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CONSIDERATION; A COMPARATIVE STUDY UNDER ENGLISH COMMON LAW, MALAYSIAN LAW, ISLAMIC LAW AND CIVIL LAW

BY

ROKIAH ABD KADIR

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF COMPARATIVE LAW

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ABSTRACT OF THE THESIS

This work examines the basic concept of consideration and the position the doctrine occupies under the Common Law, Malaysian Law, Civil Law and Islamic Law. The doctrine's importance in reality will be scrutinize vis-à-vis the problems and shortcomings arising out of the existing doctrine of consideration.

This work is divided into six chapters. The first chapter deals with Preliminary; the objectives and scopes of the research as well as the historical perspective of each legal system involved in this study. The next four chapters discuss consideration under the English Common Law, Malaysian Law, Civil Law and Islamic Law respectively. The final chapter deals with comparative assessment of the doctrine of consideration under the various legal systems.

This study reveals that the application of the principles of consideration to all cases without qualifications has caused inconveniences. These difficulties could have been mitigated by the use of the flexible approach in finding the presence of consideration and the willingness to depart from certain principles. This pragmatic approach in construing consideration is necessary particularly in cases where the enforceability is so compelling. In cases where the intention of the parties to assume legal relation is so manifest, the court should dispense with the strict technicalities of consideration and the enforceability should not be refused. The refusal of enforceability particularly in one-sided transactions should have been on the reason of policing the actual fairness of

the dealing. The unenforceability situations should not be handled with one hard and fast rule of lack of consideration as this would result in the preclusion of the application of values of fairness.

The methodology used in this study is thoroughly library-based. Reference is made to books, journals, seminar papers and Law Commission Reports.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.

S. M. Hasan

Name Syed Misbahul Hasan
Supervisor

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.

Name Prof. Mohd. Hashim Kamali
Examiner

This thesis was submitted to the Department of Private Laws and is accepted as partial fulfilment of the requirements for the degree of Mater of Comparative Law.

TAN SRI DATO' PROF. HARUN MAHMUD HASHIM
HEAD
DEPARTMENT OF PRIVATE LAW
KULLIYYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

Name
Head, Department of Private Laws

This thesis was submitted to the Kulliyyah of Laws and is accepted as partial fulfilment of the requirements for the degree of Master of Comparative Law.

Tan Sri Prof. Dato' Harun Mahmud Hashim
Acting Dean
Kulliyyah Of Laws
International Islamic University Malaysia

Name
Dean, Kulliyyah of Laws

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

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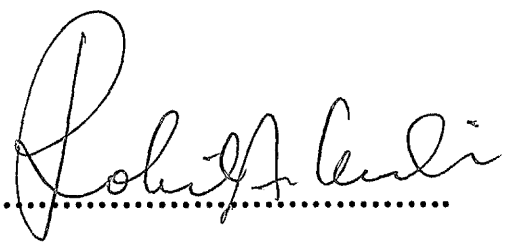
Singnature.....  **Date**.....**13 – 2 – 1998**

To my family

without whom this dissertation would not have been written

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By the wish of Allah, The All-Mighty, this humble work is completed. Blessing and peace be upon His Apostle Muhammad (S. A . W).

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CHAPTER ONE

PRELIMINARY

1.1 OBJECTIVES AND SCOPE OF THE RESEARCH.

> "Rules of law, like everything else in this modern age, must be prepared to justify themselves against attacks, and cannot shelter behind antiquity or prescription."[1]

The above statement is indeed true. The present writer will thus endeavour to search for justification, if any, of the doctrine of consideration. This paper will examine the basic concept of consideration and the position the doctrine occupies under the common law, Malaysian law, civil law and Islamic law. The doctrine's importance in reality will be scrutinised vis-a vis the problems and shortcomings arising out of the existing doctrine of consideration.

The role of consideration under the common law, as will be seen in the ensuing discussion, is to mark off various classes of transactions as enforceable. The consideration-based analysis will require the presence of the element of exchange in order to render the transaction enforceable. *Causa* and the Islamic law, on the other hand, do not subscribe to the notion of bargained-for exchange but approach the question of unenforceability on quite a different basis. The analysis employed by the two legal systems will be explored, in comparison with that of the common law.

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[1] Wright, *Ought the Doctrine of Consideration to Be Abolished From the Common Law*, 49 Harv L.R. (1936) at p 1225.

Both the doctrines of consideration and *causa* have been subjected by many critics to serious attack. With regard to the former, several scholars including Wright,[2] have gone so far as to suggest the abolition of the doctrine in the law of contract. With respect to the latter, Planiol[3] criticised *causa* as both 'false' and 'useless'. Can the law of contract dispense with these doctrines and approach the problem of unenforceability on some other basis? To what extent Islamic law agrees with the doctrine of consideration and the role it plays under either the common or civil law? These will be the areas this paper attempts to examine.

It was once argued that the significance accorded to consideration should, if any, be of evidentiary function. Surprisingly the common law, in the course of time, has given a substantive recognition to the doctrine resulting in the unenforceability of a promise unsupported by consideration. The extent that the doctrine deserves substantive application in the law of contract will be re-assessed. How far promises deliberately and solemnly made will be held unenforceable due to lack of consideration will be examined in detail.

The natural corollary of the notion of bargained-for exchange would be that one-sided transactions are unenforceable. Under the common law the situation could be readily explainable in terms of the absence of consideration. However, would it not be acceptable if the case were to be analysed on the ground of policy justification? The writer will attempt to venture into the possibility of arguing the unenforceability from

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[2] Ibid, p 1238.
[3] Planiol, *"Traite Elementaire de droit civil"*. (6th ed.) no. 10301 c.f. Earnest, G. Lorenzon, (1919) 28 Yale L.J. 621 at 633

the perspective of policy of fairness. Would it be more in line with such a policy if the options agreement made by two businessmen be handled differently from many other kinds of commercial dealings? It is interesting to note that the Uniform Commercial Code introduces this distinction, making binding a firm offer to buy or sell given by a merchant.[4] A different approach should however be taken in dealing with cases involving individual citizens as they clearly need protection, which a company should not require. The handling of one-sided transaction with one hard and fast rule of lack of consideration would surely preclude the application of values of fairness in the situation.

The concept of *causa* which does not require bargained-for exchange will be discussed. Promise of gift is enforceable as the liberal intention furnishes the cause. Since the enforceability result in promise of gift is similar to that of the Islamic law, can it be said that *causa* and the Islamic law of consideration are one and the same thing? Is it necessary in the Islamic law to introduce the notion of consideration in rendering enforceable the promise of gift, or is it sufficient to base the analysis on the principle that the promise is to be honoured? The writer will attempt, in the ensuing discussion, an analysis of these questions.

When one party promises both because he desires to confer a benefit upon the other party and because he obtains from him the advantage of some benefit or detriment, the transaction presents some elements of an onerous transaction and of a liberty. Under the common law, is such a transaction to be considered a promise of a gift and thus

[4] UCC p 2-205 and p 2-104 (1957).

classified as unenforceable? What device will be resorted to by the common law if it were to give enforceability to such a promise? These questions will be examined together with the position of the promise of mixed gift under the doctrine of *causa.*

In relation to the promise to fulfil an obligation contracted during minority, the promise of a bankrupt debtor to pay a released or discharged debt and the promise to pay an obligation on which the period of limitation has run, the common law classifies them as enforceable. Though the result is clear, the difficulties arose as to how to explain and reconcile the enforceability with the doctrine of consideration. Can it be said that the moral obligation as expounded by Lord Mansfield is revived in at least these promises?

The two latter classes of promises mentioned above are enforceable under the French law. The result has been analysed in terms of natural obligation. Assuming that the basis of enforceability of these promises under the common law is the moral obligation, can it be said that the three legal systems are, at least in this respect, getting closer to one another?

The doctrine of binding precedent could be the reason why common law's handling of commercial option is more a logical deduction than an expression of any justifiable policy reason. The absence of such a doctrine under both civil and Islamic legal systems enables them to approach the cases on a highly individualised basis.

However, with the recent development in *Williams v Roffey*[5], and *Lipkin Gorman*[6] cases, can the common law court check the fairness of the individual transaction and take a more flexible approach in dealing with the problem of unenforceability? The latter case seems to suggest that the enforceability, though warranted by the principles of consideration, could be refused on the justification of the interest of justice.

In most cases, the unenforceability is said to be relative, curable by the extrinsic elements. Under the common law, the unenforceable transactions can be rendered enforceable by seal or nominal consideration. The question whether apart from these two, there could be any other acceptable extrinsic element will be examined and ventured into this paper.

Instead of subscribing to the bargain-based notion of consideration, the Malaysian law has modified the doctrine by means of statutory provision to be rather desire-based. The question whether this modified version of consideration brings about any substantive difference in the Malaysian law will be examined. Can the desire-based notion be taken to provide a basis of justification in giving somewhat flexible application to the principles of consideration as imported from the English common law? This point is significant with regard to the rule of privity which, unlike the rules that consideration must move from the promisee and that in the *Pinnel*'s case, has not been dispensed with in the Contracts Act. Though judicial opinion seems to favour the application of the rule of privity, under the desire-based notion the matter merits

[5] (1990) 1 All ER 512
[6] (1991) 2 AC 548

reconsideration.

How far past consideration as expounded in the *Lampleigh's* case fit the desire-based notion which underlines the definition of consideration under the Malaysian law? It has been urged that section 26(b) should not be interpreted as giving recognition to past consideration, as that would contradict section 2 (d).

If the validity of past consideration is not what section 26(b) means, can it then be construed as embodying a rule of restitution? Since what would bring section 26(b) into operation is the promise, and not unjust enrichment *per se*, the attempt to interpret section 26(b) as embodying the rule of restitution must be viewed with some caution. This paper will then explore as to what can be the correct way of understanding section 26(b).

Further, can *Kepong's* case be used to endorse the utilisation of section 2(d) as a basis for the allowance of any past consideration? The writer will examine whether there is any real contradiction between the judgement in *Kepong's* case and the desire-based definition of consideration as contained in section 2(d). Finally, the suggestion that section 26 of the Contracts Act needs to be overhauled, will be examined[7].

[7] *Cheshire, Fifoot and Furmstone's Law of Contract.* (Phang ed.) p 197

1.2 HISTORICAL PERSPECTIVE.

The common law. The institution of the present English legal system is traditionally held to date back at the earliest to somewhere in the twelfth century, where the practice of the courts constituted the origin of the common law. The English legal system is representative of the common law tradition. It was from here that the idea and practice of the common law evolved and has since then spread to a large part of the modern world. Resort to equity was made when grievances were caused as the outcome of the rigid application of writ system. Both common law and equity were developed by judges. The focal point of the common law is the doctrine of binding judicial precedent. The operation of the doctrine of *stare decisis* is the fundamental instrument in the evolution of common law.[8]

The Malaysian law. Before the advent and spread of Islam, Malay customary law or *adat* was the dominant and primary source of law in Malaysia. This was evident in the earlier versions of the *Undang-undang Melaka* and the *Risalat Hukum Kanun*, which contained entirely *adat* law, later versions showed the inclusion of Islamic law alongside the *adat*.[9] As a result of British colonisation, English law has from time to time been introduced through the instrument of Charters of Justice and Civil Law Ordinances. The Contracts Act 1950(Revised 1974) was enacted based on the Indian legislation, which in turn relied heavily on the principles of English Law. Though the

[8] Owsia, P. *Formation of Contract, A Comparative Study Under English, French, Islamic and Iranian Law,* London, Graham & Troman Ltd. 1994. pp 3-5.
[9] Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, Kuala Lumpur, DBP, 1987, Chapter 2.

Contracts Act brings to an end the problems of multiplicity of legislation on contract, it was not clear whether the Act excludes the reception of English common law. Judicial and academic opinions seem to favour the continued reception of the English law by contending that since the Contracts Act is not an exhaustive code, there still exist lacunae in the law that must be filled with English principles.[10]

The Civil law. The Civil Law system, which is often termed as the Romano-Germanic tradition is in large part derived from Roman law, in particular the *Corpus Juris Civilis*, but an evolution of more than a thousand years has greatly changed its substance and procedural rules. One aspect of the civil law system that distinguishes it from the common law system is the self effacing position assumed by the civil law judges who strongly hold to the belief that the task of law making belongs to the legislators. The rejection of the doctrine of precedent has its origin in the history of Roman law tradition.[11]

The Islamic law. The Islamic law today is the product of almost fourteen centuries of continuous particularly early in the seventh century. In the early period of Islamic law, the legal sources were mainly confined to the Quran and the Tradition. However, later, due to the pressing needs of a changed, expanded and thriving community turned into an empire, recourse to *Ijtihad* was made. The emergence of the various schools of law had contributed to the development and the establishment of principles of law by means of *Ijtihad*. However when the formation of the four schools was

[10] Sheikh Mohd Noor Alam, *Contracts and Obligations, The Law in Selected ASEAN Countries*, Malaysian Current Law Journal. (1994) pp 3-6
[11] Ibid. at 21-23

completed in the ninth century, a conviction gradually grew which held that the gate of *Ijtihad* is closed and that subsequent generations had to follow the respective teachings of the early masters. This had caused the stagnation of law till the latter part of the nineteenth century, where there have been progressive movements by scholars for reconsideration and reinterpretation of the age-old stagnant law. Several codes were compiled, of which the most important was *Majallat al_Ahkam al-Adliyyah*, briefly known as the *Majallah* promulgated in 1877. It was a short form of a civil code, based on the law of Hanafi school. It contained extensive general parts and sets out provisions on various contracts, non-contractual obligations and certain procedural matters.[12]

[12] Owsia, P, *Formation of Contract*, pp 17-25.

CHAPTER TWO

CONSIDERATION UNDER THE ENGLISH COMMON LAW

2.1 INTRODUCTION; GENERAL CONCEPT OF CONSIDERATION

Under the common law, the doctrine of consideration which consists of the complex and multifarious body of rules, is a well-rooted reality in the law of contract. Being 'the most distinctive feature of contract law'[13] its role is obvious in differentiating between enforceable and unenforceable promises. Doctrinally speaking, consideration stands at the very centre of common law's approach to contract law.[14]

The doctrine represents the adoption by the English law of the notion that only bargain should be enforced.[15] The significance of this bargain-based notion of consideration is to a certain extent eroded by the recent development that contract need not necessarily be the result of bargain, i.e. inter alia the upsurge of standard form contract. Further the existence of the rules that consideration need not be adequate and the sufficiency of the nominal payment may weaken the bargain notion which has been claimed to be the underlying concept of consideration.

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[13] Walter Stern, *Consideration and Gift, International and Comparative Law Quaterly,* (1965) p 675

[14] Athur T. Von Mehren, *Civil Law Analogue to Consideration: An Exercise in Comparative Analysis,* 72 Harv. LR p 1009

[15] *Cheshire, Fifoot and Furmstone's Law of Contract.* (Phang ed.) p 133