Eclipsed by Orthodoxy: The Vanishing Point of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872

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Abstract
The definition of consideration in Section 2(d) of the Indian Contract Act 1872 substantially anticipated the far-reaching reforms to the orthodox doctrine of consideration that were proposed by the English Law Revision Committee (1937). These included making enforceable, through the doctrine of promissory estoppel, promises without consideration in the traditional sense that were meant to and did induce reliance; making enforceable a promise to perform a pre-existing duty; and making binding a promise to keep an offer open. The pivots of the definition in Section 2(d) were: a ‘subjective’ conception of consideration on which value was to be measured by the desire of the contractors alone, as opposed to an external standard; a concomitant purging of the traditional requirements of benefit and detriment; and the recognition of induced reliance as a form of consideration. The definition was designed to mark the vanishing point of consideration without having to formally abolish it. This design, however, went awry as courts and scholars in India projected the orthodox English model of consideration, replete with benefit and detriment, and external standards of value, upon this provision. Consequently, an ingenious piece of draftsmanship came to be eclipsed by orthodoxy.

I. REWORKING FAMILIAR CONCEPTIONS: A FIRST LOOK
The framers of the Indian Contract Act 1872 (Indian Contract Act) sought to radically alter the scope of the consideration requirement from what was obtained at nineteenth century English common law in order to expand the world of promises enforceable as contracts. Some of these alterations came in the shape of specifically articulated provisions. First, we have the abolition of Pinnel’s rule which, it may be noted, was
done over a decade before the House of Lords in *Foakes v Beer* cemented an already well-entrenched doctrine.\(^3\) Second, Lord Mansfield’s idea of ‘moral consideration’\(^4\) – which had lapsed into desuetude after *Eastwood v Kenyon*\(^5\) – was resuscitated. The Act did this by making enforceable promises to pay for past voluntary service.\(^6\) Third, the Act recognized meritorious consideration, by making enforceable agreements made out of natural love and affection.\(^7\) The 1866 Indian Law Commission Report also sought to incorporate Wilmot J and Lord Mansfield’s far-reaching idea in *Pillans v van Mierop*\(^8\) by proposing that any contract in writing should be enforceable as long as it was registered, but this proposal did not make its way into the final statute.\(^9\) The bulk of the radical element, however, was supplied by the expansive definition of consideration in Section 2(d). This had the potential to make enforceable, in one fell swoop, a whole swathe of promises which would have otherwise been unenforceable for want of consideration at English common law.\(^10\)

Section 2(d) of the Act provides:

> 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.

In this article, I argue that this astute piece of draftsmanship contained the germ of far-reaching reforms with respect to consideration that were proposed by the 1937 Law Revision Committee chaired by Lord Wright. This included protecting induced reforms with respect to consideration that were proposed by the Revision Committee chaired by Lord Wright. This included protecting induced agreements made out of natural love and affection.

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1. \(^1\) Sir George Rankin, *Background to Indian Law* (Cambridge University Press 1946) 103.
2. \(^2\) (1840) 11 Ad & El 438.
3. \(^3\) s 63 of the Indian Contract Act provides: ‘Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.’ In what is a sign of striking doctrinal clarity, the Act does not treat the abolition of *Pinnel*’s rule as a tweaking of the consideration requirement at all. Rather, the change is made to stand on its own legs as a rule on accord and satisfaction. Where the Act was purportedly tweaking the consideration requirement, it did so under s 2(d) which was the definition of consideration and s 25, which enumerated the exceptions to the consideration requirement. Even as late as 1884, the House of Lords in *Foakes v Beer* continued to treat *Pinnel*’s rule as implicating the question of consideration rather than accord and satisfaction: see Michael Lobban, ‘*Foakes v Beer* (1884)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008) 223-68, 226. Lobban notes that correct doctrinal view of the situation was first taken by James Shaw Wiles, the editor of *Smith’s Leading Cases* (1856): ibid 230.
4. \(^4\) *Hawkes v Saunders* (1782) 1 Cowp 289.
5. \(^5\) (1840) 11 Ad & El 438.
6. \(^6\) s 25(2); the provision also made enforceable promises to compensate for something the promisor was legally compelled to do. Extending the same principle, s 25(3) made enforceable the promise to pay a time barred debt.
7. \(^7\) s 25(1). Such an agreement, however, was required to be in writing and registered in order to be enforceable.
8. \(^8\) *Pillans v van Mierop* (1765) 3 Burr 1663. This was rejected by the House of Lords in *Rann v Hughes* (1778) 2 Eng Rep 18.
9. \(^9\) Clause 10, Exception 1; *Parliamentary Papers, House of Commons* (1867-68) 8-9.
10. \(^10\) Sir George Rankin, writing extra-judicially, found s 2(d) to be the most noticeable innovation of the Act: *George Rankin, Background to Indian Law* (Cambridge University Press 1946) 103.
pre-existing duty; and making binding a promise to keep an offer open without requiring consideration.\textsuperscript{11}

The definition of consideration under the Indian Contract Act – with its copula ‘at the desire of’ linking the promisor’s promise and the promisee’s act, abstinence, or promise – relied on two prongs for its capacious effect. One was a ‘subjective’ conception of consideration, in which value was to be measured by the desire of the promisor alone as opposed to an external standard imposed by law. Whatever act or abstinence or promise the promisor desired, however insubstantial, would suffice. It is not for the courts, on this conception of consideration, to second-guess \textit{ab extra} the value the defendant placed on a promise. The other prong was the protection of induced reliance: any act or abstinence or promise by the promisee ‘at the desire of’ the promisor made the promise enforceable. Both these prongs, as I shall argue, did not introduce new counters ‘in the legal game’ but for the most part, ‘reworked existing conceptions’\textsuperscript{12} from nineteenth century English contract law. One of the two objectives of this article would be to bring to light the ingenuity that went into the design of this provision and to tease out the fine balance between continuity with and change from nineteenth century contract law that it sought to accomplish. The other would be to adumbrate how this design went awry as courts and scholars alike projected the orthodox English model of consideration, warts and all, upon this provision, with scant regard to its phraseology, and thereby stilled its reformatory potential. This definition, which rested on a subjective theory of value and protected induced reliance, had the potential to reduce consideration to a vanishing point: a potentiality that would never come to fruition.

It is the subjective conception of consideration that informed the versatile definition of consideration proposed by James Barr Ames in his celebrated ‘Two Theories of Consideration’. Ames argued that an \textit{expansive} theory of consideration, in which \textit{any} act, forbearance, or promise, in return for a promise, constituted adequate consideration, is to be preferred normatively over the \textit{restrictive} theory, which imposed the additional requirement that the act, forbearance, or promise was also to be of some ‘detriment’ to the promisee or of some ‘benefit’ to the promisor.\textsuperscript{13} In other words, according to the restrictive theory, the consideration must have some value in the eye of the law. The Indian Contract Act anticipated Ames’ method in defining consideration expansively along subjective lines so as to render it ‘superfluous’\textsuperscript{14} without having to formally abolish it. Accordingly, it also purged the definition of

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\item \textsuperscript{12} AWB Simpson, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 Law Quarterly Review 247, 248.
\item \textsuperscript{14} Lobban, ‘Foakes’ (n 3) 242.
\end{itemize}
consideration of the elements of benefit or detriment. The subjective conception of consideration also provides the theoretical foundation for the abolition of Pinnel’s rule (s 63) and the recognition of moral consideration and meritorious consideration (s 25). Lord Denning, writing extra-judicially, noted that a very great deal of what the 1937 Law Revision Committee sought to achieve could be accomplished even without legislative intervention if the courts embraced Ames’ definition of consideration. There is little to cavil with Lord Denning’s assessment as long as one appends to it the caveat that while Ames’ definition undoubtedly supplied the principle underlying most of the Committee’s proposals with respect to consideration, it had to be tweaked cleverly at places to yield such a result. Ames’ definition, for instance, could not in itself cover cases of induced reliance which the Law Revision Committee’s proposal sought to protect. In fact, Lord Denning felt the need – while paraphrasing Ames’ definition – to supply it with a copula which could produce the effect of protecting induced reliance: ‘any act done on the faith of the promise should be sufficient consideration’. It is hard to see how a definition of consideration which incorporated Ames’ proposal and protected induced reliance could have looked or done something very different from Section 2(d).

As we will see later in Sections II and III, the definition in Section 2(d) was fashioned out of the materials of nineteenth century English contract law. It systematically drew out the implications of the will theory which – although enormously influential on the development of contract law in this period – was only inconsistently and haphazardly embraced by English courts. Contract law at this point had ostensibly signed up to the subjective conception of consideration and consequently stretched to ‘breaking point’ the traditional ideas of benefit and detriment – even the proverbial ‘pepper corn’ could suffice as consideration. But paradoxically, nineteenth century common law also continued to countenance the pre-existing duty rule, Pinnel’s rule, and the rule against moral consideration – each of which presupposed external standards of value and were clearly incongruous with the teleological aim of reorienting the doctrine of consideration to the will theory. The idea that consideration need not have any value at all was surrounded by a number of instances that rested on the principle that consideration could not just be any factual benefit or detriment – there had to be a legal benefit or detriment; ‘value in the eye of the law’. This legal benefit was by no means to be confused with ‘motive in actual fact’. The Indian Contract Act removed the potential for such confusion by omitting all reference to benefit and detriment.

Even the most opaque of tints could not have obscured the reformatory intent underlying Sections 63 and 25. The reform, which depended entirely on the deft

16. ibid.
17. It is unclear why despite taking notice of the Indian Contract Act and citing s 63 in favour of his argument, Ames did not go on to discuss the definition of consideration under Act which instantiated his prescription for the ideal definition of consideration: Ames, ‘Two Theories’ (n 13) 333.
phraseology of Section 2(d), however, could barely rest on such certainty; and as it turned out, the potential of the provision was significantly stifled as courts and scholars viewed the doctrine through glasses tinted by orthodoxy. Elements from the unalloyed English definition of consideration were projected on to the provision and completely unwarranted shades of meaning came to be pressed out of it without regard to its phraseology. Standard textbooks on contract law treat the English definition of consideration as if it were isomorphic with Section 2(d).21 Generations of Indian lawyers have been schooled to notionally interpolate ‘benefit’ and ‘detriment’ and ‘value in the eye of law’ into the definition of consideration in Section 2(d)22 and to see it as a ‘sign and symbol of bargain’.23 It has been held that although the words requiring ‘valuable’ consideration are wanting in the Indian Contract Act, it must be read to be of ‘some value in the eye of law’.24 Even the Supreme Court of India decisively settled that the definition of consideration in English law and Indian law was ‘substantially the same’.25

A similar fate was also to befall the prong of the definition pertaining to induced reliance. As we will see in Section IV, the fabric out of which the induced reliance prong in the Indian Contract Act was cut comprised three concepts familiar to nineteenth century English law: the equitable doctrines of consideration and making representations good, and the common law doctrine of estoppel by representation. The definition in Section 2(d) was so versatile as to encompass in its spectrum cases presently falling under the rubric of promissory estoppel across the common law world, as well as cases of firm offers. Here too courts and academic commentators, barring the odd exception, projected the unalloyed English consideration requirement upon this provision as a result of which they refused to read it as protecting induced reliance or promises to make firm offers. When the Indian Contract Act was nearing its centenary, the Law Commission of India in its 1958 report – which never fructified into legislation – recommended that it was time India mitigated some of the rigours of the doctrine of consideration by importing the doctrine of promissory estoppel found in the Law Revision Committee’s 1937 Report.26 The Commission also took the Law Revision Committee’s cue in proposing the protection of firm offers.27 The Supreme Court of India went on to judicially import the doctrine of promissory estoppel, albeit in a much truncated form, whilst paying copious compliments to Lord Denning’s ‘bold spirit’ without the slightest allusion to Section 2(d).28

24. Kulasekaperunmal v Pathakutty [1961] AIR Mad 405 (Madras High Court); see Avtar Singh (n 21) 127-28.
27. ibid 8.
28. Motilal Padampat v State of Uttar Pradesh [1979] AIR SC 621 (Supreme Court of India). The doctrine was held to apply only to promises made by the government.
being imported as in the case of promissory estoppel or being rejected, as in the case of firm offers.\textsuperscript{29} The reformatory potential of the provision was eclipsed by orthodoxy.

II. THE HISTORICAL SETTING

The Indian Contract Act bears some of the marks of the doctrinal fermentation that English contract law underwent in the nineteenth century. The first half of the nineteenth century was a time when the will theory was ascendant.\textsuperscript{30} The will theory, which was dominant in the Continent, viewed contracts as expressions of individual autonomy, ‘worthy of respect as such’.\textsuperscript{31} The contract treatise which made its appearance in England in the early nineteenth century sought to fit the common law into a ‘rational framework’, modelled after Robert Pothier’s version of the will theory found in his \textit{Traite des Obligations}.\textsuperscript{32} The will theory envisaged a model of contract and consideration, which was at odds with the ‘traditional English exchange model’,\textsuperscript{33} based as it was, upon an idea of ‘bargain’.\textsuperscript{34} A deductive application of the principles of the will theory which was teleologically dominant at this point, dictated nothing less than a complete dismantling of the ‘consideration-as-exchange’ idea – replete with benefit and detriment as indicia of the exchange. But this, as Ibbetson notes, was not an option available to the courts. Accordingly, judges in the nineteenth century embarked upon ‘subtle attempts to modify consideration’.\textsuperscript{35} Judges continued to formally invoke the familiar formula of benefit and detriment whilst marginalizing the doctrine by ‘ingenious (and ingenuous) interpretation’.\textsuperscript{36}

Although the outward appearance of consideration remained the same, the element of exchange began to be worn away. Judges started to find or ‘invent’ consideration even in the absence of a genuine benefit or detriment.\textsuperscript{37}

In the mid-nineteenth century cases representing the ascent of the will theory such as \textit{Bainbridge v Firmstone}\textsuperscript{38} and \textit{Haigh v Brooks},\textsuperscript{39} the courts discovered consideration ‘when none was easily to be found’ on the terms of the traditional unalloyed doctrine.\textsuperscript{40} The trick here appeared to have been that of reading benefit and

\textsuperscript{29} Bank of India v OP Swaranakar (2003) 2 SCC 721 (Supreme Court of India).
\textsuperscript{31} Martin Hogg, \textit{Promises and Contract Law: Comparative Perspectives} (Cambridge University Press 2011) 87.
\textsuperscript{33} Ibbetson, ibid 220, 221.
\textsuperscript{34} Hogg (n 31) 88-89.
\textsuperscript{35} Swain, \textit{Law of Contract} (n 18) 187.
\textsuperscript{36} Ibbetson (n 32) 236.
\textsuperscript{37} Swain, \textit{Law of Contract} (n 18) 187.
\textsuperscript{38} (1838) 8 Ad & E 743.
\textsuperscript{39} (1839) 10 Ad & E 309.
\textsuperscript{40} Ibbetson (n 32) 238.
detriment so expansively as to stretch the traditional doctrine to its ‘breaking point’.\textsuperscript{41} While the façade of reciprocity was retained, it was suggested that ‘any degree of reciprocity’, ‘however trifling’, would suffice.\textsuperscript{42} The aforesaid cases had so diluted the barrier of consideration that it was no longer a barrier at all and no ‘genuine exchange’ was required in the least bit.\textsuperscript{43}

Consideration, however, as Swain notes, was ‘common law’s great survivor’.\textsuperscript{44} While courts undermined consideration with an almost ‘Pickwickian’\textsuperscript{45} reading of benefit and detriment, they were reluctant to take that premise to its logical conclusion. Doing so would have meant crossing the Rubicon of overturning \textit{Pinnel’s} rule and the pre-existing duty rule of \textit{Stilk v Myrick},\textsuperscript{46} which were both erected upon the struts of ‘benefit’ and ‘detriment’. But at this line, the courts balked. The great treatise writers too weighed in to bail out the beleaguered doctrine. Pollock and Anson, despite their ostensible allegiance to the will theory in other respects, seemed firmly committed to a bargain theory of consideration.\textsuperscript{47} Reinforcements also arrived from across the Atlantic. Holmes made consideration the great ‘balance wheel’ of his theory.\textsuperscript{48} By the late nineteenth century, consideration had been nursed back to health. The worst was truly past and from this point, it continued to operate in a paradoxical manner with somewhat of a disregard for demands of consistency and symmetry, also dodging the odd academic and judicial broadside fired at it.

In the 1850s, however, around the time the Indian Contract Act was about to be drafted, consideration was on its way to becoming a ‘mere technicality’ and could very well have ‘withered away altogether’.\textsuperscript{49} It should not be surprising then that framers of a mid-nineteenth century contract code, beginning \textit{tabula rasa}, might have wished to fundamentally shake up the rules relating to consideration.\textsuperscript{50} Indeed, as Ibbetson argues, ‘a codifying system might legitimately have discarded… [consideration] as inconsistent with the newly imposed legal model’ – an option ‘not open to the Common law.’\textsuperscript{51} But like the ingenious common law reformers in England, the drafters continued to pay ‘lip service’ to the idea of consideration and the ‘reciprocity’ underlying it.\textsuperscript{52} They did indeed retain the traditional doctrine’s outer crust of reciprocity: an act or abstinence or promise on the ‘other side’, as it were, but they

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\bibitem{41} Swain, \textit{Law of Contract} (n 18) 217.
\bibitem{42} HT Colebrooke, \textit{Treatise on Obligations and Contracts} (London 1818) 3.
\bibitem{43} Swain, \textit{Law of Contract} (n 18) 189.
\bibitem{44} ibid 186.
\bibitem{45} Roscoe Pound, \textit{An Introduction to Philosophy of Law} (first published 1922, Lawbook Exchange 2003) 274.
\bibitem{46} [1809] EWHC KB J 58.
\bibitem{47} Lobban, ‘Foakes’ (n 3) 243; Michael Lobban, ‘Consideration’ in William Cornish and others (eds), \textit{The Oxford History of the Laws of England Vol XII} (Oxford University Press 2010) 359-400, 399.
\bibitem{49} Atriayah, \textit{Rise and Fall} (n 30) 452; Swain, \textit{Law of Contract} (n 18) 217.
\bibitem{50} The Law Revision Committee (1937) remarked, ‘A lawyer instructed to prepare a code of the law of contract and starting with a clean slate would be most unlikely to adopt the doctrine [of consideration]’. The Law Revision Committee (n 11) para 26.
\bibitem{51} Ibbetson (n 32) 236.
\bibitem{52} ibid 238.
\end{thebibliography}
tweaked this in important ways. The framers of the Act, like the English courts of the day, made it very easy to find consideration by defining it in capacious terms, which included any act or abstinence or promise, regardless of benefit or detriment. Perhaps, they too, like the Law Revision Committee, were mindful of the fact that a root and branch abolition of the doctrine might arouse ‘suspicion and hostility’ and hence decided to ‘prune away from the doctrine those aspects of it that create hardship’. They also provided that no question of adequacy of consideration could ever be raised. However, the definition did more than that – Section 2(d) had other elements that lent it the makings of marking the vanishing point of consideration. We will now turn to these elements.

III. THE SUBJECTIVE MEASURE OF VALUE AND THE REDUNDANCY OF BENEFIT AND DETRIMENT

A. The Subjective Conception of Consideration

The definition of consideration under the Indian Contract Act, with its copula ‘at the desire of’, appears to have been calculated to preempt potential hair splitting over whether the consideration in any given case was indeed valuable in the ‘eye of the law’. The idea at play here is that of the subjective theory of value: that the courts would not second-guess whether any consideration was actually valuable – what the promisor desired is what he got and that settled conclusively the matter of the value of consideration. This was one of the effects of the influence of the will theory on the traditional exchange model of consideration. While the courts under the traditional exchange model were anxious to ensure that the promisor got something the law could regard as valuable in exchange for this promise, the subjective theory of value supported by the will theory made the parties the sole judge of that. This emphasis on desire or motive is clearly expressed in Haigh v Brooks:

The plaintiffs were induced by the defendant’s promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge.

53. The phrase ‘the other side’ is a mere place holder for the different links between the promisor’s promise and the promisee’s act or abstinence or promise effected by the copula ‘at the desire of’, which will be discussed at length in Sections III and IV.
54. The Law Revision Committee (1937) (n 11) para 27.
55. s 25 Explanation (2).
56. Ibbetson (n 32) 237-39.
57. (1839) 10 Ad & E 309 (emphasis added); In Bainbridge v Firmstone (1838) 8 Ad & E 743, Patteson J emphasized on this subjective conception by holding, ‘I suppose the defendant thought he had some benefit in response to the objection that requesting to weight the plaintiff’s boiler was without any benefit and hence without consideration.'
Atiyah sees this as one in a long line of cases establishing a subjective theory of value – that the value of consideration was ‘entirely a matter for the parties’, as opposed to a model where the courts assumed things to have an ‘intrinsic nature’ of which they would be the judges, leading to an external imposition of value.\(^58\) It was not for the courts to veto the value, however unwarranted objectively, the defendant placed on his promise.\(^59\) This turn towards not imposing any external standard of value of consideration was wholly in tune with the will theory and the cognate Hobbesian idea\(^60\) that value ‘was to be measured by the appetite’, or what amounts to the same thing—‘desire’ of the contractors.\(^61\) For Hobbes, as for Hume, desire and appetite were synonymous.\(^62\)

This idea is also exemplified in cases such as Bainbridge v Firmstone\(^63\) and the American case of Hamer v Sidway,\(^64\) where the nephew’s abstinence from smoking at the uncle’s behest was held to constitute consideration for the latter’s promise to pay money to the nephew.\(^65\) These cases could be adduced to support the proposition that any motive of the promisor counts as benefit, unlike what obtains on the traditional model of exchange.\(^66\) As Atiyah notes, if benefit in the traditional definition of consideration be read as a shorthand for motive, ‘many gratuitous promises would become enforceable simply because the promisor derives a sense of satisfaction’ from the promise.\(^67\)

This subjective orientation that consideration began to assume in the middle of the nineteenth century – to the point of the assimilation of benefit with motive\(^68\) – was not unprecedented. Robert Merkin suggests that at one point in the history of consideration, when the emphasis of the doctrine was on benefit to the promisor rather than on whether the promisee had suffered enough detriment to deserve the court’s protection, the doctrine had a subjective tonality as any motive of the promisor – or practical benefit to the promisor whether or not also objectively valuable and onerous on the promisee – could constitute ‘benefit’. To such a sensibility, moral consideration and love and affection would constitute good consideration.\(^69\) The move

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\(^58\) Atiyah, Rise and Fall (n 30) 449-51; Corbin termed the external imposition of ‘legal value’ by the ‘legal eye’ as ‘putting the cart before the horse’: Arthur Corbin, ‘Non-Binding Promises as Consideration’ (1926) 26 Columbia Law Review 550, 553.

\(^59\) Atiyah, ibid 451.

\(^60\) ‘The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give.’ Thomas Hobbes, Leviathan (first published 1651, W. & G. Pogson Smith ed, Clarendon Press 1909) 115.

\(^61\) PN Daruwalla, The Doctrine of Consideration (Butterworths 1935) 239.

\(^62\) Hobbes used the terms ‘appetite and “desire” interchangeably. Consider for instance, the following passage: ‘the object of any man’s Appetite or Desire; that is it, which he for his part calleth Good: And the object of his Hate, and Aversion, Evil.’ Hobbes (n 60) 41.

\(^63\) (1838) 8 Ad & E 743.

\(^64\) (1891) 124 NY 538, 27 N. E. 256 (New York Court of Appeals).

\(^65\) Ibid.

\(^66\) Atiyah, Essays (n 19) 195; Atiyah makes this remark in connection with Hamer v Sidway.

\(^67\) ibid 195.

\(^68\) See John Simcoe Saunders, The Law of Pleading and Evidence in Civil Actions vol 1 (2nd American edn, Robert Small 1831) 131: ‘consideration’ is used interchangeably with ‘motive’ and ‘inducement’.

\(^69\) Robert Merkin, ‘Historical Introduction to the Law of Privity’ in Robert Merkin (ed), Privity of Contract (Hart 2013) 1, 9.
to emphasize the detriment to the promisee, Merkin hypothesizes, could have lent
consideration an ‘external’ tonality, thus steering courts in the direction of determining
value externally or objectively:

The term ‘consideration’ gradually began to downplay any subjective reason or
‘consideration’ for a promise being made by the promisor and instead became an
objective criterion which measured whether the promisee had done enough by way of
suffering a detriment to enforce the promise.\textsuperscript{70}

Pillans \textit{v} van Mierop\textsuperscript{71} and Hawkes \textit{v} Saunders\textsuperscript{72} were two late eighteenth century
decisions that tried to reorient the doctrine to the subjective pole, emphasizing the
benefit to the promisor.\textsuperscript{73} That reorientation, however, was never complete despite the
favourable climate created for it by the will theory and cases such as Haigh and
Bainbridge. Both cases held that any benefit or detriment, however insignificant, would
suffice and that they need not have any ‘objective’ value. Despite the weight of these
two cases, the reorientation never came to fruition because these cases operated only
within a narrow silo. This left intact the operation of an externally oriented theory of
consideration within other silos such as those of past consideration (confirmed in
Eastwood \textit{v} Kenyon), the pre-existing duty rule, Pin nel’s rule (which was confirmed in
Foakes \textit{v} Beer), and forbearance to sue on a ‘worthless’ claim. The idea that
consideration need not have any value at all was an island surrounded by a sea of
docline that consideration could not just be any benefit or detriment. This effect was
brought about by differentiating between ‘benefits and benefits’ and ‘detriments and
detriments’, to borrow Gilmore’s phrase;\textsuperscript{74} benefits and detriments were partitioned
from their kin on the basis of whether they have ‘value in the eye of the law’\textsuperscript{75}. It would
not merely do that there was in fact a benefit or detriment; there had to be a legal
benefit or detriment.\textsuperscript{76} This legal benefit was by no means to be confused with ‘motive in
actual fact’.\textsuperscript{77}

\textbf{B. The Subjective Theory and Ames}

Ames’ expansive theory made virtually any contract enforceable except in cases where
it went against public policy – making Ames’ account an unreserved endorsement of
the will theory.\textsuperscript{78} An implication of Ames’ expansive definition of consideration, as
Hugh Willis pointed out, was that ‘there would be found in the law of consideration

\begin{footnotes}
\item[70] ibid.
\item[71] (1765) 3 Burr 1663.
\item[72] (1782) 1 Cowp 289.
\item[73] Merkin (n 69) 10.
\item[74] Gilmore (n 48) 22.
\item[75] Atiyah, Essays (n 19) 198.
\item[76] ibid 198.
\item[77] Holmes, The Common Law (n 20) 293; Sir William Reynell Anson, Principles of the English Law of
Contract and of Agency in its Relation to Contract (Ernest W Huffcut ed, 8th edn, Banks and Bros 1896)
93-94.
\item[78] Ames argued that his definition ‘unquestionably makes for individual freedom of contract and for logical
simplicity in the law.’ Ames, ‘Two Theories’ (n 13) 340.
\end{footnotes}
nothing which is not already found in the law of agreement’. 79 While Willis’ suggestion makes Ames’ definition come across as almost iconoclastic, it did little more than draw out the logical consequence of taking seriously the maxim that the law does not enquire into the adequacy of consideration. 80 Pressing his theory into service, Ames argued that the cases decided in line with Pinnel’s rule, leading up to and including Foakes v Beer, did not fit in with the expansive theory as they made sense only under the restrictive theory. 81 These cases are to be treated as anomalies. He also noted that cases such as Foakes v Beer were swimming against the tide and were sooner or later destined to be overridden by statute, as they were, he noted, by the drafters of the Indian Contract Act. 82 This went well beyond any of the British votaries of the will theory were willing to go. 83 Pollock, for instance, was ostensibly an advocate of the will theory and endorsed the subjective theory of value. However, that did not prevent him from supporting the pre-existing duty rule on the grounds that there was no fresh detriment to the promisor. 84 Ames’ idea that any act or forbearance, regardless of its value, was consideration, was deemed too far-fetched by Pollock. 85

Had consideration been restored its subjective tonality completely, and if the idea that any benefit or detriment, however insignificant, would suffice, it is likely that none of the aforesaid rules would have survived. Lord Blackburn in Foakes v Beer came within an ace of doing this to the pre-existing duty rule, 86 and as Ames notes, this was the fate that met Pinnel’s rule in the Indian Contract Act and other parts of the common law world. 87 But the common law did not develop in this logical fashion, and adequacy of consideration remains one of the ‘paradoxes’ of the common law precisely because it matters within some silos and not others. 88 The silos and the resulting paradox were a vestige of the development of the doctrine that had lent it the motley nature of a ‘dog’s breakfast’. 89

80. Lobban, ‘Foakes’ (n 3) 242.
82. Ames, ibid; Indian Contract Act ss 63.
83. Lobban, ‘Foakes’ (n 3) 239. Lobban notes that not even the most willing will theorist was willing for consideration to be abolished.
84. Swain, Law of Contract (n 18) 219; Sir Frederick Pollock, Principles of Contract (7th edn, Stevens and Sons 1902) 184-85. This conundrum would also explain why Pollock thought it as one of the ‘secret paradoxes’ of the common law that a counter-promise should be sufficient consideration regardless of benefit and detriment. Someone who endorsed the subjective theory of value wholeheartedly would hardly have found it problematic: ‘Review of The Student’s Summary of the Law of Contract by JG Pease and A M Latter (London Butterworth 1913)’ (1914) 30 Law Quarterly Review 128, 129. The review is anonymous but it is believed to be by Frederick Pollock; see discussion in Swain, Law of Contract (n 18) 220.
85. Lobban, ‘Foakes’ (n 3) 242.
88. Lobban, ‘Consideration’ (n 47) 379. Ames’ plea can also be seen as the appeal to bring to bear a ‘logical metwand’ on this ‘crooked cord’ of consideration.
89. AWB Simpson, A History of the Common Law of Contract (Clarendon Press 1975) 325; this is an adoption of Simpson’s remark on consideration which was made in another context.
C. The Capaciousness of the Indian Definition

For the framers of the Indian Contract Act, who were presented with the occasion to define the contours of consideration de novo, the paradoxical nature of the common law doctrine of consideration would hardly have seemed appealing. There is ample evidence that the framers wanted to lend the doctrine of consideration a decidedly subjective tonality, and do so consistently. In addition to abolishing Pinnel’s rule, the Indian Contract Act also specifically provided that ‘moral consideration’ would be valid (s 25(2)) and that ‘natural love and affection’ would constitute consideration (s 25(1)) – these were all changes consistent with their having lent consideration a decidedly subjective tonality. Furthermore, with the prescription that any act or abstinence or promise ‘at the desire’ of the promisor counts as consideration, the Act oriented the doctrine of consideration towards the subjective pole.

The copula ‘at the desire of’ cautions against the use of any standard other than the appetites or desires of the contractors themselves. Given this orientation of the definition of consideration, there was little scope for imposing a pre-existing duty rule or requirement that a ‘forbearance’ in respect of a ‘worthless’ claim was without consideration.\(^90\) If that is what the promisor ‘desired’, the law could not really question its worth or value. This gave the definition under Section 2(d) an expansive catchment area. Williston’s tramp would have found the promise made to him as not being a gratuitous one on this definition of consideration – his walking around the corner at the desire of the promisor would have amounted to consideration for the promisor’s promise of paying for an overcoat.\(^91\) With this, a good chunk of what would have been understood as ‘gratuitous’ promises in the rest of the common law world would have become enforceable on the Indian definition of consideration – as long as the promisee gave any counter promise or did any act or abstinence at the desire of the promisor. Under this definition, therefore, even lesser would be required of Williston’s tramp. Even a promise to walk around the block made to the promisor would suffice to make the latter’s promise enforceable according to the terms of the Indian Contract Act.

Despite this, the law in India, as we will find later in this section, ended up embracing the orthodox English law of consideration with all its inherent contradictions. The reason for that is the interpolation of the notions of benefit and detriment, and value ‘in the eye of law’ into Section 2(d) – a project carried through for the most part by the influential commentators on the Indian Contract Act, such as Whitley Stokes, Frederick Pollock, and Dinshah Mulla.

D. The Interpolations

Whitley Stokes, in his early and enormously influential 1888 commentary on the Indian Contract Act, noted that ostensibly ‘in India, consideration need have no value’

\(^90\) For a discussion of the effect of reading benefit and detriment along broad lines on agreements to forbear from suing, see Swain, Law of Contract (n 18) 187. It is also of some importance that in defining consideration, the term ‘abstinence’ was preferred over the ‘forbearance’ which bore connotations of benefit and detriment in English law.

\(^91\) Samuel Williston, The Law of Contracts (Baker Voorhis & Co 1920) 232, 233. The reason, Williston notes, it would not be consideration is because the ‘walk was not requested as the price of the promise’. 
for words were wanting to that effect. In other words, there was no additional requirement of ‘detriment or loss’ to the promisee: the indicia of value in ‘the contemplation of law’. But this, Stokes goes on to surmise, could not possibly have been the real intention of the framers, who were all well versed in English law. Stokes gives us no evidence for ascertaining such intention, which trumps the plain meaning of unequivocal terms of the statute. All said and done, the case is made to rest on Stokes’ intuition that the framers of the Act could never have meant to tinker, in the least bit, with the doctrine of consideration as was then extant in English law. This faith in the drafters’ fidelity to English law, warts and all, was misplaced. To the contrary, the drafters stated in so many words that they ‘deemed it expedient’ to depart from the English law ‘in several particulars’. Some incontrovertible instances such as the abolition of Pinnel’s rule and the resurrection of moral consideration, both of which purged the need for ‘benefit’ or ‘detriment’ bear this out. These deviations did not receive the weight they merited in Stokes’ assessment. Finding the definition deficient, Stokes suggests in its place an alternative: ‘and the promisee or such other person did or does thereby undertake some burden or lose something which in contemplation of law may be of value.’ Stokes was to become the harbinger of the many gratuitous encrustations on the definition of consideration and the distortions to the provision resulting therefrom.

Frederick Pollock who, along with Dinshah Mulla, authored what was and remains, under successive editors, the most influential treatise on the Indian Contract Act, too followed Stokes in recasting Section 2(d). Pollock and Mulla defined consideration in terms of ‘benefit’ and ‘detriment’ although those words were not to be found in the Act. Pollock and Mulla held the view that the words of Section 2(d) must not be read as advancing the doctrine that consideration need not be of any ‘value’ in the eye of the law. Pollock and Mulla’s inaccurate analysis of the definition of consideration begins with the accurate observation that Section 2(d) does not appear to follow any ‘authoritative English exposition’. From this, they infer correctly that ostensibly on Section 2(d), ‘any’ act or abstinence or promise, ‘no matter what’, could pass for consideration. The eliding then begins with Pollock and Mulla’s aspirational statement that one would have expected the drafters of the Act to reiterate somewhere ‘the fundamental rule of common law’: that ‘in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but it must be ‘good’ or ‘valuable’, i.e., something which not only the parties regard, but ‘the law can regard of some value.’ The fact is that no such proposition was to be found in the Act. However, that did not prevent Pollock and Mulla from concluding ‘beyond doubt’ that ‘the silence of the Act cannot be taken as altering the English law’.

93. ibid.
94. Parliamentary Papers, House of Commons (1867-68) 3; Swain, Law of Contract (n 18) 264.
95. Stokes (n 92) 546.
97. ibid 25.
98. ibid.
There is very little reason why the drafters of the Indian Contract Act should have been taken by commentators such as Stokes and Pollock and Mulla to have wanted to do nothing more than scrupulously codify the common law doctrine on consideration and have gone so amateurishly wrong as to have missed vital ingredients in the definition. Furthermore, the drafters also had before them the Dudley Field’s code – from which, as Pollock and Mulla rightly note, the drafters drew several provisions of the Act – which defined consideration in the traditional terms of ‘benefit’ and ‘prejudice’. Should not the fact that they deliberately avoided the traditional definition, which was also to be found in the Field’s code, mean that the preponderance of probability pointed in the exact opposite direction to Pollock and Mulla’s conclusion – that the drafters deliberately wanted to chart out a path at variance from the traditional common law doctrine on this point?

The Pollock-Mulla-Stokes revision of the definition of consideration went virtually unchallenged and assumed axiomatic status as generations of Indian lawyers were schooled to notionally interpolate ‘benefit’ and ‘detriment’ and ‘value in the eye of the law’ into the definition of consideration in Section 2(d); and to see it as a ‘sign and symbol of bargain’. Standard textbooks introduce consideration by reproducing the English definition as if it flowed naturally from a reading of Section 2(d). These interpolations also received the approval of the Supreme Court of India:

[T]he content of the two definitions [Curie v Misa and s 2(d) of the Indian Contract Act] is practically the same, though the expression ‘valuable’ is implied under s 2(d) of the Contract Act, for consideration shall be ‘something which not only parties regard but the law can regard as having some value’.

Bafflingly, even on the rare occasions where the courts have noted that the ‘definition of consideration in the Indian Contract Act is wider and more comprehensive than is accepted in the English Courts’, they have relapsed, in the same breath, to defining consideration in terms of ‘benefit’ and ‘detriment’.

In the light of the phrase ‘at the desire of’ in Section 2(d), Pollock and Mulla’s argument that consideration must be of some value in the eye of the law, by which they meant the imposition of some standard ab extra, apart from the desire of the parties, was unwarranted. This kind of interpolation meant that some instances of an act, forbearance, or promise without benefit or detriment would have to treated as unenforceable, although they should have been enforceable on the plain terms of Section 2(d).

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99. ibid vii.
100. s 780.
101. Muthukaruppa Mudali v PM Kathappudayan (1914) 27 MLJ 249; Pollock and Mulla, Indian Contract Act, 14th edn (n 22) 75.
102. AC Patra (n 23) 125.
103. Avtar Singh (n 21) 100-101.
104. Chidambaraier v Renga Iyer [1965] AIR SC 193, 197 (Supreme Court of India).
105. See Gopal v Hazarilal [1963] AIR MP 37, a case which, despite rightly observing that benefit is not an essential of consideration, goes on to find that there is consideration as there is benefit in the case.
106. As Daruwalla notes, the English rule is followed (Madhya Pradesh High Court) in India although ‘it is not expressly mentioned in the Act’: Daruwalla (n 61) 229. It should further be noted that it is even in Hindu
Consider for instance, a promise to perform a pre-existing contractual obligation made to the promisor. On the plain terms of Section 2(d), this agreement should not be found wanting in consideration as the promise to perform a pre-existing contractual obligation is nevertheless a ‘promise’ and hence passes muster of Section 2(d). However, when tested on the anvil of the unalloyed English doctrine, which comes replete with ‘benefit’ and ‘detriment’, there would be no consideration to be found here. In Lalman v Gauri Datt it was held that a servant cannot claim a reward offered by the master for finding his missing nephew because the servant was already under a pre-existing contractual duty to his master to perform whatever his master ordered. Courts in India have followed the English doctrine unreflectingly here, to the extent of adopting the dichotomy, between promises made to the promisor and those made to a third party. That dichotomy, in England as in India, was hoisted on the basis that the subsequent promise to the original promisor was without any additional detriment to the person making it, while the subsequent promise to the third party imposed an additional detriment on the person making it as being exposed to two suits was certainly more onerous than being merely exposed to one. This justification has for long been known to involve circular reasoning as it begins with the assumption that the subsequent promise was binding. All this questionable logic chopping was eminently avoidable in India thanks to the plain terms of Section 2(d) which treated both classes of promise as supported by consideration. Yet, under the thrall of the orthodox doctrine, courts in India felt themselves bound by the dubious dichotomy. The logic of this error can be traced to that of encrusting the definition of consideration with elements drawn from English doctrine, an anomaly, which Pollock and Mulla were hugely influential in sustaining.

The abolition of Pinnel’s rule seriously undermined the rationale that consideration must necessarily involve a new detriment – and what is good in that context cannot cease to be so when the context shifts to pre-existing contractual duty. Kevin Teeven argues that Section 63 of the Indian Contract Act made it ‘the first common law jurisdiction’ to completely abolish the pre-existing duty rule. However, this claim is incorrect as it equates the abolition of Pinnel’s rule with the abolition of the pre-existing duty rule. The former is only a subset of the latter category, as the report of the 1937 Law Revision Committee rightly notes. A similarly problematic reasoning

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Law there is no need for any ‘valuable’ consideration in the eyes of law: Daruwalla, ibid 231; The courts also followed the English rule with respect to forbearance to sue on a worthless’ claim as being without legal detriment and hence without consideration. Gopinath Bhat v Lakshinran Singh (1916) 32 Ind Cas 937 (Calcutta High Court).

107. [1913] 11 ALJ 489.
108. Lalman v Gauri Datt (1913) 11 ALJ 490 (Allahabad High Court). Curiously, Lalman v Gauri Datt has achieved celebrity status not as a case on consideration but as supporting the proposition that no acceptance is valid unless the offeree had knowledge of the offer. For another case supporting the pre-existing duty rule, see Ramchandra Chintaman v Kalu Raju (1878) 2 ILR Bom 362 (Bombay High Court).

109. See Ramchandra Chintaman (n 108); Muthuswamappa Mudali v P.M. Kathappudayan (1914) 27 MLJ 249 (Madras High Court); Pollock and Mulla, Indian Contract Act, 14th edn (n 22) 82-83.
110. Gopal v Hazardal AIR 1963 MP 37 (Madhya Pradesh High Court).
111. Ames, ‘Two Theories’ (n 13) 342.
113. The Law Revision Committee (n 11) para 36.
can also be found in the Law Commission of India’s 1958 report which claimed that a separate rule abolishing the pre-existing duty rule is not required in India as the same result is already achieved by Section 62 which provides that ‘if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed’.\textsuperscript{114} This equation is wrong as it leaves unaddressed the problem posed by cases such as \textit{Lalman v Gauri Dutt} and \textit{Stilk v Myrick}. The issue in such cases is the \textit{enforceability} of the new agreement, which is prevented by the pre-existing duty rule, and not the \textit{unenforceability} of the old agreement which is what is in question in cases of Pinnel’s variety.

**IV. CONSIDERATION AS INDUCED RELIANCE AND PROMISSORY ESTOPPEL**

**A. Induced Reliance in Nineteenth Century English Law**

The principle of induced reliance has been known to the common law of contract for centuries.\textsuperscript{115} It has been called an ‘ancient form of consideration’.\textsuperscript{116} Simpson notes that at one point, induced reliance could very well have become the organizing principle of enforceability of contracts rather than the exchange model of consideration.\textsuperscript{117} Had history taken this turn, a good deal of the hair splitting over the adequacy of consideration and benefit and detriment would have been pre-empted.\textsuperscript{118} As it happens, most prominent among the doctrines which have in modern times been invoked to nullify these perpetually contested features of consideration is promissory estoppel – a doctrine which traces its genealogical roots to the idea of induced reliance.\textsuperscript{119}

In the middle of the nineteenth century, there were three types of cases known to English law that could be subsumed under the broad rubric of induced reliance. The first of these was the case of consideration in equity, which was more ‘liberal’ than the doctrine that obtained at common law.\textsuperscript{120} The difference between the two doctrines of consideration is illustrated by \textit{Crosbie v M’Doual}\textsuperscript{121} where it was held that ‘an engagement contracted at the request of another into which without that motive the party contracting would not have entered’ was sufficient consideration.\textsuperscript{122} The common law definition’s crucial ingredients, benefit and detriment, were conspicuously absent from the equitable definition. This made the equitable doctrine
of consideration a great deal wider than its common law counterpart as any induced reliance at the request of the promisor sufficed.

If the Law of Contract postulates that a promise is binding only if bargained for, and the Law of Equity postulates that a promise or a representation may be binding if it was intended to be relied upon, and was in fact relied upon.123

Pound notes that behind this was the principle that ‘faith ought to be kept’.124 In the high noon of the will theory, when consideration was being interpreted loosely, Chitty’s editorship went as far as making enforceable for good consideration a ‘promise on the faith of which one party is induced to do some act which, but for such promise, he would not have done’.125 Note that although the above statement was meant as a paraphrase of the ratio in Crosbie, it was much wider than it, as the element of ‘request’ was completely dropped. The plaintiff in Shadwell v Shadwell,126 which involved an action for damages at common law, prayed in aid this equitable definition now endorsed by Chitty.127 This was nothing short of an invitation to ‘jettison consideration’.128 The court in Shadwell did hold for the plaintiff, but did so yet again by stretching the traditional elements of benefit and detriment in the very fashion we rehearsed in the previous section. Gradually, by late nineteenth century, English law turned its back on it altogether to keep it from swallowing the common law doctrine of consideration entirely.129 This notion of consideration-as-induced-reliance had to be given a wide berth because it was feared, as Holmes articulated it, that ‘it would cut up the doctrine of consideration by the roots if a promisee could make a gratuitous promise binding by subsequently acting on it.’130

Kindred to this were two other types of cases which protected reliance, one of which was the common law doctrine of estoppel by representation and the other, the doctrine in equity mandating parties to make good their representations.131 The doctrine of estoppel by representation was grounded on the justification that if someone intends his representation to be acted upon and if it is indeed acted upon, the party making it would be precluded from going back on it.132 The doctrine of making representation good applied where a party ‘misled others who relied on the truth of the statement, that party was forced by equity to make good his misrepresentation by postponing his claims’.133 Jorden v Money134 reshuffled these distinctions by holding that a

124. Pound, ‘Consideration in Equity’ (n 120) 679.
126. (1860) 9 CB NS 159.
127. Lobban, ‘Consideration’ (n 47) 379.
128. ibid 380.
129. Dawson (n 123) 342.
130. Commonwealth v Scituate Savings Bank (1884) 137 Mass 301, 302 (Supreme Judicial Court of Massachusetts).
131. Lobban, ‘Foakes’ (n 3) 246.
132. ibid 247, discussing Freeman v Coke (1848) 2 Exch 654, 663.
133. Lobban, ‘Consideration’ (n 47) 367-68.
134. (1854) 5 HLC 185.
representation of intent was binding only if it was contained in a promise that was enforceable as a contract; a court would no longer hold a person liable on a representation merely because it was intended to induce reliance.\textsuperscript{135} A representation of intent therefore would only be protected if the court could find in the case, a contract which fulfilled all the incidents of contracts, including consideration. This, combined with a reluctance to jettison consideration altogether, meant that the several representations of intention hitherto protected were now left unprotected. \textit{White v Bluett} is a case in point.\textsuperscript{136} The drafters of the Indian Contract Act sought to reverse the effects of \textit{Jorden v Money} and the draft of the Act reinstated – with some changes – the two rules that existed prior to \textit{Jorden v Money} in the chapter on ‘Obligations resembling those created by Contracts’.\textsuperscript{137} Neither of the proposed rules, however, made their way into the final version of the code.

**B. Proto Promissory Estoppel and the Indian Contract Act**

The drafters of the Indian Contract Act protected induced reliance through their definition of consideration: any act or abstinence or promise at the desire of the promisor. The provision appears to have steered a middle path between the definitions of \textit{Crosbie}, and \textit{Crosbie} as paraphrased by Chitty. While the latter went as far as protecting any reliance on a promise, regardless of the intent or underlying state of mind of the promisor, the former required that the promisee’s act be induced by an external illocutionary act, namely, ‘the request’ of the promisor. The middle path comprised of suggesting that the state of mind of the promisor did matter – the act or abstinence had to be \textit{at the desire} of the promisor – but it need not issue in a specific illocutionary act, such as a request to the promisee. It may not be out of place to dwell a little longer on the difference between ‘at the desire of’ and ‘at the request of’ for they have been elided very often in the literature. As John Searle explains, ‘request’ is an illocutionary act which expresses the underlying mental state of ‘desire’.\textsuperscript{138} It follows that there could be many desires that may never issue in requests. Thus, equating the two would be erroneous. The emphasis on the underlying state of mind rendered the provision \textit{qualitatively} similar to the case of estoppel by representation. For the doctrine of estoppel by representation to be engaged, no request by the defendant was required but at the same time, the underlying state of mind of the defendant was not immaterial – the representation must have been \textit{intended} to be relied upon.

It would not be inaccurate to classify Section 2(d) as instantiating a form of proto-promissory estoppel as elements of induced reliance that the provision contained were capacious enough to cover practically all cases now understood to fall under the rubric

\textsuperscript{135} Lobban, ‘Foakes’ (n 3) 256.

\textsuperscript{136} (1853) 23 LJ Ex 36. For want of valuable consideration, the father’s loan to the son on the terms that he need not repay if he did not complain about the father’s distribution of property, was held not to be enforceable.

\textsuperscript{137} These were clauses 60 and 62 respectively. See \textit{Parliamentary Papers, House of Commons} (1867-68) 20.

of the modern doctrine of promissory estoppel. The only obvious difference would be that such cases would not be classed as cases of promissory estoppel but as those of consideration within the ambit of Section 2(d). The provision thus obviated the need to evolve a distinct doctrine of promissory estoppel.\textsuperscript{139} ‘The Calcutta High Court’s decision in \textit{Kedarnath v Gorie Mohamad} on the scope of Section 2(d) provides a useful illustration of the reach of the provision under discussion.\textsuperscript{140} In \textit{Kedarnath}, a promise to pay a charitable subscription to construct a town hall was held enforceable as soon as the promisee, induced by the promise, contracted with a construction contractor. Here was the plain application of Section 2(d) accomplishing a result which could have been brought about by the definition of promissory estoppel used in the American Restatement and by the Law Revision Committee:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.\textsuperscript{141}

The result in \textit{Kedarnath} fell well beyond the catchment of the common law definition of promissory estoppel evolved by the English courts in the twentieth century.\textsuperscript{142} Although Section 2(d) may not, at first glance, appear as wide in ambit as the American Restatement’s definition of promissory estoppel due to the absence of the element of ‘reasonable expectation’, such an impression would be misleading.\textsuperscript{143} Few cases, if any, of ‘reasonably expected’ reliance would not be also ‘desired’. This result follows from the principle – settled by Parke B in \textit{Freeman v Cooke}, albeit only with respect to ‘intention’ – that a determination of what is desired by an agent does not involve peering into the subjective state of the agent’s mind but is to be gleaned from what a reasonable person would understand as being the agent’s desire.\textsuperscript{144} It is noted that

\textsuperscript{139} Eric Holmes points out with a reference to a wide definition of consideration in American law which included within its rubric cases of induced reliance, ‘this classification would have eliminated the need for new terminology such as promissory estoppel’: Holmes, ‘Four Phases’ (n 115) 53.

\textsuperscript{140} \textit{Kedarnath v Gorie Mohamad} (1886) 14 ILR Cal 64 (Calcutta High Court).

\textsuperscript{141} Restatement of Contracts (American Law Institute 1932) §590. The 1937 Law Revision Committee used the language: ‘promise which the promisor knows, or reasonably should know, will be relied on by the promisee, shall be enforceable if the promisee, shall be enforceable if the promisee alters his position to his detriment in reliance on the promise.’ It is submitted that this provision in effect amounts to the same as the American provision. One cannot ‘know’ the future but only ‘predict’ or ‘expect’ that something is likely to happen. ‘Knowing’ thus is for all practical purposes no different from ‘expecting’.

\textsuperscript{142} \textit{Central London Property Trust Ltd v High Trees House Ltd} [1947] 1 KB 132; \textit{Combe v Combe} [1951] 2 KB 215; \textit{Ajayi v R T Briscoe (Nigeria) Ltd} [1964] 1 WLR 1326. The conception of promissory estoppel advanced by the English courts is much narrower because of the construction that they only suspend a cause of action and do not give rise to one. Elsewhere in the common law word, this construction has been dismantled: see \textit{Waltons Stores (Interstate) Ltd v Maher} (1987) 164 CLR 387 (High Court of Australia).

\textsuperscript{143} The Indian Law Commission (1958) certainly thought that the copula ‘at the desire of’ was incapable of encompassing such cases of promissory estoppel (n 26) 7 and hence felt the need to import the doctrine.

\textsuperscript{144} (1848) 2 Exch 634, 663 (Parke B); discussed in \textit{Lobban} (n 47) 247. The terms ‘subjective’ and ‘objective’ are so fraught with nebulousness – having as they do, different shades of meaning – that it might not be out of place to provide a key to the sense in which the terms are being used here, lest it lead to the perception of a tension between the ‘subjective’ tone of the promisor’s desire and its encompassing what a third person can reasonably expect – therefore, ‘objectively’ in a still unspecified sense – to be desired by the promisor. We must distinguish between ontological and semantic senses of the terms subjective and
desire is a world-to-mind state of mind to use the terminology of directions of fit commonly employed by philosophers of language.\textsuperscript{145} In other words, desire anticipates the actualization of a future state of affairs in the world. Whatever may be the actual subjective desire of the person, if the actualization of a certain state of affairs is expected by the person, he is objectively taken to have desired them; or rather, a reasonable person is expected to have desired them. If the promisor expects or should reasonably expect that his promise will induce some specific kind of reliance, he would be taken to have desired that result. \textit{Kedarnath} provides a good example. Someone promising a charitable subscription to build a town hall should reasonably expect that his promise will induce some specific kind of reliance. This was the scope of Chitty’s definition, which provided that any act on the faith of a promise would be binding. It is important to note, however, that this would also go well beyond the definitions in the American Restatement and that was provided by the 1937 Law Revision Committee.

C. Consideration and Induced Reliance: The American Trajectory

Before the American courts began using the language of promissory estoppel towards the late nineteenth century,\textsuperscript{146} they were protecting induced reliance by using the equitable definition of consideration, albeit with one difference: they did not insist on ‘request’ and any act on the inducement of the promise was being treated as

objective. In the ontological sense, the term subjective means, ‘x is constituted by the subject (person)’; and objective, as its antonym in this sense would mean ‘x is constituted by an external standard, not by the subject’. An external standard of ‘value’ which is imposed by the law would be objective in this ontological sense of the term. But there is also a much wider, semantic sense of the term used in linguistic philosophy which pertains to meaning of words. Here, subjective would mean, ‘a word means what A in her mind, subjectively intends it to mean’ and objective would mean ‘a word means what the linguistic community reasonably expects the word to mean’. It is this semantically subjective sense that Humpty Dumpty sought to invoke, when he claimed that a word meant exactly what he chose it to mean – ‘neither more nor less.’ The reason why linguistic meaning can never be subjective in Humpty Dumpty’s sense is primarily epistemological – we have no access to another person’s subjective state and we are warranted to rely on external indicia that comport with reasonable expectations of the users of the language; no meaning would otherwise be possible. Now, if ‘objective’ is always used in this wider semantic sense in contract law, it would lead to the \textit{reductio ad absurdum} that no contract can ever be subjective in the sense of depending on the intention of parties since all contracting uses language spoken or acted. In this context, therefore, on a proper understanding, there is no tension between the subjectivity (in the ontological sense) of desire and intention on the one hand and the objectivity (in the semantic sense) of meaning of the words or actions used to purportedly convey it. The subjective toneality of desire argued for here is meant to be ‘subjective’ in the ontological sense; and it is not at all inconsistent or in tension with the subjectivity of desire in this ontological sense to suggest that the way one epistemologically understands this ‘desire’ is not through peering into the persons subjective mind but objectively (in the semantic sense) by what is reasonably expected by a third person. For a discussion on the need to disentangle ‘intention’ \textit{qua} consent in contract law from the debate on the semantic senses of objective and subjective see: Anne De Moor, ‘Intention in Law of Contract – Elusive or Illusory’ (1990) 106 Law Quarterly Review 632.


\textsuperscript{146} Lobban, ‘Foakes’ (n 3) 245.
consideration. The judgment of the Supreme Court of New Hampshire in Seavey v Drake which placed reliance upon Crosbie provides an illustration:

The expenditure in money or labor in the improvement of the land induced by the donor’s promise to give the land to the party making the expenditure, constitutes, in equity, a consideration for the promise, and the promise will be enforced.

Had the American courts continued on this trajectory and protected induced reliance with the broad definition of consideration, the need for a doctrine of promissory estoppel would probably not have arisen.

A dioramic representation of the two paths that could have been taken by induced reliance – one as consideration and the other, as promissory estoppel – can be found in the drafting of the First American Restatement on Contract. Corbin preferred a definition of consideration that included ‘subsequent facts consisting of acts in reliance on the promise’ But Williston defined consideration in terms of benefit and detriment which could in no way accommodate Corbin’s definition. What followed was the following:

Corbin urged Williston to include a far less stringent definition of consideration in the First Restatement. When this attempt failed, ‘Corbin returned to the attack.’ ‘At the next meeting of the Restatement group’ he produced ‘a list of cases – hundreds, perhaps or thousands? – in which courts have imposed contractual liability’ without consideration as Williston defined it. ‘The Restaters, honorable men, evidently found Corbin’s argument unanswerable,’ and they adopted Section 90 [which defines promissory estoppel].

D. Eclipsed Again

A system which had eschewed the bargain theory of consideration, as Gilmore points out, and embraced the induced reliance theory would have found promissory estoppel ‘unnecessary’. The Indian Contract Act could have – very substantially, to say the least – yielded the fruits of promissory estoppel thanks to the versatile definition of consideration alone. It is not argued here that the drafters of the Indian Contract Act had intended Section 2(d) to cover cases of what we understand as promissory estoppel. Rather, the argument is that the definition of consideration in Section 2(d), which included a prong of ‘induced reliance’, was capacious enough to cover cases that would now fall under the rubric of promissory estoppel as defined by the Restatement. As we have already seen, had the courts in America continued to apply the wide definition of consideration as including induced reliance – this is what Corbin had argued and the nineteenth century cases Seavey and Freeman illustrate – it would have obviated the need to evolve a distinct and separate doctrine of promissory estoppel. In a similar vein, had the courts in India continued to apply the capacious definition of

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147. Parsons (n 120) 517-19.
148. Seavey v Drake (1882) 62 N H 393 (Supreme Court of New Hampshire). See also Freeman v Freeman (1870) 43 N Y 34, 39 for a similar result.
150. ibid 565.
151. ibid 565 (original citations omitted). Gordley attributes this rendering of the incident to Grant Gilmore.
152. Gilmore (n 48) 145-46.
consideration in Section 2(d) which included the prong of induced reliance, as argued for here, it would have sufficed to cover cases falling under the modern rubric of promissory estoppel. This would, similarly, have obviated the need to evolve a distinct doctrine of promissory estoppel.

Despite getting off to a promising start in this direction with Kedarnath, the law did not, however, quite take this shape. Pollock and Mulla thought the decision was unsound.\(^\text{153}\) Pollock and Mulla assumed, without any further justification that the copula ‘at the desire of’ must be read to mean ‘at the request of’.\(^\text{154}\) That became the basis of their criticism of the Calcutta High Court’s decision in Kedarnath. The actions of the promisee were not ‘at the request of’ the promisor, they argued, although such a phrase is not to be found in the Act. Despite noting that the court held that ‘the subscribers knew the purpose to which the subscription was to be applied, and also knew that on the faith of their subscription an obligation was to be incurred’.

If later Kedarnath and Section 2(d) came to be read constrictively, Pollock and Mulla were most likely major contributing factors. In Doraswamy Iyer v Arunachala Ayyar, the Madras High Court held that Section 2(d) requires some kind of a ‘bargain’ between the parties and that there ‘must have been some request by the promisor to the promisee to do something in consideration of the promised subscription’.\(^\text{155}\) Consequently, the court held unenforceable a promise to make public charitable subscription simply because the purpose for which the subscription was being made, was already in progress. The decision is also wrong because it imports the non-existent copula, ‘at the request of’ between the promisor’s promise and the promisee’s consideration. On the plain terms of Section 2(d), this promise should have been held enforceable if the promisee continued construction or did some overt act in reliance of promised subscriptions, one of which was the promisor’s. In fact, even a counter-promise by the promisee should amount to consideration, without any reliance, as any act or abstinence or promise, at the desire of the promisor, could constitute consideration on the terms of Section 2(d). But this is not all, Cornish J adds:\(^\text{156}\)

\[\text{The definition [of consideration] postulates that the promisee must have acted on something amounting to more than a bare promise. There must be some bargain between them in respect of which the consideration has been given.}\]

Not just any reliance on a promise would do, Cornish J reasoned. The promise which was relied upon must be supported by consideration. But how is one to find out which promise is supported by consideration and which promise is a bare one? Here, going by what Cornish J does, we would have to assume that Section 2(d) of the Indian Contract Act is of no assistance whatsoever and that question is to be decided independently of its terms. Consequently, and unsurprisingly, to resolve this issue, Cornish J turns to traditional English doctrine only to find no consideration in the case before him.

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\(^{154}\) ibid.

\(^{155}\) \textit{Doraswamy Iyer v Arunachala Ayyar} [1936] AIR Mad 135 (Madras High Court).

\(^{156}\) ibid.
Pollock and Mulla read *Kedarnath* as an authority on charitable subscriptions alone, and in their footsteps, it became *de riguer* to reinterpret the line of cases beginning with *Kedarnath* narrowly as concerning ‘charitable subscriptions’. This constriction was unwarranted because there was nothing in the text of the provision limiting it to cases of charitable subscription alone. The chance to embrace the possibility of a cause of action resting on induced reliance – and thereby covering cases which in other common law jurisdictions fall under promissory estoppel – as something following directly from Section 2(d) was lost in India.

Decades later, in 1958, the Law Commission of India, inspired by the report of the 1937 Law Revision Committee, laid blame at the door of the doctrine of consideration for not protecting reliance induced by a promise. In its report suggesting numerous reforms to contract law, the Commission proposed an addition of an exception to Section 25 of the Act to the effect that a promise, express or implied, which the promisor knows or reasonably should know, will be relied upon by the promisee, should be enforceable, if the promisee had altered his position to his detriment in reliance on the promise. In *Motilal Padampat v State of UP*, the Supreme Court of India – paying heavy compliments to the vision of the American Restaters and Lord Denning’s ‘bold spirit’ – imported the doctrine of promissory estoppel, allowing it to be used as a sword as well as a shield, but only in cases involving the Government. Here was the highest court of the land importing the doctrine of promissory estoppel – albeit in a restricted sense – without as much as a reference to the Act or Section 2(d) which had anticipated even the American Restatement and Lord Denning by quite a margin.

**E. Promise to Keep an Offer Open**

Another possibility that the notion of consideration-as-induced-reliance contained in Section 2(d) opened up was that of making enforceable – in cases resulting in induced reliance – a promise to keep an offer open. If the promisor had promised to keep an offer open for a fixed time and the promisee in reliance of the promise abstained from communicating his acceptance for a certain period of time, such abstinence would meet the requirement of Section 2(d). To be sure, if the promise did not induce such abstinence, no consideration would be found in terms of Section 2(d). This was another area where Section 2(d) would yield results contrary to the English common law. Here again, Pollock and Mulla argued that the English rule should prevail. They argued with reference to the English common law rule – without even referring to Section 2(d) or the notion of abstinence – that in cases such as these, no consideration was to be found. They read the requirement as implicit in Section 5 which *inter alia* provides that an offer may be revoked before the communication of its acceptance is complete. This reasoning is hardly convincing. While Section 5 clearly applied to cases of offers

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159. Law Commission of India (n 26) 7.
generally, the question at hand was about offers which were backed by promises to keep them open. The common law’s answer was not that such promises are not binding because offers are revocable, but that they are not binding because they are without consideration. That the offers were revocable, was an effect of such promises not being binding, and not the other way around. The common law did not prevent the promisor from accepting valuable consideration (money, for instance) which would make such a promise binding and it is unclear how Pollock and Mulla would navigate such a scenario on the basis of Section 5 alone. The fact is that Section 5 was never intended to cover such cases, which necessarily raises the question of bindingness—tested on the anvil of consideration—of the subsequent promise to keep the offer open. Here again, the Pollock and Mulla view has prevailed and it has been held by the Supreme Court of India that promises to keep offers open are not enforceable.

V. DIAGNOSING THE ECLIPSE

Wherever the common law is ‘codified’, there appears to be some kind of osmosis tending toward relapsing to the pre-code law. When Dudley Field’s code was adopted by the State of California, John Norton Pomeroy had famously argued that Field’s code should be ‘treated as the common law’ as if ‘no codification had occurred’. The courts should, he prescribed, ‘interpret the definitions, statements of doctrines and rules in complete conformity with the common law definitions, doctrines and rules’. This prescription was meant to inform the attitude of the courts ‘except in the comparatively few instances when the language is so clear and unequivocal so as to leave no doubt of an intention to depart from, alter or abrogate the common law rule.’ As it turned out, not only were Pomeroy’s words prophetic with respect to Field’s code, but they also anticipated what was to happen to the Indian Contract Act. The only instances where the Indian Contract Act has been held to successfully displace some of the old rules of consideration are those where there is no room for even the least doubt that the old doctrine was sought to be replaced: such as is the case with Section 63 and Section 25. Similarly, Richard Gooderson has found in court decisions on the Indian Contract Act, a tendency to ‘neglect…the plain meaning of the words of the legislature in order to import English legal principles’. It should be noted, however, that none of the interpolations identified in this article make it to Gooderson’s list of unwarranted imports.

There is also a related semantic worry. Unless the code deals in neologisms, it cannot but use terms that must already mean something very concrete to those used to the common law doctrine that the code is meant to codify. Even a very clear definition of the term, short of specific traversal of specific connotations of the term, which seeks to

163. See Bank of India v O P Swarankar (2003) 2 SCC 721 (Supreme Court of India); Somasundaram Pillai v Provincial Government of Madras [1947] AIR Madras 366 (Madras High Court).
disabuse any such association, cannot be a foolproof insurance against the antediluvian understanding of the term being brought over to understanding the term in the new code. Similarly, it would be tempting to conclude that just because ‘consideration’ finds mention in the Act, it was meant to be a mimeograph of the English consideration requirement which the framers never meant to tinker with. Consider, for instance, Warren Swain’s assessment of the requirement:

There was no clean break with the past. Some doctrines like consideration which remained contrary to Will Theory were retained.¹⁶⁷

This may be all very well qua assessment of extant Indian law – which is to say, how the Indian law has ended up over the years – but if consideration is understood along the lines argued for here, it would be just as close, if not closer, to the will theory than Ames’ definition. If Ames rendered consideration superfluous, thus obviating the need to abolish it, so did the Indian Contract Act; perhaps even more so.

¹⁶⁷ Swain, Law of Contract (n 18) 271.