VOLUME 2 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

REVISITING CONSIDERATION AS AN ESSENTIAL IN LAW OF CONTRACTS

- Amritanshu Pushkar & Shruti Suman[1]

ABSTRACT

Numerous scholarly arguments include the fact that 'Consideration' as an essential in law of contracts has its day and should be called off to enable social and verbal contracts to be evenly enforceable and binding. 'Consideration' with its importance under the Indian Contract Act, 1872 distributes the importance to establish why it should not be the only determinant to enforceable contracts instead of being 'one of the determinants of an enforceable contract'. The scholarly arguments refute to acknowledge on record that consideration, though the most dominant, has never been the only determinant of enforceability. As the time progressed, the traditional features of consideration requirement became firm in the way courts applied it and innovations in the sixteenth century were disregarded. Consideration became almost like a complex 'doctrine' but scholars were quick to find inconsistencies in the application of consideration requirements. At the same time, attempts were being made to elucidate a normative conception of contract law to find a relationship that can explain its doctrines and principles. Three of the most popular of these attempts came out in the form of the promise theory, the reliance theory, and the bargain theory. Scholars tried to analyze where the consideration requirement fits in a wider theory of contract as a whole. With some controversial issues and backgrounds and high variance of plausible arguments, the paper aims to elucidate the substantive features of 'Consideration' under the Indian Contract Act, 1872.

---

[1] Students at Symbiosis Law School, Pune & Hidayatullah National Law University Respectively

© 2022 International Journal of Advanced Legal Research

INTRODUCTION

In the Common Law, the requirement of consideration is one of the essential requirements of a valid contract. An agreement is not enforced in the court of law if it is not supported by consideration. The position is substantially the same in the Indian law of contracts. Barring certain exceptions, the Indian Contract Act, 1872[2] ("The Act") makes agreements not supported by consideration unenforceable.[3] Over the years, the essence of consideration in a contract has taken a toll, turning the opinion of many jurists, judges and contract law scholars to insist on making consideration cease to be an essential[4]. Others have pointed out the logical incoherencies in the application of the consideration requirement by the courts and hence, 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. On the other hand, there have also been some persuasive justifications of the consideration requirement. This debate on the consideration requirement has recently entered into the Indian contract law sphere when the dominant conception of consideration in the Indian contract law has been called into question[6]. It is believed that consideration under the Indian Contract Act, 1872 is severely different from those of the beliefs from the Common Law; hence, it "designed to mark the vanishing point of consideration without having to formally abolish it." Furthermore, it has been argued that the interpretation by the scholars in India interpreted the definition harmoniously with the Common law conception of consideration thereby 'eclipsing' the innovation of drafters of the Indian Contract Act with 'orthodoxy'. Here, the approach taken by the courts has been challenged and criticized using mainly the language of the Act. Hence, to answer this criticism, we will need to look closely at the language of the Act. These

---

[2] Indian Contract Act, 1872 (Section 9).

[3] Section 25 of the Act carves out certain exceptions to the rule that consideration is a necessary requirement for an enforceable contract.

[4] See, e.g., CHARLES FRIED, CONTRACT AS PROMISE: A Theory of Contractual Obligation (Oxford University Press. 2015).

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

[6] See 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).

© 2022 International Journal of Advanced Legal Research

arguments and debates do well to find out incoherencies in the application of consideration requirement and provide a normative basis for consideration requirement and contract law as a whole. But most of these arguments and debates fail to highlight some of the substantive features of consideration which necessitates its continued existence. They do not go into the question of what kind of relationship between the two parties, the consideration requirement helps to build. Also, they mistake consideration to be the only determinant of contract enforceability.

Through the following chapters, the paper aims to justify the rapport, 'consideration' as an essential help in building, which inherently and logically support for its continued existence. The paper also argues that consideration has never been the only determinant of enforceability of agreements, rather, the courts, in the early years of the evolution of consideration requirement, have applied it flexibly to enforce agreements which we now enforce under the labels of unjust enrichment, promissory estoppel, and moral obligation.

HISTORY & EVOLUTION OF CONSIDERATION

3.1 ORIGIN IN ENGLISH COMMON LAW

The origin of the requirement of consideration is difficult to trace. Many claims have been made about its origins and the sources which influenced its principles. Ames was of the view that it is impossible to direct consideration deriving from a single source[7]. Various views exist in which some see it as a modified generalization of quid pro quo in action for debt; some see it as a modification of Roman causa; some trace it to the action of assumpsit.[8] In its present form in English Common Law—seen, most importantly, as a detriment to promisee—consideration can be traced to special (specific) assumpsit; therefore, it is important to understand how it evolved from the action of assumpsit. The account of origin given here draws majorly from the work of Ames, Ibbetson, Baker, and Jenks.

---

[7] See James Barr Ames, The History of Assumpsit. I. Express Assumpsit, HARV. L. REV. 1 (1888).

[8] See generally Harold J Berman & Charles J Reid Jr, The transformation of English legal science: from Hale to Blackstone, 45 EMORY L.J. 437, 451-452 (1996). Berman and Reid explain that at that time, the English Royal Court entertained complaints in form of Writ. There were various types of writ to deal with different kinds of complaints. Writ of 'trespass' was used for complaints dealing with possessory rights of land, chattels, and person.

© 2022 International Journal of Advanced Legal Research

In the early sixteenth century, the common law had various forms of action. These forms of action were used for remedying a wrong or vindicating a right[9]. Covenant, case, and debt were such forms of action; these three forms of actions provided ordinary remedies for the enforcement of contractual claims in royal courts. The writ of 'covenant' was used for a breach of written instrument containing a promise. In the late fifteenth century and early sixteenth century, the courts used assumpsit, a species of trespass on a case, to enforce promises. Assumpsit is a Latin word meaning 'to undertake'. At that time, the lawyers preferred assumpsit to enforce promises rather than covenant and debt.

The main elements of the current requirement of consideration emerged from the procedural requirements of the action in assumpsit[10]. Assumpsit wasa form of action at common law whose origins can be traced back to the fourteenth century[11]. Assumpsit (Latin: has undertaken), in common law, referred to an action for damages in case of a breach of contract. During the fifteenth century, a defendant's breach of an agreement was characterised as a 'wrong.' But this wrong was not recognised in the case of nonfeasance. An action for breach of agreement only lay in case of misfeasance or deceit. By the beginning of the 16th Century, courts started accepting defendants' nonfeasance in the writ of assumpsit. Actions in assumpsit soon established as separate from the action in debt and the courts started using 'consideration' in the former and the expression 'quid pro quo' in the latter.

Consideration, in the context of contracts, did not acquire a technical meaning by the early sixteenth century. Assumpsit became a replacement to debt in the latter half of sixteenth century and was used to make promises enforceable by introducing facts which were relied upon; hence, it acquired a technical meaning in the sense that it indicated facts and circumstances which must be proved to make a promise enforceable. It also became a remedy for purely executory contracts[12]. The word consideration started to be used to refer to facts that were relied upon to make the promise enforceable in assumpsit. Lawyers started extending the action of assumpsit in simple contracts and in doing that, they used analogies

---

[9] See Val D Ricks, The Sophisticated Doctrine of Consideration, 9 GEO. MASON L. REV. 99, 101 (2000).

[10] See WS Holdsworth, Modern History of the Doctrine of Consideration, 2 BUL REV. 174, 87 (1922).

[11] George F. Deiser, The Origin of Assumpsit, 25 HARV. L. REV. 428, 429 (1912).

[12] William S Holdsworth, Debt, Assumpsit, and Consideration, 11 MICH. L. REV. 347 (1913).

© 2022 International Journal of Advanced Legal Research

from the action of debt thereby leaving a permanent impact on the development of the law of contract which can still be seen. For example, the influence of ideas derived from quid pro quo in action of debt can be found in our accepted modern definition of consideration. By the sixteenth century, some elements of consideration became firm which the courts used to look for in all the agreements. Though the courts in the sixteenth century used consideration to enforce a wide variety of promises, the courts did not apply consideration in its original sense, bending it to the extent to devise terms like promissory estoppel, unjust enrichment, and moral obligation. We will see how these traditional elements of consideration and other principles of enforceability emerged.

3.1.1 Traditional Elements of Consideration

Traditionally, consideration requirement had four main elements:

i) the promise must be induced by consideration and vice versa;

ii) it must move from promisee;

iii) it need not be adequate;

iv) it must be executory or executed, but it cannot be past; and

v) it must have some value in the eyes of law.

3.1.2 Other Principles of Enforceability

In the eighteenth and early nineteenth centuries, two new principles emerged in relation to the requirement of consideration. One is the idea of identifying consideration with moral obligation. The idea was that any moral obligation was sufficient consideration. The other is seeing consideration as having a mere evidentiary value[13]. This campaign was spearheaded by Lord Mansfield in a series of cases[14]. The idea of consideration as a mere evidence, which was propounded by Lord Mansfield in *Pillans v. Van Mierop*[15], did not see much light in case

---

[13] See JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (Oxford University Press 4 ed. 2002).

[14] This series of cases included Ball v. Hesketh (1697), Trueman v. Fenton (1777), and most famously Pillans v. Van Mierop (1765).

[15] (1765) 3 Burr 1663.

© 2022 International Journal of Advanced Legal Research

law and was overruled in *Rann v. Hughes*[16]. The idea of moral obligations as sufficient consideration survived a bit longer until it was decisively rejected in the nineteenth century. At the same time, the courts started enforcing agreements under the principles of promissory estoppel, moral obligation, and unjust enrichment.

3.1.3 Consideration under Indian Contract Laws

According to Pollock and Mulla, the position of the consideration requirement in Indian law is substantially the same as in English Common law. This position has been settled by the Supreme Court of India as well.[17] Consideration, in Indian contract law, is a necessary requirement for an agreement to be enforceable as a contract, barring some exceptions such as in the case of gratuitous promises where the law imposes a requirement of writing. Section 2 (d) of the Indian Contract Act, 1872 defines consideration 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." The position taken in the most authoritative works on the Indian Contract Act is that the requirement of consideration in India involves an element of benefit and detriment. The courts have also reiterated this position in various cases[18]. The Law Commission of India, in its 13th report, opined that the fact that consideration must be real and of some value in the eye of law is implicit in the term itself and there is no need to expressly provide the same. In *Sonia Bhatia vs State of Uttar Pradesh*, the Supreme Court considered if matters of love and affection constitutes sufficient 'Consideration', for the purposes of law. The Court observed that "'consideration' means a

---

[16] (1778), 7 T.R. 350.

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

[18] See, 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.

© 2022 International Journal of Advanced Legal Research

reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee...love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law." The court also regarded, considered and deliberated over the expression 'valuable', holding that Section 2(d) of the Indian Contract Act, 1872 mandates something to be valuable only when the law considers it to be 'valuable', along with the parties to the contract.[19]

The main reason cited for making consideration a necessary element in a contract is to impose limits on the enforceability of promises. It flows from the position in English Common law in which one of the main reason for consideration requirement in putting limits freedom of individuals to make binding legal promises thereby preventing them from accidentally binding themselves on impulse[20]. Wilmot J emphasized this deliberative rationale by saying that the requirement of consideration has been adopted "in order to put people upon attention and reflection, and to prevent obscurity and uncertainty... therefore it was intended as a guard against rash inconsiderate declarations, but if an undertaking was entered into upon deliberation and reflection it had activity."[21]

CONSIDERATION AND CONTRACT THEORY

Any conception of what contracts should be enforced by the state is influenced by our conception of the role of contract law. It becomes necessary for us to briefly look at the various ways in which contract law is conceptualized in legal theory. The exploration of contract theories is a complex task in itself because of the sheer amount of scholarship which has been dedicated to it. The most popular of all the theories of contractual obligation are the promissory theories, the reliance theories, and the bargain theories. One interesting way of understanding contract theories is to classify them into *party-based and process-based*

---

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

[20] See generally WILLIAM REYNELL ANSON, et al., ANSON'S LAW OF CONTRACT (Oxford University Press. 2010).

[21] Pillans v. Van Mierop 3 Burr 1663 (1765).

© 2022 International Journal of Advanced Legal Research

theories.[22] Party-based theories focus on protecting the parties. For example, promise theory primarily focuses the promisor whereas reliance theory focuses on the promisee. Process-based theories, on the other hand focus less on the parties and more on the substance of the agreement and how that agreement was reached. Since our goal is to understand the requirement of consideration our discussion will be focused on the three major theories viz. Promise theories, Reliance theories, and Bargain theories. Promise theories and reliance theories are party-based while bargain theories are process-based.

1. Promise

Promissory theories are based on liberal principles of respect for person and property. They invoke individual morality to call for respect for the person and property of others. In his 'theory of contractual obligations,' Fried explains that the basis of promise for an individual is to bind herself to others in a way that the other expects a future performance from the promisee. Promissory theories reject that the obligation to perform a promise comes from considerations of utility, or self-interest or external sanctions. Rather, the obligation to perform a promise comes from the promisor intentionally invoking expectation in the other thereby imposing an obligation upon the promisor to perform his promise. A promisor's obligation is intrinsically valuable. The measures of expectation damages comes from the promisor's promise and not form promisee's reliance or expectation.

In the context of promissory theory, the conception of consideration is contradictory because the requirement of consideration requires there to be an exchange, but the law is not interested in the adequacy of consideration. The underlying assumption here is that freedom to contract is contradictory to contract as an exchange. Consideration does not provide a substantive reason to enforce promises; the reason derbies from the promise itself. If the promise is made without an intention by the party to bind herself, then any such expression is not a promise in the strict sense. The different reasons for not enforcing a promise include illegality, duress, unconscionable bargains, etc. Hence, both reasons for enforcing and not-enforcing promises do not require consideration. Therefore, the requirement of consideration becomes unnecessary in promissory theory.

[22] This classification has been suggested in 'Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269 (1986).'

© 2022 International Journal of Advanced Legal Research

2. Reliance

Reliance theory is based on the premise that if promisor (called as 'supplier' in some works), as a result of her promise, induces a promisee ('recipient') to rely on that promise and suffer a detriment, the promisor must compensate the promisee for the loss as a result of that reliance[23]. In this sense, the promisor assumes a responsibility to honor the terms of the agreement entered into between the parties. Hence, the requirement of consideration is not strictly necessary in such a scheme of contracts.

3. Bargain

Bargain theory is a substance-based theory which means it focuses on the substance of the agreement between the parties and not the parties themselves. The origin of bargain theories can be traced all the way back to the action of assumpsit. According to bargain theory, the purpose of contracts is to enforce bargains. In this sense, offer, acceptance, and consideration are an "indivisible trinity, facets of one identical notion which is 'bargain'."[24] The requirement of consideration helps distinguishing transactions amounting to bargains from gratuitous transactions and hence any rules in our current contract law which allows non-bargain transactions to sustain or nullifies a clear bargain is unfounded. In other words, a contract is binding only if it has a notion of mutual exchange in it.

DEBATES ON CONSIDERATION REQUIREMENT

Contract law scholarship is not short of debates on the requirement of consideration. Some scholars have tried to explain it,[25] some have called for its repeal,[26] while others have tried to defend it[27].

---

[23] See Peter Jaffey, A new version of the reliance theory, 49 N. IR. LEGAL Q. 107, 108 (1998).

[24] See generally CJ Hamson, The Reform of Consideration, 54 L.Q. REV. 233 (1938).

[25] See, e.g., Lon L Fuller, Consideration and form, 41 COLUM. L. REV. 799 (1941).; See Hamson, supra note 58.

[26] See Wright, supra note 4;Clarence D Ashley, The Doctrine of Consideration, 26 see id. at 429 (1913).

© 2022 International Journal of Advanced Legal Research

1. Criticism

1.1. Lord Wright's Inconsistency Argument

Some scholars have challenged the requirement of consideration on the premise that its application by the court has been inconsistent and therefore the consideration requirement must be either modified or repealed altogether. Lord Wright points out that the law imposes an external test (of consideration) to determine contractual intention and contractual intention, even if properly established through other means is not sufficient. He questions the need for imposing such an external test. His attack on the requirement of consideration takes shape in his distinction between two types of cases. First, where the courts have enforced a contract despite consideration being absent. Second, where the courts have not enforced a contract despite consideration being present. He argues that consideration requirement is not decisive in determining a contractual intention and that courts will not just rely on presence or absence of consideration to determine deliberate mind. According to him, consideration is only one of the ways by which courts can establish contractual intention; hence, consideration is not the sole test of contractual intention. Furthermore, he contends that consideration requirement may sometimes defeat legitimate intention of the parties. He proposes that a logical theory of contract should put contractual intention at the top and take various factors such as presence of serious and deliberate contractual intention and absence of illegality, duress, mistake, fraud, immorality to test such a contractual intention. In such a theory, consideration would just play an evidentiary part rather than a condition of contract.

1.2. Fried's Criticism

Fried's criticism of consideration is very popular in the scholarship on consideration. He criticises consideration on several grounds. Firstly, he claims that the key features of the consideration requirement are contradictory as it requires a bargain or an exchange but does not insist on its sufficiency. It is contradictory that consideration should insist on a bargain but protect freedom to contract at the same time. Secondly, many contracts which do not involve consideration are enforceable. For example: a promise to pay for a past favour.

---

[27] See Peter Benson, The Idea of Consideration, 61 UNIV TOR LAW J 241 (2011).; Mindy Chen- Wishart, In Defence of Consideration, 13 OUCLJ 209 (2013).

© 2022 International Journal of Advanced Legal Research

Thirdly, requirement of consideration results in injustice by denying enforceability to seriously intended promises.

2. Justification

2.1. CJ Hamson's Bargain Model

C.J. Hamson's presents perhaps the most persuasive account of consideration in the paradigm of the bargain theory of contract. According to his view, the whole common law of contract reflects the notion of bargain and consideration is just one part of it. Rules which nullify a clear bargain are unnecessary and there is no harm in cutting them out of the common law. Taking bargain as a central notion, he contends that there is no harm in abolishing the rule that consideration must always move from the promisee because even if it moves form a third party, the contract still contains a bargain. Naturally, he is against gratuitous promises being enforced without adopting any formality and merely based on parties' intention to be bound. He is fine with enforcing promises which are, in essence, gratuitous but clothed with some formality like seal or 'peppercorn', and that such a formality is not a mere pretence. His problem with enforcing seriously intended promises without consideration is that it is difficult to apply this in practice. It is not right to dismiss consideration and ignore the practicality of law just because it does not fit a theoretical frame.

He presents bargain as a practical test and makes several observations. A person making a bargain knows that he is binding himself; the same does not happen in gratuitous promises. Where there is a bargain, the test of contractual obligation is the bargain itself. In gratuitous promises clothed as bargains, the very fact that the promisor is "willing to take pains to state his promise in form of a bargain" is conclusive of intention to create contractual obligation. He then presents practical situations of how intention can be construed in mere making of a promise without consideration and how such promises, however seriously made, cannot represent true intention of the parties because of our rules of construction. Let's take an example to understand this. X promises, in writing, to give Y, her neighbour, a sum of money every month for two years. In her mind, X is giving this sum of money because her neighbour regularly takes care of X's pet dog, but X has not mentioned that in her written promise. Now, in case Y stops taking care of X's dog, would X still be bound to pay Y the sum of money? According to our rules of construction, X would not be allowed to insert this

© 2022 International Journal of Advanced Legal Research

exception (that she is not bound to pay if Y doesn't take care of X's dog), which would otherwise be admitted in good faith, in her written promise. It is improbable in such a promise for X to mean that she was willing to bind herself to technical legal construction solely based on her words and not construction in good faith. This is a practical difficulty as the person, even with a serious intention to bind herself, agrees only to a construction of her words in good faith, and not a strict construction in a legal sense. This is the crux of C.J. Hamson's argument. Hence, he argues that our present rules of constrution do not allow us to make enforceable such gratuitous promises and we cannot do so by
disregarding the abovementioned practical difficulty.

2.2. 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. According to him, courts in seventeenth and eighteenth century construed consideration very broadly to include any good reason to enforce a contract[28]. The courts manipulate the facts or the rules to find, or to use Atiyah's own term 'invent' consideration.

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. Also, Atiyah's realist approach does not provide any normative basis for the requirement of consideration. Treitel points out that such a rule can be counterproductive to the whole contract law itself as the law aims to be clear, precise, and consistent and such a conception of consideration "negates the existence of any applicable rule of law."[29]

2.3. Fuller's Formal and Substantive Functions

---

[28] See STEPHEN A SMITH, CONTRACT THEORY 225 (Oxford University Press. 2004).

[29] GH Treitel, Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement, 50 AUSTRALIAN L.J. 439, 449 (1976).

© 2022 International Journal of Advanced Legal Research

Fuller tries address criticism linked to the requirement of consideration by separating functions served by the requirement of consideration into what he calls 'formal' and 'substantive' functions. He identified three formal functions: evidentiary, cautionary, and channelling functions. Evidentiary function, as the name suggests is to provide an evidence of the very existence or intention of contract. Writing, attestation, and certification are ways in which evidentiary function can be satisfied. The cautionary function of consideration is to ensure caution in the action of the parties and act "as a check against inconsiderate action." The channelling function is to ensure that the promisor understood the consequences of the promise. It channels a party's action to a "legally effective expression of intention."

Substantive functions which Fuller identifies are 'private autonomy,' 'reliance,' and 'unjust enrichment.' The principle of private autonomy means that parties have the power to define and change their legal relations. This power is similar to the power of legislature. In other words, it is a kind of private law making. The immediate question that one might ask after reading about 'private autonomy' function is: how is this function consistent with the objective interpretation of contracts? Fuller answers this question by drawing an analogy between law making by individuals and law making by legislature. He says that just as law making by legislature in a constitutional system is kept in its proper sphere by the courts, private autonomy must also be kept within it proper sphere. According to Fuller, exchanges and transactions ancillary to exchanges are the proper spheres within which private autonomy should be kept. The second substantive function is reliance. Fuller distinguishes between reliance as a basis of contractual liability and reliance as measure of promisee's recovery. The third function, 'unjust enrichment', is related to reliance in this way: X promises to deliver a book to Y for a sum of money and Y sends the money; X fails to deliver. Here, there is a reliance as Y sends the money relying on X's promise to deliver and at the same time there is unjust enrichment of X as X gets the money without even delivering the book.

Fuller then asks how to single out these transactions which are worthy of enforcement. His answer is consideration as it satisfies both substantive and formal purposes of enforcement. Fuller's main argument is that consideration is only justified if it is able to differentiate those non-formal transactions which satisfy formal and substantive criteria and those which do not. Hence, he presents half-completed exchange as the contractual archetype. A half-completed exchange is where one party performs a promise in return for other party's promise to pay

© 2022 International Journal of Advanced Legal Research

which the other party later defaults on. Now, on the question of enforcement, this type of exchange satisfies all of Fuller's formal and substantive criteria as there is a reliance by one party and unjust enrichment of the other. The terms of exchange are left to parties which ensured private autonomy. On the formal side, the performance of promise by one party satisfied evidentiary, cautionary, and channelling functions. As per Fuller's conception, the more an exchange moves away from this archetype, the more questions will be raised on its enforceability. Therefore, a wholly executory exchange is less enforceable than half-complete exchange. In this view, a gratuitous promise is not worthy of enforcement as it does not satisfy either substantive or formal criteria.

Fuller's account, although compelling, can be criticised on many grounds. His view that consideration plays the role of a formality by serving evidentiary, cautionary, and channelling functions is incorrect because the law does not regard consideration as just an indication by parties to give formality to their wishes. Responding to Fuller's formal functions, Chen-Wishart rightly points out that it may be a matter of mere coincidence that consideration performs evidentiary, cautionary, and channelling functions because if consideration is absent, the law would still not enforce a promise even if an intention to be bound is made in writing in front of witnesses. The reason she points out is that "the limitations on human rationality in decision-making apply to both gratuitous and Bargain promises; bargains may be rashly made, and are often made in standard form, without negotiation and with only the most basic understanding of their content…"

2.4. Chen-Wishart's Defence

Chen-Wishart addresses the calls for abolition of consideration and attacks three claims which she deems erroneous. These three claims are: first, that consideration acts as an evidence of promisor's intention to be bound; second, that if intention is clear, consideration should not come in the way of enforceability; third, that consideration is rendered redundant because of other factors (such as duress and undue influence) which ensure valid intention.

Arguing against the first claim that consideration is just an evidence of intention to be bound, she points out that promises not supported by consideration but under seal have historically been enforceable only upon delivery to the promisee whereas promises supported by

© 2022 International Journal of Advanced Legal Research

consideration are enforced as promises. Against the second claim for enforcement of voluntary undertakings, she argues that the content of contract law would be reduced to half if that was the case because the law would not have to provide for contractual questions like formation, contents, legality, and remedies and the only concern of law would be fact finding (of parties' intention). "No legal system does or can enforce all promises; something more is needed to explain which undertakings should be given the force of law." Another reason why we cannot enforce promises supported by serious intention to be bound is that what constitutes serious intention is uncertain and parties do not give much thought to it. Consequently, courts have to ultimately look at external factors (such as consideration) to determine intention. After answering the claim, she then develops her defence of consideration by invoking what is rarely invoked in the scholarship on consideration—the State. Since it is the State that empowers individuals to enforce their promises, it is important to look at the factors which the state should consider in deciding which undertakings to enforce. She argues that the State is justified in considering four factors: first, the nature of autonomy given to individuals; second, the social context; third, need for respectful dealing; fourth, administration of justice.

There are two different conceptions of autonomy: positive and negative. Negative conception of autonomy demands freedom from State interference.[30] This conception when applied to contract law restricts the role of the State to provide a platform to enforce contracts and refrain from evaluating the content of the contract as it is up to the choice made by individuals. In the positive conception of autonomy, the emphasis is on the freedom to pursue relationships which are valuable which contributes to the well-being of people. The State has no duty to maintain "neutrality between all the options." This brings us to the second factor—protection of social forms. By 'social forms' Chen-Wishart means pursuits (such as how to be friends or parents) which are socially defined and the recognition of individual existence in a society and the determination of individuality in a social context. This means that personal well-being depends on these social forms. This notion favours contract law supporting obligations which take into account the social context and not individualistic obligations which are independent of their social context. Next, she tries to establish that the

---

[30] Chen-Wishart drives this negative conception of autonomy from the works of Mill, Hayek, Freidman, Nozick, and Fried.

© 2022 International Journal of Advanced Legal Research

notion of reciprocity is imperative to the notion of well- ordered society and that lack of reciprocity threatens social stability. Reciprocity ensures social stability by inhibiting exploitative relations (generated by power disparities and egoistic motivations). Finally, proper administration of justice requires the State to restrict enforcement only to claims which ensure above three factors. Her main thesis, therefore, is that the requirement of consideration represents the positive conception of reciprocity, it protects valuable social forms, it ensures reciprocity, and meets the demands of administration of justice. Based on this, she then establishes why the State should not enforce informal gratuitous promises and why it should enforce informal promises supported by consideration.

3. Conclusion

All the accounts we have seen so far do well in explaining the substantive features served by consideration requirement, or to highlight the difficulties created by strict application of consideration requirement and on the basis of this, they try either to justify or reject it from their conception of the law of contracts as a whole. One mistake these accounts always end up making is that they see the consideration requirement as 'the' determinant of enforceability of an agreement rather than 'a' determinant of enforceability. As observed, consideration, though the most dominant, has never been the only determinant of enforceability; rather, the courts, when required, saw fit to bend the requirement for consideration and make promises without consideration enforceable on other grounds. Some of these grounds have taken the shape of separate rules in themselves. These rules are what we now call promissory estoppel, moral obligation, and unjust enrichment.

Consideration in Indian Law

Indian law on consideration is contained mainly in Section 10 and Section 25 of the Indian Contract Act. Consideration is defined in Section 2(d) of the Act. In order to understand the substantive features and the normative basis of the consideration requirement in the Indian law, we will have to look closely at the language of consideration as given in Section 2(d) of the Act and analyse it harmoniously with the language of the Act. We will then draw from the accounts produced above to understand the substantive features of the consideration requirement in the Indian Law. The definition states:

© 2022 International Journal of Advanced Legal Research

“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.”

This definition has to be read with Section 10 of the Act which makes consideration of a necessary requirement of a contract. Furthermore, Section 25 of the Act carves out certain exceptions to the rule that consideration is a necessary requirement for an enforceable contract. Some of the substantive features of consideration requirement in the Indian law are as follows:

Reciprocity: The requirement that consideration be given “at the desire of the promisor” ensures that there are two sides to a contract. This also makes sure that consideration is the reason for the promise and vice versa. As we have seen earlier, consideration and promise must purport to be ‘mutually'. This means that whatever may be the actual motive for promise, on an objective interpretation of express and implied terms of the contract, consideration and promise must be found to be the motive of each other.

Value in the Eyes of Law: This means the consideration must be something which law can regard as having some value. In other words, whether it can be measured in terms of money or money’s worth[31]. This is also referred to as objective/external conception of consideration. This is because the law imposes an objective test on what can be regarded as a consideration. In the context of the Indian Contract Act, Swaminathan argues that it was a step away from the traditional common law conception of consideration requirement. Drafters of the Indian Contract Act took a novel approach in the wording of Section 2(d) of the Indian Contract Act in order to move away from the objective conception of consideration to a more inclusive subjective notion of consideration in which consideration need not have value in the eyes of law, rather, it is something which parties’ agree on in their own subjective evaluation. The basis of this argument lies in the language of the section as, it has been argued, there is nothing in this section which tells us that consideration must have some value in the eyes of

---

[31] See Sonia Bhatia v State of UP, AIR 1981 SC 1274.

© 2022 International Journal of Advanced Legal Research

law. Swaminathan, like lord Wright, attacks the external test which the law imposes on consideration, but unlike lord Wright, he bases his attack in contract theory rather than in case law.

Before even going into the language of Section 2(d), we must first notice that the very fact the legislators at that time saw it fit to make a separate section defining consideration says that they were not ready to abandon the consideration requirement altogether. Even if we consider, for a moment, that the drafters of Indian Contract Act wanted to replace the objective view of consideration with a subjective view, we will have to see what remains in the requirement of consideration if we take out the external/objective test. Taking out the external/objective view of the consideration would mean that we consider whatever the parties view as consideration according to their subjective evaluation. So, what purpose does a subjective consideration requirement serve? As we have seen earlier, the requirement that consideration be given "at the desire of the promisor" ensures that there are two sides to a contract. In other words, it ensures that there is a meeting of minds.

Now, if we see consideration according to parties' subjective evaluation, we cannot enforce oral contracts as there is no way that the parties can show, not just to the court but even to each other, what formed consideration for their promise. If both the parties had their own separate subjective conception of the reason for making their promise, we will have no way of knowing what led to a meeting of minds. Let us take an example to understand this: A requests B to take care of her (A's) dog for a period of time; B agrees to do so thinking that A will pay her for the service. A, however, claims that she has no intention to pay B and A's request is based on the fact that A has done a lot for B in times of B's needs. B, after knowing that A has no intention of paying her, refuses to act on her promise. In this example here, there is no meeting of mind as both A and B had an agreement on their subjective consideration. The court would find it incredibly difficult and cumbersome to find out what formed consideration here. Whereas in the same case, if we introduce a consideration which can be seen objectively, (even a nominal sum of money) we can make it the basis for enforcing the contract no matter the monetary value of such a consideration. Whatever may be the actual motive for promise, on an objective interpretation of express and implied terms of the contract, consideration (sum of money in this case) and promise must be found to be motive of each other.

© 2022 International Journal of Advanced Legal Research

Arguments which call for enforcement of all the seriously intended promises, whether supported by consideration or not, call for a conception of private autonomy. But the nature of this autonomy is negative. In other words, it demands minimum interference from the State in terms of what a promise must constitute and its role merely limited to providing a platform to enforce promises. Going by the discussion we had in this part, it is hard to understand how this negative conception of autonomy could be enforced by the State. A positive conception of autonomy is a better approach to look at promises. In positive conception, the State has no duty to maintain neutrality between the parties. It can very well choose to enforce promises which it sees as valuable. The requirement of consideration fits in this positive conception of autonomy.

Eclipsed by Orthodoxy? If we see the context of the Act, we do not see any evidence for the argument that the drafters of the Act intended any kind of reform in the consideration requirement. For example, if we look at the illustrations to the sections relating to consideration, we will find that not a single illustration is based on the subjective notion of consideration. All the illustrations to Section 23 (which talks about lawful consideration), Section 24, and Section 25 use examples of consideration which is either a sum of money or it can be reduced to money's worth. Hence, on a harmonious interpretation of the text of the Indian Contract Act, it is clear that the drafters retained the traditional notion of consideration where it is seen as something which must have value in the eyes of law.

Bilateral Nexus: The consideration can move from the "promisee or any other person." As we have seen earlier, the requirement that consideration must move from the promisee, ensures that there are two sides to a contract. However, in Indian law, consideration can move from the third party also. This is a departure from the traditional common law position that consideration must move from the promisee. Although different, this does not pose problems to any of the substantive functions of consideration. Even if the consideration moves from a third party, so long as consideration is reason for the promise to the promisee, and is the basis of promisor's promise, it matters little where it comes from. This is, keeping in mind that it qualifies all the other requirements mentioned above. As I have shown above, the same has been argued by C.J. Hamson as well.

© 2022 International Journal of Advanced Legal Research

Normative Basis: Reciprocity and mutual exchange is central to the idea of a bargain. Going by the overall scheme of the Indian Contract Act, we see that it positively requires the trinity of offer, acceptance, and consideration in order for an agreement to be called as a contract. This trinity coupled with the aspect of reciprocity and objectivity in the definition of consideration and the fact that the Indian Contract Act does not enforce gratuitous promises except when they are expressed in writing and registered. points towards a bargain conception of consideration law. I accept the bargain paradigm as reflecting our current conception of consideration; however, I also recognise that the courts have never applied consideration requirements in a uniform fashion.

The Place of Consideration: As we have seen in the introductory chapter, the courts have used the consideration requirement judiciously and have bent or relinquished the requirement to enforce promises without consideration. When the consideration requirement first emerged and developed later in the sixteenth century, judges disregarded or bent the requirement to enforce promises which we now enforce under the heads of promissory estoppel, moral obligation, and unjust enrichment. The Indian Contract Act has embraced this approach which was prevalent in sixteenth century in making specific provisions for enforcement of promises under the heads of promissory estoppel, unjust enrichment, and past consideration.

CONCLUSION

Firstly, the paper showed how the consideration requirement evolved from the action of assumpsit in the common law. During its initial phase, its development was influenced by other forms of action such as debt. This introduced certain elements into the consideration requirement which could still be seen in the law of consideration today. These traditional features of consideration required that: the promise must be induced by consideration and vice versa; it must move from the promisee; it need not be adequate; it must be executory or executed, but it cannot be past; and it must have some value in the eyes of law. During the early period of its evolution, the courts used the consideration requirement flexibly to enforce promises which are now, enforced under the categories of moral obligations, promissory estoppels, unjust enrichment, and past consideration. As the time progressed, the traditional features of consideration requirement became firm in the way courts applied it and innovations in the sixteenth century were disregarded. Consideration became almost like a

© 2022 International Journal of Advanced Legal Research

complex ‘doctrine’ but scholars were quick to find inconsistencies in the application of consideration requirements.

At the same time, attempts were being made to elucidate a normative conception of contract law to find a relationship that can explain its doctrines and principles. Three of the most popular of these attempts came out in the form of the promise theory, the reliance theory, and the bargain theory. Scholars tried to analyze where the consideration requirement fits in a wider theory of contract as a whole. Depending on their theoretical inclinations, some scholars justified it, and some criticized it. The paper aimed to include the most influential of these justifications and criticisms. One mistake these accounts always end up making is that they see the 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. The paper then, drew from the substantive features of the consideration requirement as unpacked by these scholars to analyse the consideration requirement in the Indian Contract Act. The paper has aimed to argue that letting go of consideration requirement was not the intent of the drafters of the Indian Contract Act. As to the secondary questions, they can be answered if we look at consideration as one of the determinants of enforceability of promises rather than the only determinant. Thus, it is imperative to look at consideration as one of the determinants of enforceability and try to understand the distinct kind of relationship it creates between the two parties. Only then, would an honest appreciation for the utility of retaining consideration in our contract law will appear.

© 2022 International Journal of Advanced Legal Research