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## DOCTRINE OF CONSIDERATION: EVOLUTION, MEANING, & EXCEPTIONS IN CONTRACT LAW

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### ABSTRACT

*This article examines the doctrine of consideration in contract law by tracing its historical evolution, analysing its meaning and essential elements under the Indian Contract Act, 1872, and discussing its statutory exceptions. It compares Indian and English legal approaches while highlighting the role of consideration in determining contractual enforceability and legal obligations.*

### DOCTRINE OF CONSIDERATION

The doctrine of consideration is one of the fundamental concepts of contract law. It distinguishes enforceable agreements from gratuitous promises. If law of contract were reduced to atomic form, consideration is nucleus and the other elements -offer, acceptance, intention and certainty- are the electrons.<sup>1</sup> An illustration of consideration can be found in the relationship between oxpeckers and rhinos. The birds feed on ticks found on the body of rhinos, while rhinos benefit from having those parasites removed. Each provides something of value to the other. Similarly, in contract law, consideration requires parties to exchange something of value.

The doctrine, however, has not emerged in its present form overnight. Rather, it evolved gradually throughout centuries and finally took a modern form in 19<sup>th</sup> century before finding statutory expression in the Indian Contract Act, 1872. This article traces the evolution of the

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<sup>1</sup> Mark Giancaspro, *A History of Consideration at Common Law* 12.

doctrine of consideration, examines its meaning and essential elements under Section 2(d) of the Indian Contract Act, and lastly discusses the exceptions to the general rule of “no consideration, no contract”.

## EVOLUTION

The precise origin of the doctrine of consideration is not known. Origin of consideration is closely connected to the concept of exchange. Concept of exchange was known from the time of early humans. Early humans bartered with one another since Middle Stone age. By about 3500 – 3000 BC, people in Mesopotamia were using silver and other standardized measures of value to facilitate trade. While these early exchanges are truly not similar to the consideration known today, they reflected the principle of reciprocal benefit that later became central to contract law.

Legal origins of the doctrine are generally traced to medieval times. By thirteenth century, writ of covenant had developed. Plaintiffs used it to seek performance of a promise made under seal. Where specific sums of money were sought to be recovered, writ of debt was utilized. To found an action in debt under contract, the arrangement had to adhere to the doctrine of quid pro quo, i.e., it had to be shown debtor had actually received a material benefit from the creditor.

Writ of covenant, however, was not available to agreements which were not in deed form. Therefore, throughout the 14<sup>th</sup> and 15<sup>th</sup> centuries, the action of assumpsit became the primary mechanism of remedying contractual and tortious wrongs. Earlier, action of assumpsit was restricted to instance of malfeasance, however later it judicially was interpreted to be applicable to the cases of nonfeasance.

One of the earliest judicial references to consideration is found in *Joscelin v Shelton*. Term consideration was first used in the context of assumpsit in the said case. The cause of action in *Joscelin v Shelton* was founded on defendant's failure to provide the promised consideration. By the middle of sixteenth century, the connection between consideration and its effect on legitimacy of cause of action became more clear. This development is evident in *Hunt v Bate*, where the court held against Plaintiff on the ground that his act was not in consideration for the defendant's promise.

Consideration evolved into its modern doctrinal structure which we are familiar today, during the nineteenth century. During this period contract law, specifically the topics such as elements

of formation of contract etc., were organized and given structure. The then prominent scholars and legal philosophers constructed a theoretical and systematic framework of legal principal into which specific legal decisions could be fitted.<sup>2</sup>

## MEANING

Even though an agreement is necessary for contract, it is not sufficient in itself to render a contract enforceable. A contract under English law with the presence of consideration, becomes enforceable. Presence of consideration in essence means the agreement comprises an exchange in which each party treats their promise of performance or performance as the price of the other's promise of performance or performance.<sup>3</sup> Consideration is defined in *Currie v Misa* as, a valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.<sup>4</sup>

In India, consideration is statutorily defined in Section 2(d) of the Indian Contract Act, 1872. Section 2(d) treats consideration as an act or abstinence or promise. Following are the elements in the light of section 2(d) & 23:

### 1. It must be act or abstinence or promise.

As per section 2(d), consideration is an act, abstinence or promise. Nonetheless, such must not be worthless. English common law insists that consideration must be of some value in the eyes of the law.<sup>5</sup> There is no doubt that consideration must have some value, but it need not be equal in value to the promise because according to section 25 Explanation II inadequacy of consideration does not cause an agreement to be void.

### 2. It must move at the desire of the promisor.

Where an act, abstinence or promise is done not at the desire of the promisor, it is not considered a good consideration. In *Durga Prasad v Baldeo*<sup>6</sup> plaintiff built shops on the

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<sup>2</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 683 (Oxford Univ. Press 1979).

<sup>3</sup> K. Llewellyn, *What Price Contract?*, 40 Yale L.J. 704, 742 (1931).

<sup>4</sup> *Currie v. Misa*, (1875) L.R. 10 Ex. 153, 162 (Lush J.).

<sup>5</sup> *Chidambara Iyer v. P.S. Renga Iyer*, A.I.R. 1966 S.C. 193, 194 (India).

<sup>6</sup> *Durga Prasad v. Baldeo*, (1880) I.L.R. 3 All. 221 (India).

order of collector. The defendants, the occupiers of the shops promised plaintiff to pay him commission. Plaintiff's action to recover the commission was rejected on the grounds that shops were built not at the defendants' desire but because of collector's order. While, in *Kedarnath Bhattacharji v Gorie Mohamed*<sup>7</sup>, plaintiff and others collected funds for the construction of Town hall. Defendant subscribed to the fund for R100. Plaintiff on faith of promised subscriptions entered into contract. Defendant failed to pay and contended lack of consideration. Court held that the plaintiff acted (entered the contract) at the subscriber's implied request, and the subscriber promised payment in return, it therefore constitutes consideration.

Incase of Unilateral promise, where there is a promise from only one side, if promisee carries out the act which promisor desired, promisee can hold promisor for his promise. It is because his act is not only an acceptance of the offer but also a consideration for the promise.

### **3. It may move from the promisee or any other person.**

It is immaterial who has furnished the consideration. Consideration may move from promisor, or from any other person if promisor does not object.

### **4. It may be past, present or future.**

Consideration may be promised to be done in future, or is in progress, or has already been done. If consideration has already been done at the desire of the promisor, it is called as executed consideration. It is different from past consideration. Past consideration is the consideration which has been done before any promise was made. English law considers a past consideration as no consideration because as per English law consideration must be contemporaneous with the promise. The distinguishing factor between past and executed consideration is promise. Past consideration consists of an act done without promise, while in executed consideration act is done in response to promise.

A past consideration arises in two ways. First is when a voluntary service was rendered in response to no promise or request, however later on promise to pay for the service was made. Such past considerations are enforceable by virtue of section 25(2). The second way past consideration arises is when a service is rendered at request, however no promise was made. In such a situation an implied promise may be inferred. In *Upton-on-severn RDC c*

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<sup>7</sup> *Kedarnath Bhattacharji v. Gorie Mahomed*, (1886) I.L.R. 14 Cal. 64 (India).

Powell<sup>8</sup> defendant believing that his farm was within free zone, he was entitled for free service, called the Upton fire Brigade to put out the fire in his farm. Here, the Court said the services were rendered on an implied promise to pay.

5. Section 23 renders such agreements void, which have consideration but are unlawful. As per Section 23, if a consideration is such which is forbidden by law or which defeats the provisions of law, or is fraudulent or causes injury or is regarded by court as immoral or against public policy, such consideration is unlawful.

It must be understood that consideration and performance of promise are distinct. Suppose A promises to give B 5 books in consideration of B's promise. A giving those books is not consideration rather it is performance of promise. Here, promise to give books is consideration by A. Consequently, had A not given the books to B, it would amount to non-performance of promise not lack of consideration.

## EXCEPTIONS

As a general rule, agreement lacking consideration is void, however validity of the following agreements cannot be questioned on the ground of lack of consideration<sup>9</sup>, i.e., following agreements are enforceable without consideration. Such agreements are:

1. A written and registered agreement made on account of natural love and affection between nearly related.
2. A promise to compensate a person who has already done something voluntarily for the promisor.
3. A promise to compensate a person who has already done something for promisor, which he is legally compelled to do.
4. A written and signed promise to pay time-barred debt. It may be signed by promisor, his agent or someone specially authorized for it.
5. Moveable or immoveable gifts which have been completed by delivery or perfected by registration respectively.

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<sup>8</sup> *Upton-on-Severn Rural District Council v. Powell*, [1942] 1 All E.R. 220 (C.A.).

<sup>9</sup> Indian Contract Act, No. 9 of 1872, § 25 (India).

6. To create an agency, consideration is not necessary.<sup>10</sup>

Whereas English law adopts a somewhat different approach. English law classifies contracts into two types, contract under seal and simple contracts. While consideration is generally required in simple contracts, under seal contracts are enforceable without consideration.

## CONCLUSION

Doctrine of consideration has evolved significantly from its origins in the medieval law of debt, covenant, and assumpsit. Over time, what initially operated as a requirement linked to particular forms of legal action came to be recognised as a fundamental principle of contractual enforceability. Consideration revolves around the idea of exchange, requiring each party to furnish an act, abstinence, or promise carrying some value. While English and Indian law share this underlying concept, Indian law adopts a broader approach by recognising consideration moving from a third party and by accepting past consideration. Nevertheless, the law also acknowledges that certain promises deserve enforcement even without consideration, as reflected in the exceptions contained in the Indian Contract Act. Thus, while consideration remains the general rule governing contractual liability, the statutory exceptions help enforceability in its absence.

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<sup>10</sup> Indian Contract Act, No. 9 of 1872, § 185 (India).