were the rules governing consideration not crafted by the courts for consistency and convenience? Is it not the fear of what may or may not amount to consideration in law that necessitated their creation? Is the doctrine of preference of 'sufficiency' over 'adequacy' in the rules of consideration not a metaphysical battle that results in mental indigestion? Does it not create a distinction without a difference? In the Court of Appeal, Denning, L. J., in *Combe v. Combe* (1951) 1 All E. R. 767 acknowledged the *unsatisfactoriness* associated with the doctrine of consideration, yet, did not write off the doctrine. He believed in its adaption to changing trends and in this light remarked as follows: "The doctrine of consideration is too firmly fixed to be overthrown by a side wind. **Its ill effects have been largely mitigated of late**, but still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge (Emphasis ours)" (p. 770).

If the doctrine of consideration and that of offer and acceptance have been riddled with ill effects but still considered to be firmly rooted, how about the vital doctrine of intention test that is created by the law of contracts to enable a person to whom some advantage or benefit has been promised to enforce the promise or obtain a relief for its breach?

11. Conclusion

We maintain that the doctrine of intention to create legal relations is an all-season necessity and must be retained. Firstly, consideration, as a matter of practical impossibility cannot fill the gap of intention to create legal relations in a transaction. We have carefully shown this position in our submissions in this work. The wide categories of instances where consideration is present but does not metamorphose into or supply the intention requirement are replete in our case law. If we overlook this, commerce and business will be chaotic, shambolic and near impossible, if not totally impossible. The doctrine of intention to create legal relations is thus, the insurance created by law for commercial and economic life in a modern society.

Secondly, any wild attempt to abandon the doctrine of intention to create legal relations will rob contracting parties of their uninhibited, unrestricted and free disposition to enter into a contract and equally spell out what becomes of their contract. The consideration test will not be all encompassing to determine the legal effects agreed upon by parties.

Thirdly, abandoning the doctrine of intention to create legal relations will raise serious doubts as to the justiciability of a contract. How do we ascertain when a party does not intend legal consequences even after mutual promises have been exchanged? When the presumptions wither away, what happens next? Do we have a blanket case-based determination of issues or a whole new set of judicial constructs or convenience? The dire need for certainty and stability in international contracts and agreements reminds us of the duty to ensure certainty and conformity in the respective contract law of nations.

Instead of wiping out the doctrine of intention to create legal relations, we suggest that the doctrine be retained and further developed to match the trending requirements of the modern global era. We advocate for the continuous retention of the presumptions but counsel that great attention be given to it so as to achieve the twin target of certainty and flexibility.

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