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Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices

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Abstract

Consent Theory mandates that both parties should have the right to negotiate terms and conditions of the contract on equal footings. At present, the 'right to negotiate' has been adversely affected by the introduction of Adhesion Contracts in almost all forms of online business and parts of the traditional business modes. This paper aims at critically analyzing jurisprudential tensions created by the Adhesion Contract to Consent Theory through application of analytical method. The authors argue that the Adhesion Contract tilts in favor of the dominant party. This paper further aims to examine the relevant case laws in Pakistan, relating to the enforcement of Adhesion Contracts and to assess the overall effectiveness of such clauses that renders the weaker party in exploitative state. Findings of the study suggests that courts should intervene to eradicate exploitation of the weaker party, by more markedly differentiating the legal treatment of unfair terms. Furthermore, Pakistani legislators must enact laws declaring such terms to be illegal.

Keywords: *Consent Theory; Adhesion Contract; Business; E-Commerce; Unfair terms; Unfair business practices*

1. Introduction

Historically, the form or mode of a contract is instrumental in the development of the world market. This legal instrument indicates its significance for human business life since ancient times. From oral to hand-written, and from there to typed form culminated in an online format, it has gone a long way and now it has come to a standardized form. We ink countless contracts in our everyday life. It has become indispensable in our lives. From buying property to hiring services, everything is accomplished through contracts. Business activities would cease to exist if there are no contracts.

With the advancement of science and technology, trade has gone to the global

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level at an unprecedented mass scale. It has transformed the way contracts are made. To make commerce swifter and more efficient, 'Adhesion Contract' was introduced. It is a kind of template where all terms and conditions are already prepared by one party - always in dominant position to the other party. The other party, being in weaker position, has simply to agree to it without having the option of negotiating any terms. Now, this practice has not only changed the form of contract but it has posed a formidable challenge for the Law of Contract too. It has ignited a serious debate amongst the business community, jurists and lawyers.

It is argued that the Adhesion Contract tilts in favor of the dominant party depriving a weaker party of its right to negotiate or bargain which is against the Consent Theory and *Laissez-Faire* principles. For instance, every other day, there is hue and cry over these terms and conditions on Facebook, Google, and Twitter. These and many other contracts are rarely read and mostly are one-sided. These render the privacy of other party in compromising situation. Moreover, these contracts have a particular inducing power to influence the capacity of earning too. These adhesion contracts have caused agitation amongst the consumers as well (Boliek, 2021).

Apart from these online mediums and contracts, there are many contracts in Pakistan where one dominating party makes weaker party sign the unfair terms because of the Adhesion Contracts. This paper is written to examine the situation of such contracts and legal remedies available to weaker parties in Pakistan. Researchers are often unable to find any such studies about Adhesion Contract and its contravention of the Consent Theory with respect to Pakistan.

It is further argued that Consent Theory should be used to critique the Adhesion Contract in business practices is written to cover the issues posed by the Adhesion Contracts. The first part will explain the traditional concept of a contract. The second part will encapsulate the historical evolution of contracts till the introduction of the Adhesion Contracts. The third part will unveil some jurisprudential issues in Adhesion Contracts putting forward some useful recommendations. Therefore, this paper is written to cover the evolution of contract and its law. The whole article is divided into six sections. The first section belongs to the Introduction. The second section defines the contract. The third section sheds light on the historical evolution of the Law of Contract and the introduction of Adhesion Contracts. The fourth section describes the jurisprudential problems in Adhesion Contracts. The fifth section provides a solution to the adhesion dilemma. The sixth section provides the conclusion of the study.

2. Part I-Definition of Contract

There is no formal definition of a contract in English Law. It is obvious in absence of the code. The reason is the peculiar nature of the Law of Contract evolved in English legal culture. It developed around the action of assumpsit instead of some theory or concept of a contract. Nonetheless, a contract is defined by many scholars. But these definitions serve the purpose of illustration and can't be declared comprehensive one (McKendrick, 2018). According to Morawetz: "a promise or set of promises to which the law attaches legal obligations" (Morawetz, 1925, p.87).

On the other hand, in American context the doctrine of contract may be defined as: "A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty" (Restatement (Second) of Contracts, 1981, S 71). While Pakistan's Law of Contract defines the term contract by virtue of Section 2 (h): "An agreement enforceable by law is a contact.". The aforementioned definitions elucidate that a valid contract is the one that is enforceable by law. It means that few conditions are needed to be fulfilled to have a valid contract. They are enlisted below:

An agreement must take place between the parties. It means that there should be a valid offer from one party and the second party accepts it and adheres to that offer completely. The party that extends the offer may be called 'promisor' and the other party that accepts that contract is 'promisee' (McKendrick, Contract Law, 2012).

By this exercise of offer and acceptance, both parties intend to create legal relations with each other. The creation of the legal relations means that both of the parties fully understand that the offer and acceptance will create obligations for both of the parties. And they fully understand and are ready to be legally bound by that contract.

The parties must be sane, major, and allowed by law to enter into the contract. Their legal capacity must make them eligible to enter into a contract. It will not amount to a valid contract if any side of the parties is legally restricted from making any contract. The legal capacity of the parties is discussed in Section 11 and Section 12 of the Contract Act, 1872. Section 11 of the said Act states: "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject". Section 12 of the same Act then explicates the soundness of mind and says: "A person is said to be of sound mind to make a contract if, at the time when the person makes it, the person is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind".

Offer and acceptance must be obtained by free will and consent of both parties. There should be no vitiating factors that nullify the intentions of both parties. Parties should agree genuinely. Section 13 explains the consent in the following words: "Two or more persons are said to consent when they agree upon the same thing in the same sense". These should arrive at without any coercion, undue influence, fraud, misrepresentation, or mistake. Section 14 to 22 discusses these terms with insufficient clarity.

The consideration on the part of both parties must be lawful. It means that the object or service which the promisor is offering must be lawful and not illegal and the compensation offered by the other party must not be illegal. Section 23 enshrines the factors that make the considerations illegal. It states that "The consideration or object of an agreement is lawful, unless - it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void".

The contract in order to be enforceable by law must not be amongst the list classes of contract that are expressly barred by the law. Section 25 to 30 elucidates such classes.

In addition to above mentioned conditions. Contract must not be in contravention of any other law of the land. An agreement will be deemed as an enforceable contract if above mentioned conditions are fulfilled.

3. Part II- Historical Evolution of the Law of Contract and Introduction of Adhesion Contracts

Modern Law of Contract has its origin in the simple and unsophisticated English markets around two centuries ago (Terry & Giugni, 2003) and it is based upon the Laissez-Faire principle that calls for freedom of contract that is freedom from state interference. However, the Law of Contract is much older than two centuries and it can be traced back to the Middle Ages when Common Law was just starting off. Ownership of land and protection of rights in relation to it was the main concern of the society at that time. For this, the Law of Contract was mainly in relation to the property right and the law developed at quite quick pace in this regard.

The enforceability of rights depended upon the formal agreements and informal ones. The template of formal agreement constitutes its rendering in writing and authentication by 'sealing'. This mode of the contract was adopted for transfer of land and formed the basis of deed and remained in practice till 1989. By then, the requirement of sealing was waved off because of the practice of witnessing the document.

During twelfth century two main types of formal agreement developed that needed a seal on it in order to be enforceable. One of them was known as a 'covenant' which entailed a promise to perform a certain action for instance building a house. In case of breach, the remedy that got developed over time was 'specific performance'. Second kind of formal agreement was a formal 'debt'. It would constitute an 'obligation' and was actionable under that heading and thus the remedy that got developed during the time was payment of the debt.

Nonetheless the informal agreements too gradually were recognized by the law and were called 'parol' agreements that meant 'by words of honor'. The main obstacle concerning the enforceability of these types of contracts were the proof. It was hard to prove the existence of such types of contracts and terms and conditions decided thereof. Two particular actions were formed for such informal contracts. The remedy was the price of the goods when the informal oral agreement was made for the sale of goods. This was known as an 'action for debt'. Second action was 'Detinue' which was about the chattel. For instance, demand for handing over horse or other livestock.

It was during the Fourteenth Century the law of 'assumpsit' was developed and became the basis of modern law. It was an undertaking to fulfil the promise. With time, as the law evolved, the notion of 'consideration' originated. It was based on the proposition that none does anything for nothing. Contract can be defined as bargain between two parties too. Both parties make enforceable promises in respect of each other. One of the parties will make the payment against the action that the other party has promised to take. It was construed as 'freedom of contract'. Based on this notion, most of the contract law was devised in the Nineteenth Century. It became the heart of Contract Law as Britain was experiencing *laissez-faire* economics. The term is now called 'market'. It proposes the theory that market should regulate the economic relation between people instead of the intervention of the government.

The basic idea behind this theorem is that there should be a freedom for the parties to choose whatever the terms they want to agree upon. For this reason, it has not been the tendency of the courts that they have to convert a bad bargain into a good bargain. Their job has been to merely check whether the parties had free will to enter into the contract or not. Treitel noted in this regard that the expression "freedom of contract" expresses the general principle that the law will not limit the terms and conditions on which the parties choose to enter into a contract and it will not interfere and give relief merely on the ground that the terms of the contract seems harsh or unfair to one party (Treitel, 1995).

Freedom of Contract necessitates *consensus* Mere *ad idem*, which means the reciprocity of the parties for a valid agreement of the agreement. It would not give rise

to a valid contract unless the mutuality is reflected from the agreement. Law will not recognize any such agreement where one party kind of forces other party to take its goods or services when there is no such intention from the other party. Consent is contract (Klass, 2014). This statement of scholars indicates the prime importance of consent in a contract. A contract is to legally bind oneself and others in some terms and conditions. This is kind of private law where two parties voluntarily agree to make a law for themselves to the extent of that contract. Consent is essence of that contract (Kim, 2019). By consenting, both parties make themselves legally liable for non-performance of the agreement.

This Consent Theory creates the balance in a contract. Offer from one party is a manifestation of the desire to change the relationship with other party and wants to bind both of them against some consideration. Acceptance from the other party is a final consent to the terms of the contract offered in that contract (Routledge, 2006). This Consent Theory doesn't necessitate that both parties must know every minute detail of the contract but at least they should have an overall idea of the nature of the contract. This rule consensus mere ad idem is enshrined in the statutes and the rules of the Common Law.

Unsolicited Goods and Services Act 1971 entails the same. The Law of Contract doctrine, such as "duty to read" imposes on contracting parties an obligation to read and understand contracts. If a party signs a contract, the party is deemed to have knowingly agreed to its terms. Failure to read the agreement does not vitiate consent: Contracting parties constructively agree to the terms of contracts they enter into as long as they were given the opportunity to review these terms before signing. Parties may choose to disregard this duty by not reading, or to fulfill it with only modest attention, but by doing so they assume the risk that they will be subsequently surprised by the terms of the agreement (Simkovic & Furth-Matzkin, 2021). For this reason, Contract Law questions and makes sure if there was a real bargain and whether it was enforced in letter and spirit or not. Various case laws elucidate that courts were interested in the existence of a real bargain that is enforceable and does not interfere in the quality of the bargain that parties arrive at. *Williams v Roffey Bros & Nicholls Contractors Ltd* [1990] 1 All ER 512 is one such example.

Contract clauses should be assessed in relation to each other when examining their meaning, validity, and enforcement (Lobel, 2021).

Another feature of the 'freedom of contract' is the intention of the parties to legally bind themselves in the contract by their free will. Parties freely accept terms and conditions and bind themselves to the legal consequences. Disadvantageous terms for one party too will be accepted if parties are equal concerning the bargaining

strength and they both freely accepted the terms and conditions. On the other hand, it is also the manifestation of the freedom of the contract that if any of the parties was made to enter into any contract through coercion, misrepresentation, false information, or concealment of material facts render the contract nullified. It is because these factors are contradictory to free will. All other rules of Contract Law reflect the 'freedom of choice'. It echoes in the cases of 'discharge' too where a party was just able to perform the contract partly and the other party can accept it and pay for this part thereof. Likewise, if any term is violated, it will give the other party right to give up his/her obligation and the entire contract or to continue the contract and only accept the payment for the breach. However, with time, it was realized that parties to the contracts can't be granted unlimited freedom and law has to interfere for the protection of the parties.

The need was realized because oftentimes parties do not have equal bargaining power and one party can dictate the terms at the expense of the other party. Parliament and judges realized it in the Twentieth Century while European Union has recently realized that more steps should be taken to save the interest of consumers. Often businessmen prefer the profit of the business instead of the individual needs of the customers. For this reason, they need to be more protected and law needs to intervene. This gave birth to the notion of Consumer Protection and many examples of protectionism can be found in the law. It can be concluded that 'freedom of contract' purports that people are free to make the contracts of their choices and upon the terms they like. However, people are not very free to make the entire contract and its terms of their own choice. Bargaining powers are not always equal for both parties. Though there is freedom of choice if a person wants to make a contract of employment or not and if he/she wants to buy a certain product or not. Nonetheless, the person is forced to enter into a contract when the jobs are scarce and there is a monopoly or when the majority of the businessmen decided upon certain terms.

For this reason, such laws were devised in Twentieth and early Twenty-first centuries by parliament where parties are bound by certain terms and conditions by law which they have not negotiated and accepted to be bound by. The introduction of Adhesion Contracts or standard form contracts at a large scale made this realization even more intense that the businessmen as a whole are dictating terms on the consumers. This concept of standardized contract form was not drastically introduced at a certain time in history. Rather, it had been practiced for a long time in one way or the other. Variants of these informal standard contracts led to the current refined form. In the primitive market, transfer of property or shift of proprietary rights was established in front of the priest as these contracts were considered sacred. With time, these sacred words, spoken in front of priest were standardized and were later

provided to the notaries. Till date, notaries public have disposal books of forms that contain standardized formats for contemporary legal acts.

A major development in the course of standardization appeared when the insurance policies were introduced in the 16th and 17th century. At the time, the institution of insurance was relatively new and which was not provided by Roman Law. Moreover, it was not dealt by the guilds either. As the institution of the insurance flourished, it became increasingly important to include those events in the policies too that occurs rarely. Moreover, it became of paramount importance to standardize certain clauses in model policies. Same need was felt afterwards for sale of goods and rest of the commercial activities.

As time went by, guild disappeared and no labor laws entertained such matters. Thus 18th and 19th centuries saw another phase of progress in respect of standardized contracts. The gap that was created due to the absence of guild and labor laws was either filled by state regulations as happened in France or manufacturers by making their own rules in the form of factory discipline code. Trade unions were prohibited at that time and therefore these codes were often one-sided and had some tedious clauses. It was upon the manufacturer whether a certain provision is applicable to his specific laborer or not. This system was later extended to other branches and services too for instance: Sale of goods, electricity, water and gas delivery, railway and transport, etc. A large number of contracts are performed via standard conditions globally. This trend will continue to be used even on a larger scale in the commercial sector because of e-commerce. However, there is a dire need that it should be more refined so that the interests of a weaker party can be safeguarded.

At present, the standard form of contract is the most used legal instrument to serve the purpose and this format has become a very common party of commercial transactions and relationships (Patterson, 2010). But it has both advantages and disadvantages. There is no doubt about the efficacy and rapidness of this standardization in the business world. Moreover, it has reduced the transaction and agency costs as parties need not to negotiate and form a new contract every time rather standardized format is already available. There is more certainty in respect of the connotation and context of the terms and conditions of the contract. Regarding disadvantages, courts and experts have time and again showed concerns regarding standard contracts. The jurists are showing concern concerning the consumer's point of view. An important question arises whether they have read and understood the standard contract or not. Moreover, there can't be one-size-fits-all formula in a commercial transaction. Since there may be parties who are not well addressed and well treated instead of this transaction.

The complexity increases with the second layer of standardization. This multiplicity of standard contracts arises when the standard contract is utilized by the single seller in several transactions and multiple transactions. This multiform standardization of contract is achieved via trade associations that implement this kind of standardization by attaining mutual consensus on a standard contract that is to be used in a specific market. Sometimes state to participate in such standardization. This standardization works two ways. It increases the competition and decreases too. An increase in competition is established as comparing the offers of different firms becomes easier but it decreases the competition too as the terms are standardized and uniform. This standardization doesn't protect or favors the interest of all rather the market power favors the one in the most bargaining power.

In the early 20th century, the legal vocabulary of the United States was enriched by the addition of the concept of "Contract of Adhesion" (Zhang, 2008). Since then the standard contract is called an Adhesion Contract. Adhesion Contract is thus a standard contract whereby one party drafts the term and conditions and the other party is invited on the take it or leave it basis. Only option for the invited party is to either adhere to all the terms and conditions or leave it altogether. Thus that party is only adhering instead of negotiating the terms. Because of this "adherence", this contract is called "Adhesion Contract". Although it is not necessary that all standard contracts are adhesive ones but all Adhesion Contracts are for sure standard ones. For this reason, both terms i.e. standard contracts and contracts of adhesions are used interchangeably and denote to the contracts that are formulated by one of the parties in advance. Black's Law dictionary defines Adhesion Contract as: Adhesion Contract is defined as, "A standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice or no choice about the terms. Also termed Contract of adhesion; adhesive contract; adhesion contract; take it or leave it contract". These types of devices are viewed as they are considered as sources of domination (Plunkett & Lewis, 2021). It is evident from this fact that the concluding contract is not the result of negotiation and bargaining rather it is the result of adherence to the pre-printed terms of dominating party. At present, standard form contract or Adhesion Contracts are used worldwide adversely affecting the notion of free consent – an integral part of a valid contract

4. Part III- Jurisprudential Problems in Adhesion Contracts

Standard contracts have become very common these days. Every other person has to experience this if he/she wants to open a bank account; secures himself through insurance; buys a car or travels via plane, ship, or train. The magnitude is even on the larger scale where international trade and e-commerce are concerned. Maritime

Laws, transport, and insurance contracts all are adhesions one.

The debate over the "Adhesion Contract" became even more crucial and relevant with the advent of e-commerce. Adhesion Contracts are being used frequently in the online world. It has outnumbered the paper world in using adhesion contracts. In the online world, the most frequent of contracts are "click-wrap" electronic form contracts where the consumer clicks on "I agree" button or icon set up by the other party. "Browse wraps" on the other hand are electronic form agreements whereby consumers can search the terms and go throughout and download the desire data or buy some products without specifically giving consent to the terms and conditions. In the latter case, they will be termed as "click-free" agreements but it will be implied that the consent of the user was obtained as he/she performed certain actions. For instance, he/she installed any software or he/she continued the use of the website. Some websites add a most likely unnoticeable hyperlink by the name of "terms and conditions" on their page.

From the above discussion, it is clear that the Adhesion Contracts pose some serious concerns to the commercial market and Consent Theory. In the first place, parties do not enter into this contract after a purposeful negotiation and bargaining between two parties of equal footing, thus directly negating the free consent requirement of a valid contract. Secondly, these contracts are provided only in the format where the other party is not able to "pick and choose" the terms and conditions and is only left with the option of either accept it as it is presented or leave it. This helm of affairs seems and sounds like a form of duress or coercion purely going against the Consent Theory. The legal incentive behind the Adhesion Contract for the sellers is to protect them and decrease the risks of legal consequences. Such legal documents are usually prepared through the skillful hands of the lawyers so that the interests are safeguarded. Thus, they are prepared in pre-printed form.

It is another debate if another party even reads the term and conditions or understands it. Many times it happens that the contracting party didn't read the terms let alone understanding them. Sometimes, the recipient reads but the terms are written in smaller fonts with ambiguous and vague meaning that makes it very difficult to comprehend them. The legal consequences of the Adhesion Contract too are unknown or unpredictable for them.

Even if the user reads the terms and conditions and cognizes them, he/she is only left with the possibility of either accept it or refuse it. This may cause harm to the recipient's interest as the Adhesion Contract will be the same everywhere in the same market. Thus, he/she is not given a choice but is coerced into accepting the terms and conditions of the dominating party as trade unions and other associations

unanimously adopt a standardized format of contract. This proves position imbalance. Thus, Adhesion Contracts tend to be manipulative where only one party is in a position to set up the terms and conditions and present in print form or "read-only". The party possessing economic, technological, or scientific resources tends to dominate the contract over the weaker party. Thus, the other party doesn't have a real say in deciding the content of the contract and thus there is no actual negotiation, bargaining, and free will. Courts in common law jurisdictions have had the difficult job of balancing the overarching principle of "freedom to contract", which mandates they uphold contracts in their original form as much as possible, while protecting weaker parties from fraud, unjust treatment, and unconscionable outcomes (Sillanpää, 2020).

One may counter-argue that the standardization of contracts is utilitarian. The positive aspects of the Adhesion Contract outweigh its drawbacks. The most important of it is the reduction in the consumer's cost. It reduces the production and distribution costs as well. But this ontology of the Adhesion Contract doesn't adjust well within the jurisprudential concept of the Contract Law. It simply goes against the normative premise that the contract will be enforceable when the legal obligation created through it was undertaken voluntarily and consciously (Schwartz, 2011). For this reason, all those contracts were held invalid where the consent had been acquired through fraud, duress/coercion. or undue influence. In this context, the contract of adhesion seems quite opposite of the basic normative premise of the Law of Contract. An adhesion contract symbolizes no negotiation and no unequal bargaining powers. Some of the scholars have used the simile of fly and flypaper for the contract of adhesion. According to them, the contract of adhesion is not a cooperative and convincing process where both parties try to persuade each other and reach to a conclusion through mutual consent. Therefore, due to the lack of proper 'consent', the contract of adhesions are not a 'contract' in traditional setting. It should thus not be addressed by the law of contracts that has been developed through centuries. This key finding calls for 'judicial intervention' to safeguard the interests of weaker party. Affluent parties are not adherent. It's the weak who have to adhere to the adhesion contracts in practice. When the contracts take place between sophisticated wealthy parties, standard form contract only serve the purpose of the basis of negotiation. The concluding contract doesn't represent the Adhesion Contract rather it is the manifestation of the negotiation of two giants. For instance, International Swap Dealers Association, the American Institute of Architects and American Bar Association published such standard contract forms which serves the basis of the start of a negotiation. Thus, the Contract of Adhesion takes place in consumer context.

Some may counter argue that people do have a choice. They can choose other contracts or sellers. It may be argued that this choice of switching to other sellers

or service providers may render such contracts non-adhesive. Scholars and judicial decisions are divided in this matter. But the tilt is towards the view that these are adhesive. Individual monopolists or entire industry jointly draft the adhesion contract and adopt it leaving no alternative for the consumers.

Most of the time such boiler plate terms are written in such small fonts and with legal jargons, that the consumers don't read them. Even if they do, it doesn't make much difference. They still have no choice to delete any clause from the contract. On account of aforementioned facts, it is asserted that adherence to a set of clauses that the consumer never chose, can't be termed as voluntary assent. While the voluntary assent is the core requirement for a contract to be enforceable by law. Courts have been denying the enforceability of the contract where the consent is attained through undue influence, fraud and incapacity. Courts should always be permitted to afford protection to the unsophisticated party by implying terms that accord with the fundamental notions of reasonableness and fair dealing (Bertolini, 2021).

Due to aforementioned reasons, Scholars are divided into two camps regarding the validity and enforceability of the Adhesion Contracts. Some of the scholars are of the view that Adhesion Contracts are less entitled as far as the enforceability is concerned. This is the basic critique about contract of adhesion but there are other objections too. It is contended that this practice of Adhesion Contracts might lead to domination of organizations. In the words of Todd Rakoff: "submit to organizational domination, leavened by the ability to choose the organization by which [one] will be dominated" (Rakoff, 1983) While David Slawson has warned that widely used contracts of adhesion constitute an act of undemocratic lawmaking by powerful business interests (Slawson, 1971). These scholars maintain that the rules of consumer contracts must be governed by the law of contract and not by the rules that are developed by stronger party on the cost of the interests of the weaker party.

On the other hand, second group of scholars are in support of the contract of adhesion and term it as a part of evolution of business and Law of Contract. They argue that as a part of further evolution market competition will eventually lead to the development of the such terms in drafting of Adhesion Contract that will be acceptable for the consumers even if it is not optimal. This is asserted by scholars like Richard Epstein, Louis Wilde and Alan Schwartz, and Richard. This group doesn't appreciate judicial interference and contented that it will cause more harm than the benefit. It will rise the cost of consumer credit. Whereas Karl Llewellyn has argued that unreasonable clauses of the contract must not be enforced by the court. He is of the opinion that the consumer gives assent to the broad type of transactions when he signed adhesion contract, not only to basic terms but other terms too which don't hamper the spirit of the contract, therefore assent is received as a whole of contract,

not for each clause separately and courts must strike out the unreasonable clauses. Courts usually follow this tendency. Some of the scholars like Richard Posner add further and favor the Adhesion Contract by contending that business persons are very much concerned about their good will (Posner & Bebchuk, 2006). They will not be inclined to enforce harsh clauses due to the customer and public relations concerns.

First group doesn't seem to agree to any of above-mentioned arguments and reject the arguments of evolution of law and natural process of reaching to a win-win situation. Rather, they counter argue that consumers are highly rational and they always make rational decisions. They reject the proposition presented by Richard Posner as well and respond to it in following words: "The discretion of the organization has taken the place of rights enforceable by law". Moreover, the argument of reduction of cost also failed to impress this group, they are of the view that many giants are monopolistic organizations. Thus, they maintain the unenforceability of adhesion contract. Academicians are discussing all this in their academic writings but so far there is no such legislations where particularly adhesion contract is adopted or rejected as a policy.

5. Adhesion Contract in Pakistani Law

In Pakistan, there are no special provisions of law regarding the adhesion or standard from contracts. The relevant statutes in this regard are:

a. The Contract Act, 1872

b. Provincial Consumer Protection Acts.

However, these statutes do not contain any specific provisions regarding protection of weaker party from unfair terms and conditions of adhesion or standard form contracts. The adhesion and standard form contracts abundantly being used in commercial and other areas in Pakistan. The lack of proper legislative protection to the vulnerable party is a serious threat. Usually, the other party at the time of the standard form of contract is proposed, is faced with several possibilities. The first possibility is that the recipient of the standard form of contract does not read let alone understand the standard form of contract offered. The second possibility is that the recipient reads the contract, but do not understand because of different levels of understanding. The third possibility is that the consumer reads and understands, but is faced with the choice "take it or leave it", therefore when rejecting (especially on consumers), will still be faced with the choice of standard form of contract having the same type elsewhere given the homogeneity nature of standard form of contracts.

The magnitude of the problem increases by the fact that most of these contracts are written in English language while the literacy rate in Pakistan is low. Further, the

terms and conditions are written in complicated legal language usually drafted by the lawyers which most of the times not comprehensible by the consumers. Therefore, in most cases the consumer or adherent does not even know what he is signing or adhering to. This situation calls for serious legislative, judicial and administrative measures for the protection of the consumer and adherent from potential exploitation.

In Pakistan, adhesion or standard form contracts are being used in every field of life from banking, insurance, transportation, employment to software and online services etc. An important example of this, is employment contract, there is a universal tendency on the part of the employer to insert those terms, which are favorable to him in a printed and standard form, leaving no real meaningful choice to the employee except to give assent to all such terms. Such as the restrictive covenant in employment contract. A restrictive covenant is typically a clause in a contract which prohibits an employee from competing with his ex-employer or joining his competitors for a certain period after the employee has left the business or prevents the ex-employee from soliciting or dealing with customers of the business by using knowledge of those customers gained during his prior employment.

5.1 Judicial Response to Adhesion in Pakistan

In the absence of any special statutory provisions regarding adhesion, the response and approach of courts in Pakistan towards these contracts is diverse. There is no uniform policy and effective approach in this regard. Sometimes the courts apply strict contract theory and refuse to intervene in the terms and condition signed by the parties even through adhesion. And other times courts realize the potential injustice to be caused by applying the strict contract theory. In number of case laws, the courts intervened and refused to enforce the unfair terms and conditions arising out of adhesion contracts. The courts often noted that such unfair terms are the product of unequal bargaining power and therefore cannot be enforced. However, there is no established set of rules, principles or tests to be adopted by the courts in this regard. The courts randomly decided such issues in different cases.

1. **Al-Abid Silk Mill Limited Vs. Syed Muhammad Mudassar Rizvi 2003 MLD 1947 Karachi**

Brief facts of the case are that the Plaintiff-Company hired Defendant as Assistant Manager, Quality Control with negative covenant in employment contract that he will not work in any other organization in any capacity be it whole time or part time and upon leaving his employment with the plaintiff, he will not work in any organization engaged in similar trade for a period of 11 months. Plaintiff filed the suit seeking injunction when defendant left its employment and accepted other employment of

similar nature. The Court held that in the instant case the restrictive covenant is not disputed and only the plea raised is that it was obtained under coercion, on such plea the contract would be voidable and not void. The defendant has not elected to get it declared as voidable during the period of employment. The restriction cannot be termed to be unreasonable as to time and scope i.e. for 11 months in Home Textile Unit. In the light of the above discussion, the plaintiff has demonstrated prima facie case for the grant of injunction as prayed, the application is granted as prayed.

2. **Hence in this case, the court refused to intervene and thus enforced the disputed term.**

Exide Pakistan Ltd Vs. Malik Abdul Wadood 2009 CLD 716 Karachi

Brief facts of the case are that the appellant company engaged in business of manufacturing and supply of led acid and industrial batteries in Pakistan. Respondent initially employed as sales representative, and lastly promoted as General Manager. Respondent resigned after 36 years of service on 4-12-2007. The appellant's case was that last annual appraisal of the respondent was made on 12-6-2007 which was effective from 1-4-2007 on terms and conditions mentioned therein, which was accepted expressly in writing covenanted in the said letter dated 12-6-2001 that the respondent

upon leaving the employment on any reason would not join any other organization directly or indirectly competitor with the appellant in any of its products for a period of two years. After resigning respondent joined Messrs Pakistan Accumulators (Pvt.), a Company, which is one of the competitors of the appellant. The Court held that any change in terms and conditions of service to the disadvantage of employee could not be made without his consent and while considering such change made, principle of equality of bargaining would be looked into. Restrictive covenant, if for a reasonable time and area, where employee was asked not to indulge in activity, then Court could grant relief to restrain violation of covenant. Defendant during 35 years of service as sales representative could not be said to have acquired secret information about quality control formulated and developed by plaintiff. Plaintiff had failed to make out, a prima facie case, Balance of convenience did not lie in plaintiffs favor, Application for temporary injunction was dismissed in circumstances. Hence in this case the court refused to enforce the unfair terms on the principle of equality of bargaining.

3. **Zarai Taraqiati Bank Ltd. Vs. Muhammad Asim Rafique 2016 S C M R 1756 Supreme Court of Pakistan**

Bank placed advertisement in a newspaper for the post of "Management Trainee Officer". Respondents applied, passed the written test and were selected after their interviews, however, instead of issuing appointment letters, the Bank offered them a

contract for on-the-job training as “Management Trainee”, for a period of two years. Instead of the word ‘salary’ word ‘stipend’ was used for their payment. Contract further provided that the same would not constitute employee/employer relationship between the trainee and the Bank; that training could be extended beyond the original period of two years, and that the training did not offer any guarantee of regular employment in the Bank. Upon expiry of their contracts after the prescribed period of two years, the contracts of respondents were extended for a period of about seven months. However, neither was the employment of the respondents regularized nor were their contracts extended thereafter, and the Bank instead advertised vacancies for appointment in place of the respondents.

The Court held that as regards the signing of the contract by the respondents, we may observe that in a situation where the respondents after having been selected for a promised post, were offered the contract instead, and there being in equilibrium between the bargaining position of the respondents and the appellant-Bank, and keeping in view the rate of unemployment in our country, the respondents had no option but to sign the contract in order to avoid further disappointments and frustration by exposing themselves to unemployment and therefore the same should not be allowed to be used as an obstructive instrument in their way of confirmation/regularization. In the circumstances, we do not find any justification for interfering with the judgments of the two Court below. The appeals by the Bank are therefore dismissed. Hence, in this case the court dismissed the bank plea and refused to enforce the unfair terms and conditions which were exploitative to the employees.

In view of aforementioned, there is no legislative provisions in respect of adhesion or standard form contracts in Pakistan. Further, the judicial response to these contracts is diverse, random and of mixed nature. There is lack of uniform policy and standard in this respect. This situation is detrimental for the consumer and adherent as they are vulnerable and exposed to the exploitation at the hand of powerful and calls for serious steps to be taken in this regard.

6. Solution of the Adhesion Dilemma

The first step towards the solution of the issue of Adhesion Contract is the acceptance of the fact that the this is a special kind of contract and not the ordinary one and therefore, special rules must be applied over it. Freedom of contract must not be over-emphasized when bargaining powers are not equal at all. This over-emphasis will not lead to economic justice and will increase the economic disparity further. This notion of freedom of contract is only apt when there is little economic disparity and equal bargaining power. The social and economic progress and changes manifested in the legislation in the 20th century. These legislations were done to secure the public

and affected the public corporations. Administrative laws, taxation, and labor laws are some of its examples.

An Adhesion Contract is the result of the evolution of the market and economy. It should be treated as a pervasive contract mandated by the modernization of society. The jurisprudential concepts of the traditional theory of contracts must be expanded to accommodate such contracts and a unified conceptual approach should be adopted to outline a framework for the solutions of the problem.

Another important aspect is the definition of 'consent'. Law should clearly define this notion and expand its purview keeping in view the current practice of adhesion contract that is widespread in the entire world (Duncan, 1974). The jurisprudence should expand the purview and expand its context in this regard. At present, the best way to deal with the adhesion contract is by declaring the harsh terms and clauses invalid while keeping the contract as a whole valid. Declaring the adhesion contracts as a whole valid or invalid will just not make any good. Prohibiting only harsh terms will protect the weaker party from the harsh clauses while still reaping the benefits of adhesion contracts. Legislatures should analyze the cases in courts that are against the adhesion contracts. It should scrutinize the harsh terms that are contested in courts and legislate the guidelines against it prohibiting the incorporation of such terms. This is a more effective way of treating such contracts. In other words, that a project-centric approach, based upon good faith and relational contract, would better reflect the reality of the contracting experience as a more cooperative experience instead of party-centric approach (Christie, Saintier, & Viven-Wilksch, 2022).

6. Conclusion

A contract is to legally bind oneself and others in some terms and conditions. This is a kind of private law where two parties voluntarily agree to make a law for themselves to the extent of that contract. Free Consent is the essence of that contract. By consenting, both parties make themselves legally liable for the performance/non-performance of the agreement.

Two centuries ago, as Britain was experiencing *laissez-faire* economic courts were interested in the existence of a real bargain that is enforceable and does not interfere with the quality of the bargain that parties arrive at. However, with time, it was realized that parties to the contracts can't be granted unlimited freedom and law has to interfere for the protection of the parties. This realization was further felt when Adhesion Contracts were introduced in the business. because stronger parties were dictating terms on the weaker parties. With the tremendous advancements of science and technology and multiplicity of the contract, the Adhesion contract became wide-

spread. Although it proved to be an efficient and quick form of contract it reduces the freedom of contract to a considerable level as it doesn't give both parties equal opportunity to negotiate all the terms.

An Adhesion Contract is the result of the evolution of the market and economy. It should be treated as a pervasive contract mandated by the modernization of society. The jurisprudential concepts of the traditional theory of contracts must be expanded to accommodate such contracts and a unified conceptual approach should be adopted to outline a framework for the solutions of the problem. The jurisprudence should expand the purview and expand its context in this regard. At present, the best way to deal with the adhesion contract is to declaring the harsh terms and clauses as invalid while keeping the contract as a whole valid. This way both contractual parties will understand the nature of their actions. Declaring the adhesion contracts as a whole valid or invalid will just not make any good. Prohibiting only harsh terms will protect the weaker party from the harsh clauses while still reaping the benefits of adhesion contracts. Legislatures should analyze the cases in courts that are against the adhesion contracts. It should scrutinize the harsh terms that are contested in courts and legislate the guidelines against it prohibiting the incorporation of such terms. This is more effective way of treating such contracts.

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