The right to escape a contract: a unified theory of changed circumstances

Hao Jiang

Contract theory is at a crossroads. There is no generally accepted understanding as to why a contract is binding. Without one, we cannot explain why sometimes the law should allow parties to escape an otherwise binding contract. The traditional libertarian view centers around the singular value of liberty; the consensus was liberty is accorded priority over other political goods or values. For example, to thinkers such as Milton Friedman and Robert Nozick, liberty and justice are either interchangeable or liberty takes precedence over justice. Liberty centered contract theories such as Fried's contract as promise and Barnett's consent theory are not sufficient in answering when a contract is no longer binding. The recent liberal accounts try to overcome this difficulty by adding one extra element: justice or equality. They are Rawlsian inspired, egalitarian in nature and place constraints on liberty. Such constraints incorporate various forms of justice such as relational justice, distributive justice and background justice.

This additional element of justice is helpful in determining when parties can escape contracts. Only that they all miss the mark. Relational justice fails to capture what is truly at stake- the substantive justice or economic fairness. Relational injustice can only be measured by examining the economic consequence of the transaction and its fairness.

Moreover, contracts should be primarily concerned about justice in transactions. Distributive justice concerns a social decision to redistribute, which is not based on transactions. Correcting background injustice is a noble cause that is morally arbitrary as one's starting point is the result of mixture of natural inequity and other morally desirable factors. Such a cause cannot be pursued in contract law without doctrinal indeterminacy, paternalism and normative uncertainty.

I will defend a non-liberal theory that is neither libertarian nor liberal, contract as voluntary commutative justice. This theory explains most of the doctrines that allow parties to escape from contracts in both common law and civil law systems such as hardship and frustration in common law, *causa concreta* in Italian law, *Störung der Geschäftsgrundlage* in German law, change of circumstances in French and Chinese law.

In this account, contracts are binding when it is economically fair and voluntary. It is voluntary when it allows parties to receive what they value more than what they give in return. If that is not case, justice will matter whether they are bound by the contract. They should be able to escape from contracts unless allowing them to do so is unjust to the other party. It would be unjust if he was fairly compensated to assume a particular risk *ex ante* yet wished to escape *ex post*. For example, a party is bound by the contract if he was paid to assume the risk of the increasing cost of performance *ex post,* it would be unjust to the other party if he escapes. Also, if the purpose of the contract can no longer be fulfilled, the party to receive the performance can escape only if doing so will not put the other party in an economically worse off position.