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To What Extent Does Adequacy of Consideration Play Different Countries when it comes to Common Law Jurisdiction?

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This research paper provides a comprehensive analysis of the concept of consideration within the Indian Contract Act 1872, emphasizing its departure from traditional English contract law principles and its adoption of a subjective conception of consideration. Through meticulous examination of historical developments, legal doctrines, and comparative jurisprudence, the paper highlights the ingenuity of the Indian Contract Act in adapting legal principles to the specific socio-cultural context of India. Key findings include the Act's deliberate rejection of doctrines such as Pinnel's rule, the recognition of moral and meritorious considerations, and the establishment of a subjective understanding of consideration based on the desires and intentions of the contracting parties. The paper also conducts a comparative analysis with Australian jurisprudence, revealing both similarities and differences in the treatment of inadequate consideration in contracts. Ultimately, the research underscores the transformative potential of the Indian Contract Act in fostering autonomy, equity, and justice in contractual relationships, while advocating for a nuanced understanding of consideration within the framework of modern contract law.

Keywords: *contract, consideration, moral consideration, comparative jurisprudence.*

INTRODUCTION

The Indian Contract Act 1872 isn't indigenous, it is a comprehensive act but not an exhaustive code of the subject.[1] The Act was first drafted by the commission that was appointed in 1864 in England, Lord Romilly M.R was the chairman of the drafting committee. The consideration was given as a draft to India. Further, the Indian legislative branch developed it. 'Stephen drafted the first nine sections of the Act; it is known that the definition of consideration has been given by Sir Fitzjames Stephen.'[2]

The Indian Contract Act was framed in such a way that the scope of consideration requirement is altered to the world where promises are enforceable to contracts. Three things were helpful to overcome the orthodox meaning of consideration. 'Firstly, Pinnel's rule was abolished this was done before the House of Lords in Foakes v Beer. Secondly, the moral consideration by Lord Mansfield that lapsed into desuetude after Eastwood v Kenyon was resurrected. The Act made enforceable promises valid for past voluntary services. Thirdly, the act made an agreement made out of love and affection legally enforceable and considered it as a meritorious consideration.'[3] The Indian Law Commission Report had planned to incorporate the agreement that is in written form, must be registered to be enforceable by law, but then it wasn't added to the final statute.

The Act protected induced dependence by enforcing the promises without consideration categorized under the traditional sense, with the help of a few doctrines such as promissory estoppel; promise to perform a pre-existing duty and to keep an offer open without consideration, there must be a binding promise.[4] The term 'consideration' encompasses the copula 'at the desire of, which is associated with the promisor's promise and the action, abstention, or promise performed by the promisee. The provided definition encompasses two distinct features. Firstly, it incorporates a subjective understanding of consideration, wherein

[1] R.N Gooderson, 'English Contract Problems in Indian Code and Case Law' (1958) 16(1) The Cambridge Law Journal <https://www.jstor.org/stable/4504494> accessed 15 March 2024
[2] *Ibid*
[3] Shivprasad Swaminathan, 'Eclipsed by Orthodoxy: The Vanishing Point of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872' (2017) 12(1) Cambridge University Press <https://doi.org/10.1017/asjcl.2017.5> accessed 15 March 2024
[4] *Ibid*

the determination of worth is based only on the promisor's wish, which contradicts the established rule. Furthermore, the enforceability of a promise is contingent upon the act, abstention, or promise inducing dependency on the part of the promisor.[5] Both the courts and several experts have consistently advocated for the traditional English concept of consideration, acknowledging its flaws and imperfections.

James Barr Ames has proposed two theories about consideration. In his comprehensive theory of consideration, he asserts that any deed, refraining from an action, or promise made in exchange for a promise can be considered sufficient consideration. This theory is favoured above the limited theory because it aligns with the legal norm established by the law.

The subjective conception of consideration is considered a foundational theory to abolish Pinnel's rule (section 63) and it helped to recognize moral consideration and meritorious consideration (section 25). Lord Denning's opinion on the definition of consideration, he says the goal of the Law Revision Committee could have been achieved even without the intervention of legislature if courts had embraced Ames's definition of consideration.'[6] According to Lord Denning, Ames definition should include a copula that safeguards induced reliance, where 'any act done on the faith of the promise is considered as sufficient consideration.'

In the early nineteenth century, The Will theory developed a model of contract differing from the traditional English model based on a bargain. The contract at this point had emerged from will theory which influenced the field of contract but then it was paradoxically and arbitrarily embraced by the English Courts. 'The contract law engaged in the subjective conception of consideration, and it has been stretched to the breaking point of the traditional way of benefit and detriment even the smallest things could suffice as consideration.'[7] In the 19th century, the common law system persisted in applying certain established principles, namely the pre-existing duty rule, Pinnel's rule, and the rule against moral consideration. These principles were based on the external standard approach, which stood in contrast to the will theory. There were

[5] Swaminathan (n 3)
[6] A.T. Denning, 'Recent Developments in the Doctrine of Consideration' (1952) 15(1) The Modern Law Review <https://www.jstor.org/stable/1090200> accessed 15 March 2024
[7] Swaminathan (n 3)

a few instances where it led to an idea that consideration doesn't have to have any value and this relayed upon the principle that consideration couldn't just be any factual benefit or detriment, but in fact, there must be legal benefit or detriment, value in the eyes of the law. The legal benefit shouldn't be confused with the motive in the fact. The Act removed the possible confusion by removing the reference to benefit or detriment.

The law students in India have been schooled that benefit detriment and value in the eye of the law is the definition of consideration in section 2(d)[8] and they see it as a symbol of bargain.[9] The section must be read as having some value in the eye of the law.[10] The Supreme Court of India considered that. English law and Indian law were 'substantially the same'.[11]

LITERATURE REVIEW

After collecting detailed basic information about the topic from the JSTOR. We referred to the articles Eclipsed by Orthodoxy: The Vanishing Pret of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872 by Shivprasad Swaminathan to understand the topic in a better way. Two Theories of Consideration, by James Barr Ames. English Contract Problems in India Code and Case Law by R.N. Gooderson. Considering Consideration in the Indian Law, An Analysis of the Requirement of Consideration in the Indian Contract Act, 1872 by Ashwary Sharma. We later referred to the case laws mentioned in the Research Papers. We covered the historical developments in the subjective conception of the consideration. The Traditional model of the consideration has been mentioned. An Expansive Ames Theory has been explained in the paper. The Copula which is considered the heart of consideration has been explained in the paper in detail. Interpolations between Stokes and Pollock and Mulla. We did a comparative analysis of the validity of a contract between India and Australia and mentioned the different opinions about the consideration. Later, the paper concludes with brief arguments.

[8] Swaminathan (n 3)
[9] I. C. Saxena, 'Reviews: The Indian Contract Act, 1872. Volume 1 by A. C. Patra' (1967) 9(1) Journal of the Indian Law Institute <https://www.jstor.org/stable/43949969 > accessed 15 March 2024
[10] Swaminathan (n 3)
[11] *Chidambaraiyer & Ors v P. S. Renga Iyer & Ors* (1965) AIR 193

OBJECTIVES

1). To show the ingenuity of the section 2d consideration.

2). The journey of the subjective conception of consideration from the early nineteenth century till date.

3). How does International Jurisprudence treat the inadequate consideration?

4). Comparison of Australian and Indian jurisprudence regarding subjective conception of consideration.

RESEARCH QUESTION

To what extent does adequacy of consideration play different roles in different countries when it comes to common law jurisdictions?

THE HISTORICAL DEVELOPMENTS

In the early nineteenth century, the will theory developed a model of contract which was different from the traditional English model based on a bargain. The will theory was dominant in the Continent, it has a different vision regarding contracts, it considers contracts as individual autonomy. The contract treatise pursued to fit the common law into the rational framework, this is exhibited after Robert Pothier's version of the will theory found in his *Traite des Obligations*. This model was against the traditional English exchange model, which used to take place through bargains. The will theory dismantled the 'consideration-as-exchanged' idea and sufficient with the benefit and detriment as indicia of exchange. Bainbridge v Firmstone and Haigh v Brooks case laws mitigated the barrier of consideration that made it no longer a barrier and no genuine exchange was needed in the least bit. Consideration is known as common law's great survivor.

In the 1805s, the Lip service paid to the capacious spirit of consideration but made a mere technicality. Around this time Indian Contract Act was about to get drafted and consideration

was becoming a mere technicality and had withered away altogether.[12] In England the ingenious common law reformers, the drafters unremitting to pay lip service to the idea of consideration and the reciprocity underlying it. The framers of the Act made it find very convenient by defining it in capacious terms, that contained any act or abstinence or promise, regardless of benefit or detriment. In 1872 section 2d of the Indian Contract Act provided ample space for the subjective conception of consideration. In the present times owing to decades worth of adverse rulings and interpolations, we have now lost touch with the ingenuity of the provision.

Subjective Conception: The amongst parties must be at the behest of the promisor/promisee. No external standard shall be imposed on the contracting parties. The people shall judge the value for themselves. The definition of consideration with its copula at the desire of creates potential doubt about whether consideration, in any case, was indeed valuable in the eye of the law. The subjective theory of value is trying to explain that the courts shouldn't interfere with whether a consideration is valuable, it must be left to the parties if the promisor desires something and if he gets the same the matter of consideration is settled by this. No external standard shall be imposed on the contracting parties. An exchange/bargain is not necessary, the people shall judge the value for themselves. The courts under traditional exchange made sure that the promisor gets something, the law would label it as valuable in exchange for the promise. The subjective theory had a support of will theory, so this made the parties judge the value for themselves and this has been expressed in the case law Haigh v Brooks.

The defendant gained what he sought by way of the promise he made to the plaintiffs, who were persuaded to part up what they could have retained. How can the defendant justify breaking this commitment by learning later that the object he provided it in exchange for lacked the worth he believed it to have when they are both free and capable of making their own decisions? It is impossible to know if he valued that principle above all others. He was the only one who could estimate the weight of his possible additional goals and motivations. In contrast to a paradigm where the courts considered that things had an essential character over which they would be

[12] Swaminathan (n 3)

the judges and resulted in the imposition of value from the outside, a subjective theory of value held that the worth of consideration was completely a matter for the parties.[13]

Bainbridge v Firmstone and the American case of Hamer v Sidway, where it was decided that the nephew's refusal to smoke at the uncle's request constituted payment in exchange for the latter's promise to give the nephew money. These examples might be used to demonstrate that, contrary to the standard paradigm of business, any purpose of the promisor qualifies as an advantage. According to Atiyah, 'Many gratuitous promises would become enforceable only because the promisor feels satisfied because of the promise. This is because the benefit in the standard concept of consideration might be understood as a shorthand for motive.'[14]

According to Robert Merkin, 'the doctrine once had a subjective tone because any motive on the part of the promisor-or practical benefit to the promisor, whether it was also objectively valuable and burdensome on the promisee-could constitute a benefit. At that time, the emphasis of the doctrine was on the benefit to the promisor rather than on whether the promisee had suffered enough harm to warrant the court's protection.'[15]

AMES'S THEORY

According to Two Theories of Consideration, a contract is enforceable unless it violates public policy.[16] It endorsed the will theory. According to Hugh Willis, Ames' broad definition of consideration had the effect of implying that there would be found in the law of consideration nothing that is not already found in the law of agreement.[17] Willis' remark, which almost comes

[13] Patrick Selim Atiyah, 'The Rise and Fall of Freedom of Contract' (1982) 1(1) Australian Journal of Law & Society <http://www5.austlii.edu.au/au/journals/AUJlLawSoc/1982/13.pdf > accessed 15 March 2024
[14] Swaminathan (n 3)
[15] Vivek Jha, 'The Doctrine of Privity of Contract under Indian And English Law' (*Legal Service India*) <https://www.legalserviceindia.com/legal/article-8557-the-doctrine-of-privity-of-contract-under-indian-and-english-law.html> accessed 15 March 2024
[16] *Chidambaraiyer & Ors v P.S. Renga Iyer & Ors* (1965) AIR 193
[17] Hugh Evander Willis, 'Consideration in the Anglo-American Law of Contracts' (1932) 8(3) Indiana Law Journal <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=4932&context=ilj > accessed 15 March 2024

off as iconoclastic given Ames' definition, did little more than highlight the logical ramifications of taking seriously the adage that the law does not inquire into the sufficiency of deliberation.'[18]

The instances ruled following Pinnel's rule up until and including Foakes v Beer, according to Ames' thesis, did not fit in with the expansive theory since they only made sense under the restricted theory.[19] These situations must be handled as anomalies. Additionally, he pointed out that instances like Foakes v Beer were swimming against the current and would eventually be replaced by statute, as they were by the authors of the Indian Contract Act.[20] This went much further than any of the British supporters of the will hypothesis were prepared to, for instance, Pollock backed the subjective theory of value while purportedly supporting the will theory. That did not stop him, nevertheless, from defending the pre-existing obligation rule because the promisor had not suffered new damage. Pollock disagreed with Ames' assertion that any deed or show of patience, regardless of its worth, constituted consideration.[21] According to this perspective, the law of consideration contains nothing novel that cannot also be found in the law of agreement (Willis). The hypothesis appears to be unrealistic (Pollock). None of the principles would have likely survived if deliberation had lost its subjective tone and the assumption that any benefit or harm, no matter how little, would suffice.

There is plenty of evidence to suggest that the founders consistently intended to give the doctrine of consideration a strongly subjective tone. Along with abolishing Pinnel's rule, the Indian Contract Act also made it clear that moral consideration would be valid and that 'natural love and affection' would constitute consideration, all of which were changes that were consistent with giving consideration a decidedly subjective tone. The Act further shifted the notion of consideration towards the subjective pole by stating that any act, abstention, or promise made "at the desire" of the promisor qualifies as consideration.

The copula at the desire of forbids the use of any norm other than the preferences or aspirations of the contractors. There was no room to impose a pre-existing obligation rule or requirement

[18] Swaminathan (n 3)
[19] James Barr Ames, 'Two Theories of Consideration. i.e. Unilateral Contracts' (1899) 12(8) Harvard Law Review <https://doi.org/10.2307/1321909> accessed 10 March 2024
[20] *Ibid*
[21] Swaminathan (n 3)

that a forbearance in respect of a worthless claim was without consideration given this orientation of the concept of consideration.[22] The law could not truly contest its worth or value if that is what the promisor desired. This resulted in a broad catchment area for the term under Section 2(d). According to this definition of consideration, Williston's tramp would have considered the promise made to him to be not gratuitous; his stepping around the corner at the promise-maker's request would have amounted to regard for the promise-maker's pledge to pay for an overcoat.[23] Despite this, the law in India ultimately adopted the traditional English law of contemplation, complete with all its inherent inconsistencies, as we will see later in this section. The idea of advantage and harm, as well as worth in the eyes of the law, was interpolated into Section 2(d) for that purpose; this project was mostly carried out by the major commentators on the Indian Contract Act, including Whitley Stokes, Frederick Pollock, and Dinshah Mulla.

Abolishing of Pinnel's Rule, The Indian definition has abolished Pinnel's rule as it states that part payment cannot be considered as good consideration to a contract. The abolition is because the Indian definition rules out the use of any standard other than the contractors' desire. The Indian definition states that no more advantage or harm is necessary beyond what is determined by the contractors for consideration to be legitimate. According to this, a consideration is legitimate if the benefit or harm is not regarded as valuable in the eyes of the law.

Opinions of Whitley Stokes, Pollock and Mulla and Prof Swaminathan:

Whitley Stokes:

1). Whitley Stokes, admits that there's no requirement of additional detriment.

2). He also claims that framers could not have intended to tamper with the English rule.

3). He mainly defined it in terms of detriment.

[22] Swaminathan (n 3)
[23] Lon L. Fuller, 'Williston on Contracts' (1939) 18(1) North Carolina Law Review <https://core.ac.uk/download/pdf/151512835.pdf> accessed 15 March 2024

Pollock and Mulla:

1). Pollock and Mulla claim that if it must be enforceable, a consideration must be 'valuable' by law and not by the parties themselves.

2). They both admitted to the omission, but they claim that the silence of the Act cannot be taken as altering the English law.

3). They are both defined in terms of benefit and detriment.

Prof Swaminathan:

1). Prof Swaminathan's perspective believes that there is no requirement of benefit or detriment.

2). The claims of Stokes don't have any evidence. Pollock and Mulla didn't make any proposal in the text, framers did away with traditional code.

3). Definition doesn't involve benefit and detriment. But is more capacious and subjective.[24]

A complex and nuanced subject, inadequate consideration in contracts is subject to international jurisdiction and is closely related to the legal systems, rules, and customs of several nations as well as international treaties. In this more thorough discussion, we will go into the comparative elements of international jurisdiction regarding contracts with inadequate consideration, offering a thorough study of how other countries approach and resolve this issue.

Opinion International Jurisprudence on the subjective conception of Consideration: In Civil Law systems, like those in continental Europe, the interpretation and application of the law by the courts may be more rigorous. Contract law is frequently codified in these systems. Inadequate consideration may be assessed following legal requirements and fairness standards. Common law systems, such as those in the US and the UK, rely on case law and precedents,

[24] Swaminathan (n 3)

which can give judges more latitude in how they interpret and implement the law of contracts. When determining inadequate consideration, courts may consider all relevant factors.[25]

Comparative Analysis between Indian and Australian Jurisprudence about Inadequate Consideration: The Australian and Indian jurisprudence share some similarities regarding inadequate consideration in contracts due to their common law heritage, but they also exhibit distinct differences shaped by cultural, historical, and legislative factors. This comparative analysis provides insights into how each jurisdiction approaches inadequate consideration in contract law. Australia and India both rely on common law principles, highlighting the necessity of legal consideration for a contract to be enforced. This common ground includes the notion that consideration must be adequate but need not be.

Meeting of the Minds: Both legal systems stress the need for a meeting of the minds or consensus ad idem between the parties, suggesting that they must be aware of and concur with the key provisions of the contract.

Australia has a federally organized, unified legal system. The Australian Consumer Law (ACL), which guards consumers against unfair contract conditions, is one of several legislative laws that augment common law norms on contract law, especially those about insufficient consideration.[26] On the other hand, India is governed under a federal system that includes unique contract laws at the federal and state levels. The primary piece of legislation controlling contracts in India is the Indian Contract Act, of 1872. There isn't a uniform national consumer protection statute like the ACL in the United States, unlike Australia. In Australia, a contract may be voidable due to insufficient consideration, which means it will remain in effect until one party decides to void it. This gives parties a little flexibility in case they subsequently see how unfair the provisions of the contract are. The Indian Contract Act declares contracts with insufficient consideration void, making them unenforceable from the beginning. However, if

[25] Ashwary Sharma, 'Considering Consideration in the Indian Law' (2018) SSRN <https://dx.doi.org/10.2139/ssrn.3674969> accessed 15 March 2024
[26] *Ibid*

some contracts that have little or no consideration fit within the Act's exclusions, they could still be upheld.

In Australia, when deciding whether to uphold a contract, Australian courts are more likely to take public policy into account, particularly when there are large disparities in bargaining power or unethical behaviour. Contracts that are found to be against public policy may be revoked. In India, although public policy is considered by Indian courts, the Indian Contract Act makes less explicit references to it than Australian law does. Instead, to invalidate contracts that contravene public policy, Indian courts may rely on basic principles of equity and fairness.

The common law practice of requiring valid consideration for enforceable contracts is upheld by both Australian and Indian jurisprudence on inadequate consideration in contracts. The way they regard inadequate consideration (void vs. voidable) and how much they consider public policy and unconscionability, however, are different. When dealing with contract issues involving inadequate consideration, these variations reflect the legal, cultural, and historical settings unique to each jurisdiction and emphasize the value of getting legal counsel that is specialized to that jurisdiction.[27]

ANALYSIS

The notion of consideration in contract law is thoroughly examined in this research study, which also compares Australian jurisprudence with the Indian Contract Act of 1872. It does excellent work of highlighting the creativity that goes into the Indian Contract Act, especially in the way it handles consideration. The Act offered a more flexible and nuanced approach to contract enforcement by departing from conventional English law by eliminating Pinnel's rule and adopting a subjective definition of consideration. This divergence reflects the drafters' purposeful attempt to modify legal precepts to fit the particular circumstances of India, exhibiting their progressive mindset toward legal reform. The article also provides insightful information on the comparative analysis of Australian and Indian jurisprudence addressing inadequate consideration in contracts. Despite having similar law roots, the two legal systems differ greatly due to legislative, historical, and cultural influences. Legal professionals and

[27] *Ibid*

legislators handling cross-border contractual issues must be aware of these distinctions because they emphasize the necessity of uniformity and clarity in contract law across legal systems. The Indian Contract Act serves as an example of the subjective idea of consideration, which emphasizes the goals and preferences of the contracting parties in order to foster autonomy and justice in contractual interactions. This method is different from conventional English law, which favours enforcing external norms of value. Legal systems can encourage a more favourable climate for business transactions and dispute resolution by adopting a subjective conception that improves the flexibility and equity of their contract rules.

CONCLUSION

1). The removal of Pinnel's rule and prior consideration demonstrates that any prior obligation was eliminated (through copula).

2). This demonstrates that the drafters, who were knowledgeable about English law, intended to introduce these revisions and depart from the conventional definition.

3). Stokes' claim that the drafters could not have intended to deviate from the conventional meaning is thus unfounded.

4). Therefore, in our opinion, Stokes' argument cannot be taken seriously since there has been a deliberate effort to change the English meaning.

5). Adding to point 2, the resurgence of moral concern implies that the authors of the document made a deliberate choice to deviate from the traditional definition and place emphasis primarily on the aspirations or appetites of the contractual parties. Pollock and Mulla's perspectives are likewise unfounded because the drafters made it plain when the copula was to be used.[28]

[28] Swaminathan (n 3)