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ASSESSING CONSIDERATION AS THE SOLE DETERMINANT OF CONTRACTUAL INTENTION: A CRITICAL ANALYSIS OF LEGAL PRINCIPLES

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I. ABSTRACT

Judges, practitioners, and academics of contract law have all engaged in passionate debate and discussion over the need for consideration in contractual disputes. Common law Academics have argued time and again that consideration should be eliminated since it cannot be considered a fundamental component of contract law. Given that consideration's place in Indian law is the same as it is in common law, this debate is also well-known in the field of Indian contract law jurisprudence. The prevalent understanding of consideration in Indian contract law has been questioned². There is a contention that the definition of consideration found in the Indian Contract Act, 1872, deviates from the common law's conventional understanding of consideration, which is something that can be valued objectively and encompasses promises that are subjectively expressed.

This research aims to demonstrate that subjectively expressed commitments were not intended to be covered by the Indian Contract Act. Its ongoing existence has also been explained by the fact that it fosters a particular and different type of connection between the parties to an agreement. Some believe that consideration is the sole element for determining the enforceability of a contract while others, due to its vague nature, have many a times criticized it. This legal research paper shall highlight the historical evolution of the concept of Consideration in common law and Indian law along with the debates on the requirement of Consideration while determining the Contractual intentions with criticism and justifications by various contract scholars.

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² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674969

II. KEYWORDS:

Contract, Agreement, Consideration, legal enforceability, assumpsit, quid pro quo

III. INTRODUCTION

The position of Indian Contract Act is substantially the same as that of the Common law when it comes to the fact that the requirement of the Consideration in a contract is one of the essential elements of a valid contract. Simply put: No Consideration No Contract. An agreement will lack legal enforceability unless it is backed by the element of consideration. Barring certain exceptions, that is.³

This is where the question arises, and arguments are put forth. Some believe that since consideration does not necessarily form the essence of the contract law, consequently time has come to abolish it.⁴ Others have pointed out the irregularities in the application of the consideration requirement by the courts and consequently has called for its repeal.⁵

Some scholars argued from a theoretical standpoint by propounding a theory of contract and analysing the consideration requirement to see whether it fits a particular theoretical model of contract law as a whole. In contrast, there have also been some justifications of the consideration requirement.

This debate has recently into the sphere of the Indian Contract law. It has been argued that that the definition of consideration in the Indian Contract Act, 1872 is a step away from the traditional Common Law conception of consideration⁶ and is wide enough to cover subjectively manifested promises; hence, it was “designed to mark the vanishing point of consideration without having to formally abolish it.”⁷

³ The Indian Contract Act 9 of 1872 (1872).

⁴ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (Oxford University Press. 2015).

⁵ Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, 49 HARV. L. REV. 1225 (1936)

⁶ In the traditional common law sense, an objective/external test is applied to the consideration requirement. This means that the it must have some value in the eyes of law. In other words, it can be measured in terms of money or money's worth.

⁷ Shivprasad Swaminathan, *Eclipsed by Orthodoxy: The Vanishing Point of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872*, 12 ASIAN JOURNAL OF COMPARATIVE LAW (2017).

It is also argued that consideration has never been the only determinant of enforceability of agreements, rather, the courts, have applied it flexibly to enforce agreements which we now enforce under the labels of unjust enrichment, promissory estoppel, and moral obligation, in the early years of the evolution of consideration requirement.

IV. RESEARCH OBJECTIVES

1. To study extensively the origin of consideration in common laws and Indian laws respectively.
2. To comprehensively examine and assess the legal provisions and principles related to consideration as the sole determinant of contractual intention.
3. To elucidate the ground on which the scholars differ on the question of importance of consideration and placing it out.

V. RESEARCH QUESTIONS

1. How the concept of consideration evolved?
2. Whether it is the sole determinant of contractual intention?

VI. RESEARCH HYPOTHESES

1. The concept and existence of consideration is essential for the contract however its definition is quite vague, and it more often depends on the discretion of the judicial authorities.
2. Some contracts may have the legal enforceability attached to it despite not having consideration, while some contract with consideration may still be enforceable. Thus, the emergence of the ongoing debate.

VII. RESEARCH METHODOLOGY

This paper utilizes a strictly doctrinal research approach. Doctrinal research, known as library-based research, primarily involves the study and analysis of legal statutes, case law, and academic writings. This method is ideal for exploring the theoretical and conceptual dimensions of law. It systematically presents legal doctrines and principles. In doctrinal research, primary sources include statutory materials, judicial

decisions, and authoritative literature. Secondary sources like commentaries, articles, and legal summaries are also essential. The research process entails identifying, gathering, and critically evaluating these sources. The goal is to form logical conclusions and provide insights on the legal questions being studied. This paper aims to deliver a thorough and unified view of the legal structure relevant to the topic addressed.

VIII. MEANING, DEFINITION & EXPLANATION

- **Indian Law**

The position of the consideration requirement in English common law is essentially the same as in Indian law, as Pollock and Mulla have stated several times.⁸ The Indian Supreme Court has also rendered a decision on this matter.⁹ Contractual consideration is a prerequisite for an agreement to be enforceable under Indian contract law, with a few exceptions allowed by the law, such as gratuitous promises where a written agreement is required. According to the Indian Contract Act of 1872, section 2(d), consideration is defined as:

“When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

According to Pollock and Mulla, which is considered as an authoritative work on Indian Contract Act, consideration can be “an act, forbearance or promise done or given at the request of the promisor to any other person.” According to the most authoritative publications on the Indian Contract Act, there is a benefit and harm component to India's demand of consideration.¹⁰ In a number of situations, the courts have also resolved this issue.¹¹

⁸ POLLOCK & SIR DINSHAW FARDUNJI MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 46 (Lexis India 14 ed. 2012).

⁹ Chidambaraiyer v Renga Iyer [1965] AIR SC 193, 197.

¹⁰ AVTAR SINGH, CONTRACT & SPECIFIC RELIEF (Eastern Book Company 12 ed. 2017)

¹¹ e.g., Sonia Bhatia v State of UP, AIR 1981 SC 1274; Muthukaruppa Mudali and Ors v Pi Mu Kathappudayan and Ors (1914) 24 MLJ 249

The Law Commission of India, in its 13th report,¹² has pronounced that that the need that consideration be genuine and have some legal significance is implied by the term itself and does not require explicit provision of such information. The Supreme Court examined whether or not love and affection, spiritual benefit, or other comparable elements constitute adequate consideration in the case of in the case of *Sonia Bhatia vs State of Uttar Pradesh*¹³.

The Court observed that 'consideration' means a valuable benefit or reasonable equivalent given by the promisor to the promisee...love, affection, spiritual benefit and many other factors are considerations that cannot be called or held to be legal considerations as understood by law."¹⁴ The Supreme Court has observed that the expression "valuable" is implied under Section 2 (d) of the Contract Act and something is valuable if not only parties but the law can regard it as having some value.¹⁵

IX. HISTORICAL BACKGROUND / EVOLUTION

It is challenging to pinpoint where the requirement of consideration emerged. In the opinion of Ames, contemplation cannot be attributed to a single source. There are a variety of opinions on this matter. Some see it as a reworking of the Roman *causa*, or as a reworked *quid pro quo* in the context of debt; other link it to the *assumpsit* action. The word "assumpsit," which originates from the Latin "to undertake," refers to a damages action taken in the event of a contract breach.

The procedural requirements of the action in *assumpsit* gave rise to the fundamental components of the current need of contemplation. Courts began referring to actions in *assumpsit* as distinct from actions in debt, using the terms "consideration" in the former and "quid pro quo" in the latter.

During latter half of the sixteenth century, the action in *assumpsit* became an alternate to an action in debt when debt was brought on a contract. This had a lasting impact on the evolution of the requirement of consideration. Consideration, in context of

¹² Law Commission of India, 13th Report on the Indian Contract Act, 1872 15 (1958).

¹³ 1981 SCR (3) 239

¹⁴ *Sonia Bhatia v State of UP* AIR 1981 SC 1274

¹⁵ *Chidambaraiyer v Renga Iyer*, AIR 1965 SC 193, 197.

contracts, did not acquire a technical meaning by early sixteenth century. In the latter half of sixteenth century Assumpsit became an alternative to debt and was used to make promises enforceable; As a result, it took on a technical meaning in that it described the conditions that had to be met for a promise to be enforceable. It evolved into a remedy for contracts that were only executory. The facts that were depended upon to make the promise enforceable in assumpsit began to be referred to as consideration.

When determining whether an agreement may be enforced, courts used to look for certain, solid considerations by the sixteenth century in all agreements. Although sixteenth-century courts employed consideration to uphold a wide range of commitments, they did not uniformly apply this criterion, and they twisted it to uphold pledges that are today known as promissory estoppel, unjust enrichment, and moral obligations.¹⁶

X. COMPARISON WITH OTHER COUNTRIES

Defining Consideration: English Law

Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd has laid out a popular definition of consideration as:¹⁷

“An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.”

This definition involves the idea that the act or forbearance is something which have values as recognised by the law. The law imposes a materialistic/practical standard on what qualifies as consideration. It is not based on what the parties themselves regard as consideration according to their own subjective evaluation. This objective position manifests itself in two necessary conditions – benefit and detriment, and valuable benefit. Another popular definition of consideration was given in the well-known case of Currie v Misa as seen from the perspective from benefit or detriment:¹⁸

¹⁶ Ricks

¹⁷ Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd, 195 AC 847 (1915)

¹⁸ Currie v. Misa (1875) LR 10 Exch 153, 162.

“A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one part, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.”

XI. Essentials / Elements / Pre-requisites

Conventionally, consideration requirement is known to have these main elements:

- i. the promise must go hand in hand with consideration;
- ii. it must move from promisee;
- iii. adequacy of the consideration is not a requirement;
- iv. it must hold some value in the eyes of law; and
- v. it must be executory or executed, but it cannot be past;

XII. Exceptions

Sec 25: An agreement made without consideration is void, unless –

(1) it is expressed in writing and registered under the law for the time being in force for the registration of 1 [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless;

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

XIII. Debates on consideration requirement

The Contract law arena is not short of enormous debates on the consideration requirement. Some have scholars beautifully and adequately tried to explain it,¹⁹ some

¹⁹ e.g., Lon L Fuller, Consideration and form, 41 COLUM. L. REV. 799 (1941).; See Hamson,

have undeniably called for its repeal,²⁰ while others have tried to meticulously defend it.²¹

A) Criticism

- *Lord Wright's Inconsistency Argument*

The consideration requirement has more often been challenged and asked to either modified or repealed altogether, on the premise that its application by the court has been inconsistent and irregular. He distinguishes between two categories of cases, which is how he attacks the requirement of consideration. First, instances in which a contract has been upheld by the courts in the absence of consideration.²²

Second, in cases where consideration is present but the contract has not been upheld by the courts.²³ He contends that courts will not determine deliberate mind solely by looking at the presence or absence of consideration, and that the consideration requirement is not the deciding factor in establishing a contractual intention. He contends that consideration is not the only test of contractual intention and that courts can determine contractual intention in a variety of ways. Moreover, he argues that the requirement of consideration may occasionally undermine the parties' legitimate intentions. According to his proposal, a rational theory of contracts should prioritize contractual intention and test it based on a number of criteria, including the existence of a serious and intentional contractual intention and the absence of illegality, duress,

²⁰ Wright, *supra* note 4; Clarence D Ashley, *The Doctrine of Consideration*, 26 *see id.* at 429 (1913). Mark B Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 *LOY. LAL REV.* 713 (1995); Mark B Wessman, *Should We Fire the Gatekeeper-An Examination of the Doctrine of Consideration*, 48 *U. MIAMI L. REV.* 45 (1993);

²¹ Peter Benson, *The Idea of Consideration*, 61 *UNIV TOR LAW J* 241 (2011).; Mindy ChenWishart, *In Defence of Consideration*, 13 *OUCLJ* 209 (2)

²² In this, he takes the example of *Balfour v Balfour*, in which, a man promised an allowance of 30 pounds to his wife in return for her agreement of supporting herself entirely out of that allowance. It was held in this case that even though there was consideration, the arrangement is not a contract as there was no contractual intention. He takes numerous other examples such as *White v Bluett*, *Conradie v Rossouw*, and *Rose and Frank Co. v Crompton* through which he highlights that consideration was not regarded as decisive to determine contractual intention and that is it only one of the many ways which courts determine contractual intention.

²³ In this, he gives the example of *Foakes v. Beer*

error, fraud, or immorality.²⁴ According to this theory, consideration would not be a requirement of the contract, but rather it would serve as evidence.²⁵

- *Fried's Criticism*

In the field of consideration studies, Fried's critique of consideration is highly regarded. He critiques consideration for a number of reasons. First, he argues that the consideration requirement's main components are incompatible since it calls for a deal or exchange but does not mandate that it be sufficient. It is incoherent to demand a deal while simultaneously defending the right to enter into contracts. Second, a large number of non-consideration contracts are upholdable. As an illustration, a pledge to reimburse a previous favor. Thirdly, requiring consideration creates injustice by making well-intentioned promises unenforceable.²⁶

B) Justification

- *CJ Hamson's Bargain Model*

According to him it is not right to dismiss consideration and ignore the practicality of law just because it does not fit a theoretical frame.

- *Atiyah's Justification*

Atiyah argues that the courts use consideration to take into account various factors for and against enforcing agreements. Atiyah's approach towards consideration is called the realist approach.

The main problem with seeing consideration as any good reason to enforce a contract is that there is no end to a list of reasons to enforce a contract and it can be modified by judges as they see fit. This leaves the requirement of consideration into a very uncertain terrain.

- *Peter Benson's Transfer Approach*

To build his justification of consideration, Benson then takes the traditional features of consideration, viz, the consideration must either be a promise or move from a

²⁴ Wright,

²⁵ *id*

²⁶ FRIED

promise, it must have some value in the eyes of law, it must move from a promisee. He analyses these features seriously and tries to show how each of these tradition feature contributes to a special kind of relationship established by consideration.

XIV. CONCLUSION, SOLUTIONS, SUGGESTIONS & RECOMMENDATIONS

So far in this, ever other account we have seen has made considerable progress of outlining the substantive features that the consideration requirement serves, or highlighting the challenges that arise when the consideration requirement is strictly applied. Based on these insights, the accounts attempt to either support or refute the consideration requirement in light of their overall conception of the law of contracts.

One mistake these accounts always end up making is that they see consideration requirement as 'the' determinant of enforceability of an agreement rather than 'a' determinant of enforceability. Consideration, though the most dominant, has never been the only determinant of enforceability; rather, the courts, when required saw it fit to bend the requirement for consideration and make promises without consideration enforceable on other grounds. Some of these grounds have taken shape of separate rules in themselves. These laws are now known as moral obligation, unjust enrichment, and promissory estoppel.

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