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# I. The Theory of Declarations of Intention

## *Abstract*

*The theory of declarations of intention is part of the legal tradition in several European countries. The theory, in its various versions, seeks to specify the meaning and legal effects of an intention being “declared”. The theory’s starting point is that a person, by declaring his or her intention to achieve a legal effect, can make a commitment, dispose of his or her property et cetera. This chapter provides a comprehensive overview of the theory of declarations of intention, with special attention to the way the theory has developed in the Nordic legal systems.*

## I.1 Introduction

The theory of declarations of intention, as formulated in Nordic doctrine, is primarily a legal theory “de lege lata”. The theory claims that a person within certain limits can achieve a legal effect by declaring his or her intention to achieve the effect in question. As a legal theory, the theory of declarations of intention is incompatible with a legal system where the legal fact consists only of the actor pronouncing certain definite words. In a primitive legal system (one perhaps containing magical elements) it is conceivable, for example, that a village member’s utterance of the words “ta-ta-ta” constitutes a both sufficient and necessary condition for the entry of certain legal consequences, e.g., that he or she sold one thing to another. Legal rules in which the “naked words” constitute a both sufficient

and necessary requirement are of course incompatible with the theory of declarations of intention.<sup>1</sup> The theory seeks to emphasize that it is not the words in themselves that matter: a person can normally use any words or manner of conduct, if he or she “declares an intention” in the way the theory states.

Normally, a person declares an intention by making a verbal statement, for example by uttering certain words to the other party or by providing the other party with a signed document containing those words. Examples of the words used might be:

“I hereby sell the car.”

“I hereby undertake to pay SEK 500.”

By uttering the words in these two examples or by providing them in writing, the speaker or author achieves a legal consequence of a certain kind. The theory of declarations of intention, however, emphasizes that it is not the words in themselves or the utterance of them that constitute the determining legal factor.

That uttering the words is not a sufficient condition for a declaration of intention becomes clear when we examine a situation involving two actors on a stage, one saying to the other: “I hereby sell the book for SEK 1,000”. In such a case, it would be a mistake to assume that the speaker has made a genuine offer to sell the book. A similar situation arises when someone utters the same words for teaching purposes or as a joke: the teaching or joking element, like the acting, rules out the possibility of a genuine declaration of intention in the sense that the theory of declarations of intention demands. The theory thus claims that it is not enough for an individual to utter certain words. He or she must also utter the words under such circumstances that the other party has reason to infer an intention to sell.

<sup>1</sup> Cf. H. Karlgren, *Avtalsrättsliga spörsmål* p. 164.

Furthermore, for an intention to be declared in the legal sense, it is normally not a necessary condition that the parties utter a certain and definite set of words. This is evident from the fact that the person who e.g., accepts an offer does not have to say the words “I hereby accept the offer”. Depending on the circumstances, a declaration of acceptance may be made e.g., through the acceptor saying “Okay” or quietly nodding his or her head and shaking hands with the other party. According to the theory of declarations of intention, the acceptor can declare an intention regardless of whether he or she expresses himself or herself in a conventional way or not. The only requirement is that the declarant expresses himself or herself in a way that gives the other party reason to believe that he or she has the intention in question. If the parties are aware of this, they may e.g., agree in advance that the word “Abracadabra” is to be used instead of “I hereby accept”. Under such circumstances, the acceptor may thus effectively declare an intention to accept by pronouncing the word “Abracadabra”.

A declaration of intention, as understood in the theory of declarations of intention, is characterized by the declarant announcing his or her intention to be bound by his or her declaration. In this respect, the concept differs from what is referred to as a “letter of intent”. Such a declaration is characterized not by the declarant announcing his or her intention to be bound by the declaration, but by the declarant announcing his or her intention to enter a legally binding contract in the future.<sup>2</sup>

## 1.2 Explicit and implicit declaration of intention

A distinction has often been made between explicit and implicit declarations of intention. How the boundary between these two forms of declarations has been drawn has varied.<sup>3</sup> Many authors

<sup>2</sup> Cf. e.g. A. Adlercreutz et al., *Avtalsrätt I* p. 155 ff.

<sup>3</sup> See e.g. H. Karlgren, *Studier i allmän avtalsrätt* p. 18 ff.

have, however, used the term explicit declarations of intention in reference to cases where the intention is immediately apparent from the words uttered by the declarant, and the term implicit declarations of intention in reference to cases where the other party can conclude an intention of the declarant by his or her other conduct. Not least in Nordic doctrine, such a view has been common.<sup>4</sup> A standard example of an implicit declaration of intention is the continued payment of rent of interests after an agreed loan and rental period has ended, through which the paying party achieves a renewal.

### 1.3 Promises, decrees, and authorization

Especially in Nordic doctrine, declarations of intention have been divided into promises, decrees, and authorizations.<sup>5</sup> Promises usually refer to cases where the declarant through his or her declaration of intention has committed to do or not to do something (commitments) or declared his or her intention to transfer, grant or relinquish a right of some kind (dispositions). Decrees refer to cases where the declarant has declared his or her intention to impose an obligation on another party or to waive an obligation imposed on another party (termination of a debt, termination of a contract, etc.). Authorizations refer to cases where the declarant has declared his or her intention to grant someone the legal competence to act on his or her behalf.

Although promises may be of a beneficial nature (e.g., promises of a gift), they are usually part of a mutually binding contract between the parties. The declarations of intention that are made when parties enter a contract are called offers and acceptances. An offer can be regarded as a conditional promise: the legal effects that the declarant has declared his or her intention to achieve are conditional on the other party making a promise. An acceptance, on the

<sup>4</sup> See e.g. J. Lassen, *Obligationsretten* p. 227; H. Ussing, *Aftaler* p. 103 ff.

<sup>5</sup> See e.g. H. Ussig, *Aftaler* p. 6 ff.; L. Vahlén, *Avtal och tolkning* p. 11 ff.

other hand, can be regarded as both a promise and a decree: through his or her answer the acceptor ensures that the conditional promise of the offer becomes binding and definitive.<sup>6</sup>

Literature on the theory of declarations of intent often emphasizes how concordant declarations of intention (so-called consensus) are a necessary condition for the conclusion of a contract according to the main rule.<sup>7</sup> This means that the conditional commitment made by the offeror becomes final only if the offeree's promise is in accordance with the content of the offer.

#### 1.4 Essentialia, accidentalia and naturalia negotii

The starting point for the theory of declarations of intention is that the individual has the legal competence to achieve a legal effect by declaring his or her intention to achieve it. The theory does however not even in its most classic form suppose that the legal effects of a declaration of intention are solely determined by what the declarant has declared.

For a very long time, private law has distinguished between essentialia, accidentalia and naturalia negotii.<sup>8</sup> Essentialia negotii refers to the content of a declaration that determines the type of declaration in question; the essentialia of a purchase contract are thus the transfer of property for consideration. Accidentalium negotii refers to legal effects that the declarant has stated his or her intention to achieve, but which are not part of the essentialia of the legal act. If a declaration of intention e.g., contains time and place of delivery of a sold item, this content constitutes accidentalium negotii. Naturalia negotii refers to legal effects that occur without being declared. The literature points out that the contents of a declaration of intention

<sup>6</sup> See e.g. H. Ussing, *Aftaler* p. 7.

<sup>7</sup> See e.g. T. Almén/R. Eklund, *Lagen om avtal* p. 27.

<sup>8</sup> See e.g. F. Stang, *Innledning til Formueretten* p. 283 ff.

are often supplemented with these legal effects in cases where there is a gap in the contract.

In the classic theory of declarations of intention, the effects of *naturalia negotii* were construed to reflect what the parties would with reasonable certainty have agreed to if they had addressed the issue.<sup>9</sup> Furthermore, in doctrine, great importance was attached to commercial custom; whatever prevailed in business was believed to correspond to the intentions of the average party.<sup>10</sup> The view that the supplementary legal rules should only be based on what could be assumed to be the intentions of a hypothetical, or average party, was modified over time with reference to the need to ensure that the rules conformed to what follows from good faith and fair dealing.<sup>11</sup> Modern legal systems have furthermore introduced rules that can be used to adjust or override unfair contractual terms, and the purely dispositive legislation has been supplemented with mandatory legislation for certain types of contracts.

## 1.5 The theory of will and the theory of reliance

The notion that legal effect is dependent on intention and that the declaration of intention is only the manifestation of this intention dominated nineteenth century German doctrine. One of the most prominent advocates of this view was Friedrich Carl von Savigny. According to von Savigny, intention was the only relevant and effective factor and since intentions were inner, invisible phenomena, they had to be declared.<sup>12</sup> In other words, the declaration of intention was, according to von Savigny, only proof of an inner, normative intention.

As stated, the theory of declarations of intention in its original form requires that the declared intention corresponds to the actual

<sup>9</sup> See e.g. J. Lassen, *Obligationsretten* p. 371.

<sup>10</sup> See e.g. F. Stang, *Fra Spredte Retsfelter* p. 76 ff.

<sup>11</sup> Cf. H. Ussing, *Aftaler* p. 436.

<sup>12</sup> F. C. von Savigny, *System des heutigen Römischen Rechts* III p. 258.