A COMPARATIVE STUDY OF LAW OF CONTRACT UNDER THE CIVIL LAW AND THE COMMON LAW SYSTEM VIA INDIA AND FRANCE

Authored by: Atipriya Gautam*

* LLM, National Law University, Delhi

ABSTRACT

This paper tries to trace the differences and the similarities which exist Law of Contract of France and India. While France is a country of civil law tradition; India which forms part of the common law tradition. Over a period of time, due to convergence, a lot of similarities developed in the contact law of the countries; however, there were still distinct features which differentiated one from the other. While France recently redefined its Contract Law, the Indian Law of Contract did not undergo any such major change. Conclusively, due to the emergence of technology, there are various challenges which the Contact Law of a nation needs to address.

Keywords: Comparative Law, Law of Contract, India, France.
INTRODUCTION

Comparative law analyses the homogeneity and heterogeneity of doctrines and rules in various legal systems across the world, and contract law in that sense has distinctive features which may be comprehensively different or absent altogether. Whether it is comparative law of contract of comparative law of contracts? The presence and absence of the letter ‘s’ signifies the difference between the two major approaches in a legal system, the common law and the civil law, on the same legal concept of ‘bond of law’ or ‘obligation’ which is created by the will of human beings. However, the genesis of both the systems is in the Roman law of contracts. However, in the course of their development, the systems adopted different legal approaches to solve similar practical issues emerging from the necessity to regulate the transactions emanating from the interactions of people either in a common law or a civil law system. The contract law of India is founded upon the common law tradition of the English law and is generally compared with the private laws of the two most influential countries of the Western legal tradition, that is, France and Germany.

The law of contract has been one of the central subjects of comparative law studies; so much so that the International Encyclopedia of Comparative Law has allocates two out of the seventeen volumes to it and is significantly covered by the comparative law casebooks. The reason for this is majorly founded on the modern comparative law studies focusing on the similarities and dissimilarities between the common law and civil law traditions which considered contract law as a fertile area for studying. The civil and common law approach were similar and comparable on issues which centred around corresponding topics, for instance, contract formation (offer and acceptance), non-performance of contract and remedies for the same, interpretation, change of circumstances, mistake, deceit and duress, while on the other side they had striking and substantial differences to make the comparison worthwhile, for instance, the underlying conceptions of breach, the doctrines of cause and consideration, and the stress on specific performance and

2 Id, p. 3.
payment of damages\textsuperscript{6}. It is pertinent to note that these distinctions and similarities stem from the historical developments in the nations. Traditionally, the concepts under law of contract were more distinct, however, there was a considerable convergence in the latter part of the nineteenth century when the common law came under the massive influence of the civil law\textsuperscript{7}. The comparative law study on contract law is also of great significance in the present times due to its importance in the economic sphere and international litigation and negotiation.

French law is a part of the family of ‘civil law’ which has adopted the system of continental Europe as well as Latin America and such other countries which form part of the continental European legal systems. The French Civil Code was a result of the jurisprudence of natural law school coupled with the enlightenment that occurred in the eighteenth century. The societal view which was also endorsed by the thinkers of that school, was based on the concept of social contract which was of the opinion that the society was founded upon agreements which were made by individuals\textsuperscript{8}. Therefore, contract was regarded vital for social human existence and the freedom of the individuals to enter into contractual agreements was regarded as a fundamental social value. The primary source of contract law of France was the Civil Code\textsuperscript{9}. However, the work of the French jurist Pothier, was of great significance with regard to the drafting of the French Civil Code sections which governed the law of contract\textsuperscript{10}. According to the Code, a contract is a legal technique of acquiring and transferring rights\textsuperscript{11}.

In India, during the ancient and the medieval period there was no code in general which covered the contractual obligations and the principles stemmed from the sources of Hindu law, namely the Vedas, Smritis, Shrutis and Dharamshatras; and with the advent of the Muslim rule, the matters related to contracts were started to be governed by the Mohammedan Law of Contract\textsuperscript{12}. Although, the Roman notions of contract have not been directly incorporated under the Indian law of contract,

\begin{itemize}
\item \textsuperscript{6} Id., p. 901.
\item \textsuperscript{9} Articles 1101 to 1369-11, The French Civil Code, 1804.
\item \textsuperscript{10} JEM Portalis, \textit{Discours préliminaire du premier projet de Code civil}, in PA Fenet, Receuil complet de travaux preparatoires du Code civil (Vidocq, Paris 1836).
\item \textsuperscript{11} Article 1101, The French Civil Code, 1804.
\item \textsuperscript{12} Charles Hamilton: Hedaya, London, 1971 Preliminary Discourse 1xxxvi.
\end{itemize}
but they have indirectly been significant in its formation as it played an influential role in the development of English law, thus, affecting the Indian Contract Act of 1872\textsuperscript{13}.

Therefore, the Indian Contract Act was designed upon the model of the English Common Law. The ambit of the Act covers the contractual rights, duties and obligations of the contracting parties. The Act codifies the formation of a contract, the implementation and the execution of contractual obligations and the breach of a contract. The individual prerogative is predominant in a contact, however, there are certain restrictions on the capacity to contract under the Act. Moreover, there are specific acts which deal with the property, specific performance and movable goods, such as the Transfer of Property Act of 1882, the Sale of Goods Act of 1930 and the Specific Relief Act of 1963 which earlier part of the Contract Act of 1872, but subsequently they were codified as separate laws.

The basic study of a contract law of any country begins with the components of contract formation, such as offer, acceptance and consideration. From a theoretical perspective, a contract can be seen as an ensemble of rights which are held by a person, while from a pragmatic point of view, it is a legal instrument of economic exchange. Under the French law, a contract is an agreement between the parties; while under the Indian contract law which is of common law tradition, it is more likely a promise in return for good consideration\textsuperscript{14}.

The contract law generally includes two forms of rules: mandatory and default rules. The mandatory rules are the ones which the parties cannot alter or waive off by agreement, for instance, the fundamental rule that parties must act in good faith while enforcing and performing the terms of the contract\textsuperscript{15}. These rules are common to most of the law systems, and in this case, both to India and France. On the contrary, a default rule is one which only applies to the parties if they agree upon not altering it\textsuperscript{16}. Although, the studies indicate that there are differences with regard to default rules, however, they might not be of much relevance in practice since the parties have the

\textsuperscript{14} Nicholas (1974), Tulane LR, 946.
\textsuperscript{15} Arthur von Mehren, \textit{The French Civil Code and Contract: A Comparative Analysis of Formation and Form}, 15 La. L. Rev. (1955) Available at: https://digitalcommons.law.lsu.edu/lalrev/vol15/iss4/4 (Last visited on: 19\textsuperscript{th} April, 2018)
\textsuperscript{16} Id.
liberty to alter these rules whenever they do not justify the needs of a particular transaction, therefore, these rules might resemble each other after modification by the parties.

Under the Indian contract law, for a contract to exist, there are three mandatory conditions: an offer and acceptance, a consideration and an intention to enter into a legal relationship. Along with this, the parties must give free consent and must be capable of contracting\(^\text{17}\). The concept of offer and acceptance may not be fundamentally different in common and civil law, their effects might be so. According to the common law systems, consideration is necessary for binding the promisor and the parties must have an intention of creating a legal relationship which might be examined by the courts in case of a conflict. However, the French law is founded on the concept of autonomy and consent. Article 1108\(^\text{18}\), embodies four essential requirements for a valid contract: free and informed consent of the parties, the ability of the parties to contract, a certain and determined object and a lawful clause. The theory of autonomy means that the will of the parties is the source of the ‘binding force’ of the contract. It connotes that law only protects this will or expression of the parties but does not create it, however, it might enforce its execution if required. This concept is the byproduct of the Canon law of France which operates upon the Kantain principle that a person cannot be subjected to laws other than those which he provides for himself (\textit{Métaphysique du droit})\(^\text{19}\).

Mutual consent is the heart of contract law and according to the classical theory it can only be reached when there is a ‘meeting of minds’ or consensus ad idem as one can only be bound by a contract if he intends to. The French law embodies the principle of subjective consent and takes into account that the actual declaration or communication of consent is necessary\(^\text{20}\). The Indian Contract Act also embodies similar principle and free consent is a sine qua non for an agreement to be considered a contract\(^\text{21}\), it is further added that when consent is caused by coercion, fraud,

\(^{17}\) Section 10, The Indian Contract Act, 1872.
\(^{18}\) The French Civil Code, 1804.
\(^{21}\) Section 10, The Indian Contract Act, 1872.
misrepresentation or undue influence, the contract maybe voidable\textsuperscript{22} while a consent formed due to a mistake is void\textsuperscript{23}.

The theory of offer and acceptance is found under the French law and when several concordant wills are met, a contact is formed. Moreover, the principle of consent requires that no specific form of consent is required for the performance of the contract; the meeting of the minds sufficiently creates contractual obligations. French contract law is both more 'moral' and more dogmatic; while contract law in a common law system is both more 'economic' and more pragmatic\textsuperscript{24}. However, at the same the moral duty of disclosure of pre-contractual information cannot be avoided even under the common law tradition of India.

There is a similarity with regard to the acceptance of a contract between the two countries. The 'mirror image rule' of France is followed under the Indian contract act as well even though the phrase might not be used\textsuperscript{25}. According to this rule, the acceptance must be absolute and unqualified and due considerations must be given to the specifications mentioned in the proposal. Thus, the acceptance should be unequivocal and accepted without any modifications as the proposer is considered to be the master of the offer. Any attempt to alter the terms of the offer creates a counter-offer which leads to the rejection of the original offer.

In France, theoretically, the revocation of an offer can be operated even without referring to whether it was sent or received by the offeree.\textsuperscript{26} This rule is in contradiction with the general objective rule of common law where revocations must be received so as to be effective. This rule in France is based on a French doctrine which provides that most offers are irrevocable for a reasonable time period and if they are revoked prematurely, then a dialectical obligation is due to the offeree\textsuperscript{27}. In India, the revocation of a proposal can be done before it comes to the knowledge

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\item Section 19, The Indian Contract Act, 1872.
\item Section 20, The Indian Contract Act, 1872.
\item Supra Note 19.
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of the acceptor and the revocation of an acceptance can be done before it comes to the knowledge of the proposer 28.

The components of contract formation under the French law resemble an ‘objectivist’ common law system. However, this objectivist common law system is not purely objectivist in nature, rather it is inclusive of a lot of subjective components, which have been mostly borrowed from France 29. In reality, however, there cannot be a pure objective theory of contract and pure subjective theory of contract 30. Therefore, the French law principle of subjective intent and pure autonomy of will, is similar to the objective theory which is followed worldwide 31. This concept of pure autonomy of will was so deeply entrenched under the French Civil Code, that even today, there exists no distinction between real intention and its manifestation 32. With the advent of time, there was a need to place reliance upon the outward behavior, and therefore, the French writer devised a theory which claimed that there was no distinction between real and apparent intention and outward behavior, as the real intention was a means to deduce the behavior. However, practically this test under the French law is not much different from the objective test followed by the countries of common law tradition.

The ethical basis of the French law of contract is emphasized by Rene David in his book, wherein he points out that: “The French law of contract is based on a principle of morality, stressed by the canonists, for whom it was a sin for a person not to fulfil his promises: pacta sunt servanda, you must keep your word and, if you do not, the State and the law will oblige you to do so.” 33 While the Indian law which follows the English law, on the contrary lays more emphasis on the fact that the promisee or the party who furnishes consideration should not suffer damage if case of any breach 34. Therefore, treating contract as a bargain.

Furthermore, with the advancement of technology and emergence of internet, the legislatures across the worlds face a lot of difficulty with regard to electronic contracting rules 35. They aim to

28 Section 5, The Indian Contract Act, 1872.
29 Supra Note 26.
30 Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 760-69 (2d Cir. 1946)
31 Supra Note 26.
32 Id.
33 Rene David, English Law and French Law, 6, at 126.
34 Id.
harmonize the rules of the traditional world with the electronic contracting environment, however, they face the issue of consumer protection\textsuperscript{36}. A brief analysis of the comparative study between these two legal systems indicate that the common law countries (specially UK and India) have consumer friendly rules with regard to electronic contract formation, while the civil law countries like France, have neutral rules which undermine the consumer protection aspect\textsuperscript{37}.

Since the enactment of the Indian law of contract in 1872, there has been no amendments and the law still stand good. The French contract law underwent a major reformation in the year 2016\textsuperscript{38}. However, the Reform was not targeted towards fundamentally changing the French law of contract, rather it was done so as to codify the changes which were introduced by the French Courts through case laws. This Reform was also intended to elevate the position of France in the competitive international arena, especially in comparison to the countries which follow the common law system.

Thus, one can conclude that due to their varied historical conditions, both these countries had different origins to their Law of Contract and contract formation remains one of the basic and guiding principle under it. One can say that, consent is the basis for French law and consideration forms the basis for the common law system of India. There is a lot of convergence which is happening in this field, however, the distinctiveness of the legal systems is still there. This convergence is primarily due to the emergence of the international rules and principles which govern the global commercial transactions. The UNIDROIT is one such inter-governmental organisation which drafts international conventions and model laws and both India and France are signatories to it\textsuperscript{39}.


\textsuperscript{38} The French Government has, by Ordinance n° 2016-131 of 10 February 2016, amended the French Civil Code regarding contract law that had previously remained unchanged since 1804 (the Reform).