

Advanced Contracts, Tendering and Public Procurement
Prof. (Dr.) Sairam Bhat
Professor of Law
National Law School of India University
Formation of Contract: Legality of Object & Public Policy - Part 01

We are now moving forward to understanding an important part of contract requirement, the essential test of an agreement to be enforceable as a contract. This is probably the final test, apart from what we have seen so far that you have done an acceptance to the offer, there has to be consideration, you have to have capacity, the content has to be free and but finally, and most importantly, that the object and consideration of the contract should be legal. This is the final test.

So, if the object of the contract is not legal, or if the consideration in the contract that flows between or exchanged between the parties is not legal, then the contract will not be enforceable, the agreement is not going to be enforceable. So, this is the final essential element of making agreements as contracts.

(Refer Slide Time: 1:10)

**6. Legality of
object and
Consideration:
Sec. 23**

- 1. It is forbidden by law
- 2. Defeat the provision of any law
- 3. Injurious to person or property
- 4. Agreement Injurious to public policy
- 5. Immoral
- 6. Agreement opposed to public policy Sec. 23
 - A. Traditional categorization
 - Trading with an enemy
 - Trafficking in public offices
 - Interference with the administration of justice
 - Morality and Law: e.g.: Marriage brokerage: *Herman v Charlesworth* 1905 2 KB 123



Now, when there are possibilities that the legality will be tested in the contract. Now, we should understand that contract law is the basic law, it is a foundational law. And it is not a law that tells you which contracts are doable and which contracts are not doable. We probably have to understand the same with the help of other legislations.

Let us take an instance of legislation called the Indian Penal Code. Now, Indian Penal Code, 1860 is the basic criminal law of the land, and it does prohibit certain kinds of activities and

makes it punishable or makes it crime to probably attempt to commit to someone's money. Now, can there be a contract that is done, we say supari killing, can there be a contract which says that if you go and kill A, I will pay you 1000 rupees.

Now these kinds of contracts are very, very important in terms of the legality of the object of the contract, what is the object of the contract to cause injury or harm to another person or to another property, this may be forbidden by law. There are so many legislations that are complementarity, which say you can do this, you cannot do this. For example, dealing with banned substances or narcotic substances or what we call as these bad drugs, as it were.

Now, you have a legislation which clearly says that dealing with the same, sale, transfer, transaction in any of these substances is prohibited by law. It is illegal to deal with this kind of stuffs in India. So, any transaction that can deal with narcotic substance is forbidden by law. So, you cannot have a contract. So, the central object of the contract is something that is prohibited by the statute. And because it is prohibited by the statutes, the legality of the object test is not going to be fulfilled, and hence the agreement is not going to be enforceable at law.

What does this mean? This means that the parties cannot approach the court of law, the remedies for breach of contract are not to be granted by the court of law. And the parties may have to settle their rules course beyond the legal system or beyond the law. So, important for us to understand what is permitted by law and what is forbidden by law. For example, we can also say, can there be a contract for the purchase of a kidney, blood, or human organs for that matter?

Now, again, we have legislations like the transportation of Human Organs Act and several other legislations which have state that, there cannot be any transaction for the purchase or sale of kidney or for blood, these are essential human organs that cannot be traded, they cannot be commodified, they cannot be commercialized. And hence, no contract of that character or nature is permissible. The legality of object, testing of the object of the contract, whether the object is permissible by law, or whether the object is non-permissible by law.

We have to understand what is the subject matter of the contract. For example, let us assume one more kind of example to test the object of a contract. Now very often than not we have people trying to make several kinds of contracts. And it could be as normal as buying land. It could be as normal of selling products, purchasing services. But again, if you focus on the object of the contract friends, you will notice that a lot of times we have control orders on certain kind of commodities.

Like the sugarcane control order or the coffee control order or the milk control order, which mainly control order which are there under the essential commodities act, all you will notice that probably during a pandemic or a health emergency time, certain drugs were listed as essential commodities, certainly vital, life saving drugs were listed as essential commodities.

Now, it is not that the law forbids you from dealing with it, but the law actually fixes the price at which it should be transacted. So, there could be a law that clearly gives you a prohibition from dealing with, there could be another law which says you can transact but at a specified price, there could be another law which says that you should only sell it to the government and nobody else.

Now, for example, we under the sugarcane control order, which was there prior to the LPG era, and it existed even later on for some time, which is the liberalization, privatization and globalization era, you would notice that the farmers or the cane growers had to sell their cane to only a particular factory, and through government regulation and order. So, there is a forbidden next to the freedom of contract, you do not have an absolute freedom, sometimes it is illustrative. So, your object to the contract should not be against a given law.

So, whatever the law prescribes, you can only work within that you can make contracts within that anything that is forbidden by any other statutes, apart from the Indian Contract Act, if you attempt to do it, it will track Section 23 of the Indian Contract Act. And because it violates Section 23 of the Indian Contract Act, the contract will be held to be void. Now, there are two things that at this context, one must realize, and that is void versus illegal.

Now, void means it has only civil consequences or a civil action or sanction. That is, what is illegal, friends, is something that is clearly forbidden by law, it would probably say like this in the ITC, that any contract to kill someone is punishable with the offense of 6 months. It is not only forbidden but it is also punishable by a given statute. If you decide to make a contract, which is then attracting forbidden law with an additional amount of punishment that is prescribed by that special statutes, then we will say that the contract is illegal.

So, illegal contracts interestingly have no remedy i.e. what we got in the Indian Contract Act. Void agreements still have something but illegal contracts do not. So, illegal contracts are treated far more stringently, they are prohibited, forbidden plus there is a punishment in case you do anything that is in furtherance of the same through a contract that you do probably.

Also, Section 23, very interestingly has what is known as the direct test and the indirect test. Now the direct test is that look, if you make a contract that is forbidden by law, then obviously sorry that is void however, there are so many legislations that will not give a clear prescription that please do not make a contract regarding this, they may not say so. But what you will make in your contract defeats the provisions of those law, the object of those law, vision of those law. And then this is the indirect test.

So, if your contract attempts to defeat the provision of any given statute indirectly, even then, please note that agreement is not going to be made enforceable, it would attract Section 23 and it will be declared as void. So, this is the first two is the one is the direct test. The second is the indirect test. So, I think respecting parliamentary intention of the legislature, the Indian Contract Law, though is foundational law is always balanced with the interest of legislations that are made later on.

And any such legislations can actually make prescriptions of which kind of contract is permissible, how it should be made. And if it is not made, aspect those special legislations that it will attract Section 23. Section 23 of the Indian contract Act also insist on the fact that contracts that are made between two private individuals cannot attempt to injure any other third intuition to either himself or to the property of that person.

Now, contracts are supposed to benefit two parties, the seller or the buyer as the case may be or maybe in case of government contracts, it is to benefit the larger public, as we say public works contract. So, you do not expect contracts to in any attempt, so the object of the contract must not result in making a kind of attempt to injure a person or a property. So, this is also an interesting element under Section 23. It opens a kind of an area that is not necessarily to be decided by any legislation, this is something that courts can also intervene to decide.

So, if two persons make a contract, wherein the element of this contract is promising or attempting to promise, any kind of loss, injury to the person, or to the person or the property of another division, then to that extent those contracts could be tend to be void. This very clearly gives the direction that two brothers cannot fight amongst themselves so as to cause injury to some third party or two brothers cannot enter into a contract when they decide to share the property between themselves, but deny the property to their third brother.

So, injury here is not the injury in the sense of the physical term, it is injurious to the right, interest of the third party that is where the element of injury definitely comes into place. So, say in a government contractual sense this injury could be to a competitor where you want to

exclude the competitors, and you include certain aspects. So, you actually have a tacit understanding between the contractors and then say, look, we tried to exclude the competitors, so that they do not get injurious to person, property, business. That, I think is a very interesting way in which Section 23 has been drafted.

And that is why Section 23 is called as the heart and soul of contract law. It very clearly expects contracts to be for public interest, public welfare, it can result in profit to the contracting parties. But then, there is a public element, that public element is your contract should not affect public interest, public rights. That is a very interesting part of the Indian contract Act. It is an interesting scenario in the Indian Contract Act. And, also please note, there is this concept of public policy that has been brought under Section 23.

Section 23 says that agreements that is injurious to public policy. The definition of public policy does not exist. It is not there, it is for probably the judges to evolve and decide, because, again, if you go back to my previous point, there are certain things that cannot be static, it cannot be permanent, it has to evolve from time to time. Now, for example, why there is no definition of a public policy, I think, because the drafters of the Indian Contract Act wanted to keep this as an open question for application for evolution, every generation would want to determine its own public policy.

Public policy in government contract can be something else. And in a private contract, it can be something else, so you cannot have one precise definition of what it means. Some judges have attempted to define it by saying public policy could mean injury to public interest. Yes, it can be. Say public policy would mean avoiding paying the appropriate stamp duty or registration charge in a contract that can also be public policy. So, if there is an agreement between two parties, which is going to be injuries, please note it may not the injury may not occur.

If the injury occurs, let me tell you it can amount to crime. So, injury to person, is not it a crime? Yes, the Indian Penal Code says it is an injury to someone's property, is not it a crime? Yes, it is a crime. So, if you actually commit the act of doing that injury to person, property or public policy or public property, then you will be punished under the criminal law, that is a different issue. But an increment to that effect is not permitted. This is one.

Point two is that agreement is a consent to defeat the object of any legislation. And that is where you will notice that these four points become a very critical factor in deciding whether

agreements are going to be enforceable at law, or whether they are not going to be enforceable as well.

In the next slide, we will deal more on public policy, especially in the current context, I will give you some very recent and very classic examples of how and where this public policy element has to be brought into place in terms of the discussion of contractual issues. The fifth point that Section 23 deals and I think it is a very important way in which the Section 23 warns is contracts that are immoral, the object of the contract if it is immoral, or if the consideration the contract that flows is immoral, then the contract is void as well.

So, I think Section 23 is so encompassing it has so many elements of determining the legality of object immorality. Very interesting friends, what is moral and what is immoral? How does one test it? There is nothing like a parameter of definition that the Indian Contract Law gives. However, you will notice again that morals are some kinds of preachers, guides, the do's, that spiritual and religious institutions actually give in a given society.

Our parents, our teachers can actually guide us about what is moral and what is immoral. Morals are I think high standards of human behavior, expected standards of human behavior. And if you follow the natural statement is that probably you are demanding. Now the expected standards of human behavior friends you will notice are generally lead down in our day to day activities. Our elders tell us what to do, what not to do, religious leaders will tell us our spiritual texts will tell us what is moral and what is immoral.

Now, this element in contract also says that look, what is there in society as high standards of human behavior is also expected in your commercial transaction in a commercial contract. So, being immoral is an element that is not permissible in contract. So, the object of the contract cannot be sold. The immediate question for many of us should be, Sir, how can you give us some illustration on examples of immorality, we can give you a lot of examples on that. And please note these examples do exist from time immemorial.

Let us look at some traditional categorizations. Now, in traditional categorizations, you will notice that there was this concept of a concubine in certain societies, in India, mistresses in certain societies in India. Now, let us assume that I have a concubine or mistress. And my society permits me to have the same, now you must be saying so which society really do you live in. In today's society, you will look as if you are a Hindu, you are bound by the Hindu Marriage Act. If you are a Muslim, you are governed by the Muslim Marriage Act or the Christian Marriage Act as the case may be, we have special legislations.

However, India most legislations except the Muslim Ottoman legislation in insists that you must practice monogamy. You must have only one spouse at a time, unless it is divorced and so on, so forth. So, monogamous marriages are something that is facilitated by a given law. Now, can I have a concubine, in or may be before 1955 the time I say about 1955 is because that is the time the Hindu Marriage Act was put in place. And monogamy became a rule.

But before 1955 during British times, in West Bengal, in certain societies in India, these kinds of polygamous marriages. The polygamy please note, is also something that the Indian Penal Code speaks about. But polygamous marriages were some kind of permitted in certain circumstances. And this concubine issue is a very important issue because it has some customary traditional complications.

Suppose just imagine during those times concubine was permitted, the Devdasi system was there, and so on and so forth. So, I can give you numerous examples, how the Indian society had some of these practices and systems. Let us imagine that my concubine or my mistress has to get maintenance. It is my duty to maintain my spouse, is not it? That is what the law says, is not that what morality would want to say, moral high ground, I must maintain my independence.

I make a promise to a concubine, please note, it is a promise it is an offer saying that look, if you remain loyal to me, and you should do that, I will give you a house and I will give you a maintenance of 5000 rupees every month. I made this promise, the concubine accepts his promise. Now, this kind of a contract can be tested on Section 23, you know why, legality of object morality of consideration.

So, society may permit me to have a concubine, can it allow a contractual promise to the concubine? This is something that we will have to be testing because please note friends, the fact that I have a moral obligation to maintain someone is fine. I may have a legal obligation also to maintain my dependence is also fine. But the fact is can I make a contract that is immoral.

Morality here very clearly means that you are actually giving consideration or payment to something that society does not permit. Society thinks having a concubine is not moral. You must be dedicated only to your wife. Momedian marriage should be respected. So, societies will have to change will have to evolve. And hence, once you will notice, even morality is a changing dimension. It is a changing perception. What was moral in the 1980s, probably may not be moral today as we see right now.

So, certain values may change, the younger generation may take morality as some kind of absurd kind of a standard who is society to judge whether I am moral or no, why should the society judge the same. Remember, the thin line of distinction is, I say this is moral but does the law say it is illegal. If it is illegal, obviously, whether it is young generation or older generation, you are not supposed to practice the same. So, any kind of a contract that is illegal, obviously, is not to be permitted by law. But morality is one of the law prescribes the legality. It is about your expectation of high standards.

And remember, when I see your expectation of high standards, it could be something that the judges in a case may want to implement or judge. So, the judge may say, this is immoral. So, the statutes in Section 23 says, if an agreement is immoral, it is void. Yes. So, the testing is going to be by the judge on whether what is the object of this contract.

I will give you one more example. Let us say friends, that you are a landlord of a house. And a gay couple or homosexual couple want to take rent of this house. They want to become your tenants. Let us test this hypothetically, what do you think this is moral or immoral? Now, you may saying sir, is being gay legal? I am not sure. The Supreme Court right now has said as we speak today, it has said that being homosexual is not a crime. But it is not said being homosexual is legal. This is one part of the story.

But do you think our society is yet to accept homosexuality as moral? This is for us to decide. So, I tell you a precise kind of an example that I always kind of go for empirical evidence. If you want to speak to elder generations, I am talking of the 60s and the 70 years old. They will tell you homosexuality is definitely not moral, you will take a survey majority will tell you it is moral. But the younger generation if you go and speak 20-25 year old, they will say this is moral, there is a generational gap on the morality of homosexuality.

But the point is, let us talk about the contract of giving tenancy you are a landlord, will you give on rent house to homosexual couples, you may say why not? What is the immortality there, immortality is friends, probably the society like say in Haryana or in Uttar Pradesh, where they are very conservative societies, they may think that you are promoting homosexuality, indirectly. You are promoting such kind of behavior indirectly. Friends, morality is an external element of what the society thinks you are. You will not care of the society that is a different issue. But that is what the society as a majority would want to impose upon you.

Say for example, in so many societies today, we are still grappling with inter caste marriages. There are so many societies that do not permit they think it is not moral. So, I think the issue of morality is a very, very tricky issue. There are few cases in which it has already been implemented or decided. For example, I will give you one very classic case in which morality was judged a carriage. It is like giving the car on rent, let us imagine. The owner of the car or the owner of the carriage gave it to a prostitute. He gave it on hire. He gave it to a prostitute. And she took that carriage for her sex work, sex workers we call them.

So, she went in the evening in the same carriage she performed her work. And then she came back and she returned the carriage. The issue is she refused to pay for them hire of that carriage or the car. She was very clear. She said I would not pay, why because you have given the same foreign immoral activity. The court had to judge whether this contract giving the carriage to a prostitute or a sex worker to do her own trade. Is it moral or immoral? Now you judge this. I would say most of you will say it is immoral. Prostitution is immoral. Sex work is immoral.

Friends, you are judging someone else. You are judging that sex worker, the society is saying that is immoral. And hence a contract of carriage for prostitution is going to be moral. Similarly, can you give your house on rent to a prostitute or to prostitution or to a sex worker? Can you, should you? See, please note there is a law which probably would regulate these activities because that house could be used for the purpose of prostitution. So, you do not expect seek prosecutions have the right to shelter, I do not deny that it is a contract. But the contract of morality is something that we all have to guess and we all have to determine, is not it?

And having it in law, it is kind of what the British's thought 1872 is this law, the British's wanted to properly put in the aspects of morality. Now, I do not know when the British's brought this law, whether they were testing morality as per Christian standards and British Standards because the judges were not British during that time.

And here are Indian, who are practicing certain very interesting aspects of what this contract is what this customers. So the point is, you cannot discourage morality to other elements. This is something luckily, the Supreme Court has restricted morality, they have said, we are not testing morality on other aspects, for example, it could be animal cruelty. What could be animal cruelty, we put a kind of a metal piece to the leg of cattle, so that when the cattle is actually galloping and running on our roads, they can be crippled.

Suppose I give a contract to a person to put that half horseshoe shaped metal piece to the leg of a cow or a bullock. You may say, sir, that is cruelty to animal it is immoral. But remember, immorality on several other grounds cannot be done under contract law. The Supreme Court has said let us only restrict modality to sexual morality. Yes, so morality is only on sexual part. And that is the narrowing down of this definition under Section 23.

But remember, the examples that I gave you on homosexuality, on prostitution, on concubines are all those aspects that determine sexual morality and any such contract could be set aside by the court of law on the ground that the object of the contract is immoral. Second, the consideration of the contract is moral, now you will be saying so how can consideration of the contract be moral? Very simple, suppose I am going to build a house, the money that I get to build this house, the consideration that is coming to me to build this house, should it be legal or can it be illegal?

Now, what is illegal money? Let us assume that this money is coming to the hawala transactions, illegal money, violation of federal regulations, Foreign Exchange Management Act, it has been smuggled into India. The money is wrongly printed. In those circumstances, would you say that consideration is legal? No, you will not say it is consideration.

Similarly, let us assume the money that is given to me to construct this house is coming from say the earning that a prostitute or a sex worker has done, is that constitution legal? That money has to be utilized, I completely agree with you. But can I make a living on what the sex worker has contributed to me? Maybe the judges in this case would say that the concentration is immoral, moral money, what is it?

You may do the hard work, you take the income from it, you construct your house, that is moral that is what our spiritual leaders, advisors, gurus, our religious takes what is there a society, society will say only utilize good money, white money, but black money, immoral, illegal, both prostitution, who is earning her own income, is it immoral as well as illegal?

So, I think that it is immoral and illegal, it is very easy to decide, there is no problem because the law actually put that restriction, but remove the legality part, just focus on the morality part, then you start finding how difficult it is for judges to actually decide those cases in which the consideration is considered to be moral.

And those I think aspects that want to get considered, for example, I just do the last instance of immorality of concentration. Money that is coming from bribe, can it contribute to a

contract? Should it contribute to contract? I am sure your answer will be definite, no. That is a consideration that we can always say is an immoral. So, we will understand Section 23 with various of its facets, in which, one or the other issue under what we would want to look at the traditional categorization of trying to test the legality of object.

Now there are two categorizations. One is modern categorization of testing legality, and one is traditional categorization. Now in traditional categorization, you will notice that trading with enemy is considered to be violating the aspects of public policy. Public policy means public interest, public welfare country's permanently, and hence, if the country is at war with another state, it will be the neighboring states, or countries or any other state on which the country imposes what we would want to say, as the enemy status, then, in those circumstances, trading with such kind of enemy, state or its citizen is considered against public policy.

So, there are two things that you have to understand here is that the legality of the object can creep into the contract at some point of time, maybe at the stage of performance, maybe at the stage of delivery of the goods, maybe at the stage of receiving the goods, maybe at the stage of paying the price, or of paying the consideration of the contract. It could be at the stage when the contract is also entered into.

Now, you cannot probably go against a national security interest. So, contracts are expected to adhere to those national security interests. And that is what public policy is, obviously, so citizens who are making a contract cannot contract with an enemy state, and its citizens. And this is very clearly prohibited, that is considered against public policy and hence, the legality of the test of the object and concentration in such contracts is definitely tested on those grounds.

Trafficking in public offices which means that you cannot use illegal, unethical, immoral means to gain access to public offices, or famous grounds contracts for public offices. Now, we know that in government contracting, there is a very interesting pact called the integrity pact. This is something that both the government and the contractors have to enter into. The integrity pact is generally the anti corruption kind of clause. Both the parties say that they have approved the contract with clean hands without actually trafficking in public offices. There is not offered any kind of unethical or immoral or illegal gratification to actually seek the contract.

And since trafficking public offices is a prohibited activity to punishable offense, further any contract that actually tries to look at trafficking of public offices is attracting Section 23. And such contracts will definitely be not only void, but I think it would be illegal as well. So, we have to understand that we always use the statement all illegal contracts are void.

However, all void contracts need not be illegal. The illegality of contract comes into place, especially if one evaluates the fact that the action that leads to the voidness is a punishable activity, it has been held to be prohibited or punishable with sanctions, with imprisonment, with fine and that is where you will notice that the illegality of contract is on a separate footing. So, all illegal contracts are void. All void agreements may not be in legal agreements.

Like we talked about trafficking in public offices, you should also look at interference with administration of justice. Now, Justice Administration is the judicial system approaching the judge trying to make contracts trying to do backdoor deals, to secure settlements and judgments. All of these are prohibited activities, and they are something that the law does not provide for.

And hence, it is a clear example of how the object of such contracts are not to be encouraged. These contracts cannot come into existence. Anything that you do with justice and Justice Administration, the contracts are going to be illegal, as well as void. So, you cannot get into any of these actions. And these actions are considered to be clearly prohibited actions of contract.

Finally, marriage brokerage agreements were considered to be immoral at one point of time. Why, because marriage was considered to be a kind of a sacred activity. It was supposed to be a noble religious activity for which contracts that actually try to make the boy and the girl meet or try to brokerage the marriage were not considered to be moral they were considered not to be enforceable at law. This was during early times.

But now, times have changed. As I told you, morality, marriage, things are in a different dimension today altogether. And hence, I think the dimensions of early times need not be the dimensions that we do it today. So, these are some traditional categorizations under Section 23. And they give us an idea about how at least not the interesting part of Section 23 is somewhere, you will notice that the last line of this section as it is written by the British lawyers, draftsman, they have given the right to the court to determine two things, the issues on public policy and the issues of morality.

This is something that is always dynamic, it is not static, it could change or the parties, what is the subject matter of the contract, and hence, the courts will decide whether it is in favor of public policy or is opposed to public policy. So, the role of the court in Section 23 is quite void, very, very important.

And that is where you will notice that there are a lot of judicial verdicts over here. There are interesting cases that come by over here and do not forget government contracts are also tested on the ground of Section 23. So, if you just go by a very interesting case, and the case name is *Brojo Nath Ganguly v. Central Inland Transport Company*, it is the case of precedent under Section 23.

Central Inland Transport Company was a government company which had an employment contract and the terms and conditions of the employment contract was challenged as being opposed to public policy. Please note contracts are also between an employer and employee it can be a temporary contract, it can be some other outsourcing contract, so everything that is done by the government.

Interestingly, there are two legislations that actually converge. One is the Indian Contract Act, other is the Indian Constitution. So, article 14 of the Indian Constitution very clearly states that any action of the government which is arbitrary, unfair, unreasonable, is something that the courts can strike it down and beat the contractual law.

Contracts can be challenged as being arbitrary as being unreasonable, as being unfair, as being discriminatory of the policy of equality. And then *Brojo Nath Ganguly v. Central Inland Transport Company*, you will notice that the Supreme Court states that anything that is reasonable in an employment contract is liable to be struck out. It is liable to be moderated. And governments do not have the discretion to make contracts that are unfair, and exploitative.

And public policy very clearly means that the government contract has to be in favor of the public spirit, in favor of public interest. And if the government fails to draft a contract in public policy, then such contracts are liable to be struck down. So, that is the Supreme Court decision that has always been cited to actually challenge government contracts on the ground of public policy.