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History of the Indian Contract Act

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The Indian Contract Act[1] *is one of the most important pieces of legislation that governs all commercial interactions and transactions. The Indian Contract Act was not in force and was not the same forever, initially, there was no act or legislation for contractual transactions. The contractual relation was governed by several religious denominations before the concept of the Indian Contract Law was approved. Britishers wrote certain rules to make it easier for them to govern from time to time, but there was no consistency. While the British, drafted regulations to make it simpler to govern, there was still no uniformity. To satisfy the demands of the time, laws and legislation were developed, but a suitable Contract Act was necessary. When the demand for contract law started increasing, in 1866, the Britishers originally drafted the contract law. However, it was launched in 1872. The foundation's core model has remained unchanged since its inception. There were some amendments and revisions, including separating some sections and creating new parts, as well as minor changes to some of the pre-existing statutes. The Law Commission issued two reports on the foundation of the act, both of which had recommended modifications, but the contract legislation is still out of date and requires some revisions and alterations. The article analyses the historical period, the British regime pre- and post-independence era, and the current needs and requirements of the law.*

Keywords: *contract, religious laws, law commission.*

[1] Indian Contract Act 1872

INTRODUCTION: THE HISTORICAL CONCEPT

Vedic and Medieval Period

India had no traditional contract code during the ancient and medieval periods. The *Dharma shastras, Vedas, Smritis*, and *Shrutis*, for example, provide a vivid exposition of the law that was equivalent to contracts at the time. The V*yavaharmayukha* portion of the law contains the rules that govern contracts. In Hindu law, *Vyavahra* means legal procedure. The *Vyavaharmayukha* portion of the law contains the rules that govern contracts. While studying Smriti, it was established that this idea of contract dates back to the Vedic period.[2] There are notions or issues such as sales without ownership, debt deposit, pledges, and gifts, all of which are contracts in nature that can be found and mentioned. As established in Manusmiriti, the first and crucial element of the contract procedure is the competence of individuals desiring to engage in the contract. According to contemporary legislation, which is now section 11 of, the Indian Contract Act[3], says, dependents, juveniles, *Sanyasis*, those deprived of limbs, and the wrongdoers were all disqualified to contract. In the *Narad Smriti*, the three groups of competent persons are the king, the Vedic instructor, and the family head.

The economic component and the moral factor were the two factors on which the contracts were regulated till the end of the medieval period. Agreements and pledges were necessary for activities such as the transfer of property, the execution of services, and other activities that included business or commercial transactions and personal interactions. The rights and obligations in a Bailment, as we know them today as part of sections 151 and 152 of the Indian Contract Act, of 1872[4], have their historical roots in the *Katyaynasmriti*, which contains a specific clause known as the "*silpinyasa*" dealing with the deposit of raw resources with an artisan and the extent of care attached.[5]

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[2] 'History of the Indian Contract Act 1872' (*Law Teacher*, 23 September 2021) <https://www.lawteacher.net/free-law-essays/contract-law/history-of-the-indian-contract-act-1872-contract-law-essay.php?vref=1> accessed 10 December 2022

[3] Indian Contract Act 1872, s 11

[4] Indian Contract Act 1872, s 152

[5] History of the Indian Contract Act 1872 (n 2)

Islamic Law

During the Muslim reign in India, the Mohammedan Law of Contract covered all contract-related problems. In Arabic, the term contract is 'Aqd', which means conjunction. It refers to the combination, i.e., the conjunction of 'ljab' which means the proposal, and 'Qabul' approval or acceptance[6]. A contract needs the presence of two parties, one who proposes and the other who accepts it; there should be a common meeting of minds; and there is also an obligation to enter into a legal relationship, the same being essential in today's contracts. Marriage (Nikah) was also seen as a contract, and this is still the case today. Any of the parties to the marriage (contract) proposes, if the other party agrees, it becomes a contract, and the man must pay a sum to the woman as a token of respect, known as Mahr, either at the moment of marriage or thereafter. The Mahommedans were also the first people to understand the notion of divorce. By this concept of divorce, a party to marriage might release oneself from contractual duties.

It also included laws for governing certain commercial, proprietary, and mercantile transactions, such as agency, guarantee and indemnification, partnership, etc. All transactions were recognized as secular contracts, and standards for resolving all forms of disputes, including those involving property and succession, were established.

CRITICAL ANALYSIS

British Regime: Before 1872

In the United Kingdom Queen Elizabeth's Charter of 1600, provided "the Governor and Company of Merchants of London Trading into the East Indies," also known as the "London East-India Company", legislative powers, enabling them to adopt such laws and ordinances as were essential for company's good governance. The company's laws, directives, and penalties have to be reasonable and compliant with English law.[7] The company had taken up the judicial administration of the islands of Bombay, whose sovereignty was vested in the British king, and

[6] Prof. Dr. Eman Suparman & Nugraha Pranadita, 'Implementation of Sharia Trade Contract in the Development of the Indonesian E-Commerce Market' (2018) 21(2) Journal of Legal, Ethical and Regulatory Issues <https://www.abacademies.org/articles/implementation-of-sharia-trade-contract-in-the-development-of-the-indonesian-ecommerce-market-7188.html> accessed 10 December 2022

[7] Mahabir Prashad Jain, *Outlines of Indian Legal and Constitutional History* (Wadhwa Law Publishers 2007).

the laws enacted there were properly administered by a hierarchy of courts with varied powers as part of the East India Company's exercise of authority. For a long time, the mayor Court in Madras, which consisted of a mayor and aldermen, was running successfully. Following the acquisition of the three villages Sutanati, Govindpur and Calcutta positioned the corporation as a Zamindar[8], paying income to the emperor in Delhi and exerting limited criminal and civil revenue control over the native people.

In the meanwhile, several Charters and Acts were issued, which did not make any difference and were anyways overturned. Later when the Regulating Act, was passed in 1773[9], it authorized the Governor-General and Council to make as well as issue these kinds of regulations as they were necessary for the good order, as well as the civil government of the United Company's settlement in Bengal, and all places subordinate to it. The Governor-General's Council's right to make local laws was confirmed in 1797. Bombay and Madras Governments were given the same power later. In addition, there were acts and rules imposed by tribunals established by the Royal Charters in the presidency town that constituted British laws. The towns suffered difficulties as a result of the British restrictions, and the native population working, conducting business, or settling in the three presidential towns was perplexed.

The Declaratory Act, passed in 1781 to demonstrate and define the powers of the Supreme Court in Bengal, enacted, that in disagreement between the native people of Calcutta, the Apex Court at Bengal shall have exclusive jurisdiction; "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party shall be determined, in the case of Mohammedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Gentus (Hindu); and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant."[10]This immunity of Hindus and Mahomedans from indigenous laws was later applied to Madras and Bombay.

[8] Sumeet Malik, *V D Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (12th edn, Eastern Book Company 2019)
[9] Regulating Act 1773
[10] Declaratory Act, 1781

Various acts were also passed along the same lines as the legislation mentioned above. For example, in suits concerning succession, inheritance, matrimony, and caste in all religious usages and organizations. The general regulations were to be the same as the declaratory act. When the need was not met, minor additions and deductions were made.

People other than the ones who followed the Islamic and Hindu religious law were ruled by their customs and their marriage contract was also governed by their norms, in addition to the other regulations. Regulations were applied to them, and they were granted the benefit of English law in the Suddar court in Bombay.

LAWS IN OPERATION

The courts in three Presidency cities operated under distinct laws and processes from those in the rest of the British Empire in India. The law obtained in Calcutta, Madras, and Bombay mayor's courts consisted of the common and the statute law that was in effect in England. Civil law prevailed, just as it did in English admiralty courts[11]. In cases involving inheritance and succession to lands, as well as any instances of the contract dealing between parties in whom a Hindu or Mohammedan was a defendant, the religious laws prevailed.

NEED FOR AN ACT

As examined, there was a vulnerability and there was not any consistency in the common laws that were followed in the country. There was a requirement for a commission that was needed to consider the issue of uncertainty of the civil law which was pertinent to the other people (the ones who did not follow Hindu or Islamic laws) living. Anyways, these people who possessed in the Presidency town had laws as to the people living in the *mofussil* (the provincial or rural districts of the country).

PRE-INDEPENDENCE ERA

The first law commission report: The first law commission report in the pre-independence period submitted a total of 6 reports out of which the second and third reports gave temporary regulations which were later used as a base for framing the draft of the Indian contract act. Even

[11] Atul Chandra Patra, 'Historical Background of Indian Contract Act, 1872' (1962) 4(3) Journal of the Indian Law Institute < https://www.jstor.org/stable/i40163132> accessed 10 December 2022

though the first Law Commission report did not produce any meaningful results, it did serve an important role in highlighting the country's legal ambiguity. The report of the panel successfully drew the attention of the public of the country to the country's complex legal concerns.

Lex Loci Report: The term lex loci is the Latin word for "law of the land", it is a shortened form of the choice of law principles that determine the 'lex causae', that is, the laws chosen to decide a case, in a conflict of laws. This lex loci report was the initial report which tried to bring uniformity regarding the civil laws in the country. Under the chairmanship of Andrew Amos, the first Law Commission submitted its report, which suggested that an Act must be passed making the substantive law of England the lex-loci, i.e., the law of the land outside the presidency towns in *mofussil* areas, and which would apply to all except the ones following the Hindu and Islamic laws.

Civil Procedure Code: The report presented a civil procedure code and proposed many modifications to the civil litigation process.

The Second Law Commission: The second law commission in its second report agreed to the lex loci report's recommendation, that there should be a substantive civil law for those in the *mofussil* who lacked their legal system. It was also to be made sure that no attempt should be made to codify the personal laws of Hindus and Mohammedans. The second commission came with some important laws but still, a certain clarity was needed in the contract act.

The Third Law Commission: The third law committee was constituted under the chairmanship of Lord Roomily, and its phase is known as 'the golden age of codification.' Out of the three tasks, one of the most essential duties assigned to the third law commission was to pass a substantive civil law for the country. The third law commission in its tenure submitted a total of 7 reports out of which the second report was the contract bill or the contract act draft, and the third report was suggestions for the government of India relating to the contract act draft and its specific provisions.

The Indian Contract Act Draft (1872 and Later): The second report of the third law commission known as 'The Contract Bill' was drafted in the year, 1866 but made an act in the year 1872. The

bill planned to bring Indian contract laws into line with English contract laws. Although it was not an entire contract law, the bill will suffice for a long time. It is hoped that if flaws are discovered, they will be supplemented with additional chapters. The contract was also incomplete since the drafters were unsure of what should be included and what should be excluded. The provisions of specific contracts (for example, partnerships) were still under discussion.

As it deals with property rights and also includes the transactional portion, the commercial transactional portion, and the Indian contract functions as civil law. It is a substantive law since it establishes rights and responsibilities. It is not retroactive in nature, meaning it does not apply to lawsuits brought after the laws have been passed. The act is not an exhaustive one; that is, it is not fully comprehensive, and there is always room for additions and deductions.

THE POST-INDEPENDENCE ERA

Some revisions to the contract act were made before the law commission's further reports. The following summarizes the major amendments:

Civil law was a Central Subject under the Government of India Act where the expression "The Government of India" meant not a separate Parliamentary enactment but a proper version of the Act of 1915 as subsequently amended. Sections 123 of the Indian Contract Act, 1872, forming Chapter VII Goods, were removed by the Indian Sale of Goods 1930. Similarly, Sections 239 to 266 of the Contract Act Chapter XI: of Partnership, were repealed by the Indian partnership Act, 1932. The later amendments and proposals were suggested in the two law commission reports in the contract act, the 13th, and the 97th law commission reports. Since the 13th Law Commission report was the first after independence to address the contract act expressly, it was complex, with 95 pages of recommendations, whereas the 97th Law Commission Report was drafted in ten pages. The relevant facts of both reports are detailed below.

13th law commission report

Consideration: Consideration is regarded to be one of the most important aspects of modern contracts. Different states have approached consideration in their contracting systems in different ways. Promises, for example, were only partially enforced under Roman law. Because

the Romans believed in honoring their agreements, their interpretation of consideration was based on the phrase *Pacta Sunt Servanda*, which means "Agreements Must Be Kept," which is considered a moral philosophy of guaranteeing the authenticity of contracts. However, this viewpoint was just not practical and was later revised. If we study English Contract Law, their definition of consideration is centered on the Latin maxim Quid Pro Quo, which states that if something is done, a return is expected so long as it is not a charitable act.

The concept of consideration was borrowed by the Indian Contract Act from the English contract act, and therefore is based on the lines of *Quid Pro quo*. Consideration is defined under section 2 (h) of the Indian Contract Act which says "an agreement enforceable by law is a contract."[12]

The Law Commission report suggests amending section 25 (a promise to compensate), to make the system more adaptable and follow the prevailing needs. It stated changes in Section 10 of the Contract Act which describes consideration as one of the three essentials of forming a contract.[13] That even if an offer is considered to be valid for a specific period but is declared void due to a lack of consideration, the Commission argued that the offer should be permitted to continue open even if there is no consideration at the moment. There is an element of 'future consideration' that the commission's report encourages. According to the commission, a contract is legitimate even when there is no consideration if one party believes the other side can be trusted.[14]

The Law Commission report necessitates the reformation of the contracts act, following the western countries. There is a serious need for change in the area of consideration, as per the law commission report. The cases shall be deemed void or legitimate based on the information and details of the case, rather than the fact that it contains or lacks consideration. The legitimacy of a man's word of mouth, which is an implied contract, should be considered since his purpose and cause are to participate in the agreement without consideration. The worst-case situation is when people promise to donate to charities but then refuse to and also where an agreement is

[12] Indian Contract Act 1872, s 2
[13] Indian Contract Act 1872, s 10
[14] Law Commission, *Thirteenth Report* (Law Com No 13, 1958) para 11

made out of love and loyalty, they will be deemed null and invalid simply since no consideration was given, as happened in ***Kedarnath Bhattacharjee v Gorie Mahomed.***[15]

Doctrine of Privity

In its sixth interim report, the English Law Revision Committee addressed: The rule of privity in common law would adhere to the notion that a contract must not bestow any right on a stranger to the transaction, even if the primary purpose of the deal was to benefit him.[16]There was a proposed modification that was recommended which was that, if the contract expressly states that there is a direct benefit to the third party, it shall be exercisable by the third party and must also be valid between the contracting parties unless the contract expressly states otherwise. The contract may be suspended by mutual consent of the parties to the contract at any moment before the third party has expressly adopted it. The English legislature has not yet given any effect to the suggestion.[17]

India, too, adhered to the notion of not granting the power to sue a third party. The strict adherence to the Doctrine of Privity was certain to pose complications. Even now, there are a few exceptions to the rule that must be accepted. According to the 13th Law Commission report, the commission recommends that the law revision committee suggestions be implemented and that a specific section be included along those same lines.

Quasi-Judicial Contracts

Chapter 5[18] talks about quasi-contracts which provides insufficient provision for obligations presenting those generated by contracts. According to the Law Commission recommendation, the concept of unfair enrichment should be adopted, and after making explicit provisions for well-known examples of unjust enrichment, a respective Residue Resection should be established to cover circumstances that are not particularly addressed.[19]

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[15] *Kedarnath Bhattacharji v Gorie Mahomed* (1887) ILR 14 Cal 64
[16] 'The Law Revision Committee's Sixth Interim Report' (1937) 1(2) Modern Law Review <https://doi.org/10.1111/j.1468-2230.1937.tb00011.x> accessed 10 December 2022
[17] Law Commission, *Thirteenth Report* (Law Com No 13, 1958) para 14
[18] Indian Contract Act 1872, ch 5
[19] Law Commission, *Thirteenth Report* (Law Com No 13, 1958) para 17

97th Law Commission Report

The 97th Commission report recommends and suggests changes in the part of the Indian Contract Act which talks about limiting the time within which the rights are to be enforced. The Commission even gave some suggestions for the other parts of the act but it was not of many effects as this. The problem with section 28[20] is that the agreement simply relinquishes the remedy by stating that if a suit is to be made, it must be submitted within a particular time limit, which is shorter than the limitation act's term of limitation. The rights accrued under such a provision persist even after the time limit has expired and is not extinguished, but there is a restriction on the time to sue as provided by the limitation act. Because of section 28, such a clause is considered null and void. However, there is no infringement of limitation law if the right itself is extinguished. The extent to which this distinction is justifiable is a question on which the Law Commission report made suggestions.

The report included two proposals, in which the first one said not to have a limitation period; the only limitation period to be followed is the limitation period laid down by the limitation act. The second proposal was regarding that the contract could have a 'Periods of prescription' which means there could be a mention of the prescribed time in which the party can sue and if not sued in the prescribed time, then it may extinguish its rights to sue. Summarizing both of the proposals means that the law limiting the time of filing a case is void but a clause specifying the duration up to which the rights remain alive and extinguishing those rights at the end of such period is allowed. The reasons underlying this recommendation is that section 28 is aimed at preventing the agreements which could operate only so long as a right for existence; the section is only aimed at convenience not to sue at any time and not to sue after a limited time.[21]

The Court ruled that a restriction is unlawful while it existed but a right continued to exist after that period within which it could be enforced. The 1997 amendment fixed this by noting that while a limit on the time during which a right might be exercised was allowed, a contractual restriction on remedies was not. However, the 2013 amendment opted to shorten the claim period to a minimum of one year since the term may be viewed as 3 years for private persons

[20] Indian Contract Act 1872, s 28
[21] Law Commission, *Section 28 Indian Contract Act, 1872* (Law Com No 97, 1984) para 2.3

and 30 years for governmental organizations. Although the 97th Law Commission study found certain more problems in existing legislation at the time, none of them had the same influence as the section 28 proposal.[22]

FUTURE PROSPECTS: RE - LOOK NEEDED

The origins of English common law, on which the Indian Contract Act is based, can be traced back to property law. There were a lot of land-related agreement conflicts as the land was by far the most important type of property. According to the Law Commission's thirteenth report, there have been many advances in the realms of law, commerce, and economic connections to be covered by the Indian Contract Act since its enactment in 1872. And the Indian contract of 1872 enacted, was much into the complexities of property laws. Some of the parts that demand modifications are listed below:

Doctrine of Privity: As previously stated, the doctrine of privity is an English legal principle that assures that no one who is not a contractual party is bound by its terms that nobody can contest the judgments, and the only recourse is limited to the parties to the contract. As a result, this doctrine has led to problems for third parties. Some exclusions, to the aforementioned regulation, are based on legal exemptions. In the event of a trust, the beneficiary has the right to challenge if an agreement is formed between the Trustee and the other party to protect the trust's interests. If any contract commands a party to pay a specific sum to a third party and the party accepts, the obligation will be enforced against the party that approved it. In the event of contingent and multilateral agreements, a third party has the right to claim for the enforcement of its interests as well as for the provisions established for a specific member of the family in the case of family settlements.

The 13th Law Commission Report recommended that the doctrine be eliminated because it is ambiguous and lacking in clarity regarding the third-party rights, which were made for that party's benefit under certain sort of situations. To do this, a comprehensive definition or

[22] Thriyambak J. Kannan, 'The third exception to Section 28 of the Contract Act, 1872 and claim periods under bank guarantees' (*Lexology*, (3 August 2021) <https://www.lexology.com/library/detail.aspx?g=04dfac89-47c7-4e6e-8723-8be688c8af86> accessed 10 December 2022

provision must be introduced, or a separate piece of legislation needs to be codified for third-party rights if certain conditions are satisfied.

Need for Codification: The Preamble of the Contract Act states that the contract legislation does not purport to be a comprehensive treatment of contract law, and also the lawmakers did not want to comprehensively codify the complete contract law. As a result, in all cases where the law is ambiguous, the courts rely on the English law of 'justice, equity, and good conscience. According to the 13th Law Commission report, Indian legislation depending on English common law causes uncertainty and problems and adds no clarity. Several statutes connect with the Indian Contract Act, which serves as branches of the primary statute. However, since the legislation was passed, the judicial trend shifted the other way. Not only are there different laws for commercial terms, such as the Negotiable Instrument Act of 1881, but there are also portions that are treated as independent acts, such as the Partnership Act of 1932.

Doctrine of Consideration: As stated earlier, the 13th Law Commission report[23], rather than eliminating or introducing a new substitute, the report suggests that there is a need to make required modifications to the present law, which will minimize equitable and ambiguous impacts of rigid doctrinal adherence. This might be accomplished by amending Section 25 to include paragraphs specifying unusual circumstances in which contracts are lawful without consideration.

Include Clause for E-Contracts: E-contracts are similar to traditional contracts in that it includes the exchange of goods and services, with the exception that they are carried out using an online platform as a channel of communication. This eliminates the need for intermediaries, allowing suppliers and buyers to go straight to the market. E-contracts arose from a pressing demand for speed and productivity. It was particularly tough to sign the copies and courier for the intercountry contract. However, because of digital media, it may now be confirmed within seconds. This Electronic type of contract was at first a matter of concern for legislators, but now that many countries follow it and it is producing satisfactory results, it is necessary having an

[23] Law Commission, *Thirteenth Report* (Law Com No 13, 1958) para 11

act or a clause, formation of jurisdiction rights, obligations of parties, and certain other e contract-related matters.

CONCLUSION

The need for a contract act in a country and its development from the time of the Vedas to the present has been recognized since the start. From time to time, revisions and modifications were made to create a law that met the needs of the time being. At first, it was seen that the British passed various rules and legislation depending on their demands and requirements. However, none of them lasted long, and no law was enacted to indefinitely govern contractual terms. There were religious laws, as previously mentioned. For the most part, Hindu and Islamic laws were respected in civil trials, but there was an issue with persons who did not observe these religious laws. With time, the demand for a permanent Act became more pressing. Finally, before independence, in 1866, a document of the Indian Contract Act was drafted, which later came into force in 1872.

As the Contract Act of 1872 was enacted by the Britishers, it was certain to have flaws due to the difference in necessities before and after independence. As a result, it began by dividing sections into different acts. The other needed modifications were stated in the 13th Law Commission report, which was the first comprehensive report on the Indian contract act. It made recommendations in nearly every subject, but especially regarding the doctrine of consideration privity and quasi-judicial contracts. The 97th Law Commission report, which came out later, proposed that section 25 be modified. There were two amendments to the act, one in 1997 and the other in 2013, both of which changed some elements of the act. However, a significant number of the suggestions suggested by the law commission went unnoticed. There is still a need to reexamine many sections and parts of the Contract Act, and there is a dire need for the suggested amendments to be made.