WHATSAPP PRIVACY POLICY: LOST OPPORTUNITY FOR SETTING A PRECEDENT IN STANDARD FORM PRIVACY POLICY CONTRACTS

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ABSTRACT

Standard Form Contracts have been the staple for all privacy contracts in an outside India. Developed countries and unions like the USA and the EU have a robust infrastructure to deal with both contract and privacy based legal issues arising out of the rapidly evolving e-standard form contracts. India has been no stranger to this influx of e-contracts. However, due to a legislative framework not comprehensive enough to deal with privacy related contractual issues, social media platforms have been taking user's privacy for granted. Due to the passive influx of FinTech platforms, like WhatsApp, financially sensitive information of these users is being collected without compliance of the existing privacy and contract law in India. This paper analyses the WhatsApp's Privacy Policy from a contractual and privacy-based perspective and points it's inconsistencies with Indian Law while pointing out loopholes within the legislative framework. As it stands right now, WhatsApp has claimed that they wont implement a policy before the passing of the Personal Data Protection Bill. However, this has left the glaring contractual issues within the privacy policy unaddressed and hence an opportunity to set a meaningful precedent is lost. This paper attempts to address the glaring problems that exist within the current structure of Contract Law and it's failure to adopt a suitable framework to accommodate the current trend of Standard Form Contracts.

I. INTRODUCTION

On November 19, 2009, CEO of WhatsApp (the 'Application/App'), Jan Koum had claimed that the application's competitors were behind a misinformation campaign aimed at accusing the developers of the application of 'selling the user's personal information' and this tactic was scaring away existing and potential new users.[1] Mr Koum recognised this issue and made a statement in an attempt to nullify the impact of these claims. The statement read – "So first of all, let's set the record straight. We have not, we do not and we will not ever sell your personal information to anyone. Period. End of story. Hopefully this clears things up".[2]

After WhatsApp was acquired by Facebook in 2014[3], a lot of apprehensions surrounding Data Sharing with WhatsApp ensued.[4] WhatsApp dismissed these apprehensions and assured its users that nothing of that sort is going to be reality.[5] As it stands now, WhatsApp has amassed over 2 billion users worldwide,[6] and over 530 Million in India itself.[7] Since 2009, WhatsApp had maintained an edge over its competitors[8] at the time; however, that edge may have come at the cost[9] of non-compliance with its previous privacy-related promises. This has been showcased through the recent privacy policies that the app has rolled out. A perusal of this trend is necessary to determine the exact implication of the privacy policies formulated by the app.

A. Summary of Events:

1. February 2014: Facebook buys WhatsApp,[10] and becomes a part of the Facebook

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[1] WhatsApp: "*Just wanted to say a few things...*" November 19, 2009, para no. 5,6 See: https://blog.whatsapp.com/just-wanted-to-say-a-few-things

[2] *ibid* para no. 4

[3] Jay Yaro, Business Insider: "*WhatsApp, Facebook's $22 Billion Acquisition did $10.2 Million in Revenue Last Year*" October 29, 2014 See: https://www.businessinsider.com/whatsapp-facebooks-22-billion-acquisition-did-102-million-in-revenue-last-year-2014-10?IR=T

[4] Internet Freedom Foundation: "*Explainer: WhatsApp Privacy Policy Changes #SaveOurPrivacy*". January 11, 2021 See: https://internetfreedom.in/explainer-whatsapp-privacy-policy-changes-2021/

[5] WhatsApp: "*Setting the Record Straight*" March 17, 2014. See: https://blog.whatsapp.com/setting-the-record-straight

[6] WhatsApp: "*Two Billion Users Worldwide: Connecting the World Privately*". Available at: https://blog.whatsapp.com/two-billion-users-connecting-the-world-privately

[7] Press Release: Ministry of Electronics and IT. See: https://pib.gov.in/PressReleasePage.aspx?PRID=1700749

[8] Richard Harper, News Scientist: "*The WhatsApp edge: Why it was a must-buy for Facebook*" February 24, 2014 https://www.newscientist.com/article/dn25144-the-whatsapp-edge-why-it-was-a-must-buy-for-facebook/

[9] Gordon Kelly, Forbes: "*5 Key Reasons WhatsApp is worth $19 Billion to Facebook*" Feb 20, 2014. See: https://www.forbes.com/sites/gordonkelly/2014/02/20/5-key-reasons-whatsapp-is-worth-19bn-to-facebook/?sh=1b558f1260d9

[10] Parmy Olson, Forbes: "*Facebook Closes $19 Billion WhatsApp Deal*" Available at: https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/?sh=1417ce0f5c66

Companies.[11]

2. August 26, 2016: WhatsApp announced a policy (the '2016 Policy') through which they would start sharing data with Facebook and its other affiliate companies.[12] The app gave 30 days to opt-out of this data sharing, but after that period, the data transfer became mandatory unless chosen otherwise.[13]
3. January 5, 2021: WhatsApp rolled out a new policy (the 'Updated Policy') wherein WhatsApp users from India got an in-app notification that essentially makes it compulsory to consent to data sharing with WhatsApp's parent company, Facebook, offering no other option but the deletion of their account upon non-acceptance. (the 'Boilerplate Clause'). Users were given till February 8, 2021, to review the policy before deletion.[14]
4. January 15, 2021: After receiving international backlash for this move, the app decided to postpone the updated policy's effect till May 15, 2021,[15] changing nothing about the terms of the policy and hence keeping the Boilerplate Clause intact.
5. May 10, 2021: WhatsApp unilaterally rolls back the Boilerplate Clause and announces that no account will be deleted by virtue of non-acceptance of the updated policy.[16]

B. Privacy Policies and Standard Form Contracts:

WhatsApp's privacy policy, similar to most privacy policies, runs parallel to a 'standard form contract' or an 'adhesion contract'. A standard form contract also referred to as a 'boilerplate contract' is a standardized contract between two parties that does not offer the opportunity for any real negotiation. [17] Such a contract, often drafted in advance by a supplier of goods and services presents itself as a 'take it or leave it' opportunity before the customer; whereby the customer can only obtain the desired product or service when he/she agrees to the pre-drafted terms of the contract.[18] Thus the terms of these contracts of adhesion, or contracts that are to

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[11] Facebook: "*The Facebook Companies*" Available at: https://www.facebook.com/help/111814505650678

[12] WhatsApp: "*WhatsApp Privacy Policy*" August 26, 2016 Available at: https://www.whatsapp.com/legal/privacy-policy/revisions/20160825

[13] *Supra* note 4. 'Volte 2016'

[14] Business Today, "*WhatsApp forces users to accept new terms of service, privacy policy*". See: https://www.businesstoday.in/technology/news/whatsapp-updates-privacy-policy-asks-users-to-accept-terms-of-service-to-continue-using-messaging-app/story/427144.html

[15] WhatsApp: "*Giving More Time For Our Recent Update*" dated January 15, 2021, available at: https://blog.whatsapp.com/giving-more-time-for-our-recent-update/?lang=en

[16] WhatsApp: "*What happens on the effective date?*" dated May 10, 2021, available at: https://faq.whatsapp.com/general/security-and-privacy/what-happens-when-our-terms-and-privacy-policy-updates-take-effect/?lang=en

[17] Kumari Shrilekha Vidyarthi And Others v. State Of U.P (991 SCC 1 212) para 21

[18] Arthur Lenhoff, *Contracts of Adhesion and Freedom of Contract*, 36 Tul. L. R. 481 (1962); see also Todd D Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96(6) Harvard Law Review, 1173, 1177(Apr. 1983)

be adhered to in *toto*, are drafted unilaterally and forced on the other party (customer), who has to either accept the contract *en bloc* or walk away from the good or service sought totally. By setting the stage for a contract which only functions under the garb of free will, these pre-printed contracts have often been criticised to be contracts in name, alone.[19]

Traditional analysis of standard form contract's enforceability is based primarily on two important concepts: consent and unconscionability.[20] This paper will analyse the WhatsApp Privacy Policy on these metrics. However, since consent forms the central part of what constitutes unconscionability,[21] this paper will analyse the updated policy on the metrics of procedural unconscionability.

II. UNCONSCIONABILITY

A. Introduction:

In contract law, an unconscionable contract is extremely one sided in favour of the person who has superior bargaining power.[22] The Legal Glossary of the Government of India defines the term as 'irreconcilable with what is right or reasonable'.[23] Developed countries have adopted specific legislative avenues to deal with the unconscionability of contracts. In 1977, with the promulgation of the Unfair Contract Terms Act, the test of reasonableness was introduced by the UK legislature, to ensure that unreasonable terms cannot be enforced in standard form contracts.[24] In the United States of America, the Uniform Commercial Code was enacted to deal with, amongst other issues, the unconscionability of contracts.[25] However, the Indian legislature has yet to set similar widened standards in Contract Law when it comes to unconscionability.

B. Types of Unconscionability: Indian Perspective

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[19] Law Commission of India, *Report on Unfair (Procedural and Substantive) Terms in Contract*, Report No.199 pg. 55 ('199th Law Commission Report')
[20] Nishith Desai Associates, *E-Commerce in India,* Available at: https://archanabala.com/2015/06/03/e-contracts-in-India; See also: John J.A. Burke, *Reinventing Contract*, (2003) 10(2) Murdoch University Electronic Journal of Law; see also: Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contract*, Seattle University Law Review, Vol. 31:469 ('Warkentine')
[21] 199th Law Commission Report *supra* note 19 , pg. 11; Annexure, *Unfair (Procedural and Substantive) Terms in Contract Bill, 2006*, Section 3(d) and (e) pg. 230
[22] West's Encyclopaedia of American Law, "*Unconscionability*", Ed. 2, The Gale Group, 2008.
[23] Government of India, Legal Glossary (2001), pg. 351; See also: 199th Law Commission Report, *supra* note 19, pg. 19
[24] Unfair Contract Terms Act, 1977 (U.K)
[25] Uniform Commercial Code, 2003§ 2-302 (U.S.A)

An unconscionability analysis focuses on (1) procedural unconscionability, and (2) substantive unconscionability.[26] The definition of these terms slightly varies upon the jurisdiction; however, the Law Commission Reports and some judicial decisions can help shed some light on these terms concerning Indian law. The Law Commission of India (the 'Law Commission') in its 199th report uses the terms 'unfairness' and 'unconscionability' interchangeably.[27]

Despite the Law Commission's recommendation for amendments in the Indian Contract Act,[28] the contract act doesn't have an exhaustive definition of what constitutes unconscionability. Since procedural unconscionability holds a primary place over substantive unconscionability in Indian Law,[29] this analysis will focus more on the procedural unconscionability of the policy.

C. Procedural Unconscionability:

While defining the concept of procedural unconscionability, the 199th Law Commission Report iterated:

> "A contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or the circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties."[30]

The 199th Law Commission Report categorises Section 18 and 19 of the Indian Contract Act, as an existing meaning of 'procedural' within the meaning of procedural unconscionability.[31] As a result of this categorisation, it is clear that the Law Commission of India has carved out a measure to constitute procedural unconscionability within the existing legal framework of the Indian Contract Act. Hence, under Indian Law, any contract that suffers from the contravention of Sections 18 and 19 will be categorised as procedural unfairness or unconscionability. This conclusion has also been inferred by the Supreme Court of India in the Central Inland case where the Apex Court held that a standard form contract would cease to be enforceable if it

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[26] Arthur Allen Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) ('Leff')

[27] *Id.* pg. 15

[28] *Id.*

[29] MP Ram Mohan & Anmol Jain "*Exclusion Clauses Under The Indian Contract Law: A Need To Account For Unreasonableness*" NUJS Law Review, 13 NUJS L. Rev. 4 (2020); See also: 199th Law Commission Report, *supra* note 19, pg. 16-53

[30] *Id*. pg. 5

[31] 199th Law Commission Report, *supra* note 19, pg. 16-53. See: pg. 11; See also: Annexure, *Unfair (Procedural and Substantive) Terms in Contract Bill, 2006*, Section 3(d) and (e) pg. 230

derogates the principles of Free Consent.[32]

Hence, vide judicial decisions and Law Commission reports, it can be safely inferred that any contract which violates principles of Free Consent, would be enough to constitute procedural unconscionability. It has been proven that WhatsApp's updated policy has procured consent from its users in a way that is inconsistent with Section 18 of the Indian Contract Act and therefore significantly derogates the principle of Free Consent.[33]

1. Privacy Policies and Consent:

In 2017, the Government of India constituted a committee of experts (chaired by Hon'ble Retd. Justice B.N. Srikrishna) to analyse and recommend privacy regulations in India.[34] The committee went on to release a whitepaper detailing various issues regarding the existing privacy practices in India and their subsequent recommendations.[35] The paper noted that a 'one size fits all' model may not be sufficient for data collection, and an implied consent may not be sufficient for the collection of sensitive personal data.[36] The paper also detailed the problem with the current scenario of consent *vis-à-vis* privacy policies:

> "Consent and notice go hand in hand. An individual can make an informed choice regarding the collection and use of her personal information, only on the basis of information that she receives from an organisation. Most individuals do not read privacy notices, and, if they do, are unable to comprehend the information contained in them. **This may be because of certain flaws within the notice itself**. In certain situations, individuals do read the privacy notice, but they lack sufficient expertise to assess the consequences of agreeing to a particular use of their information.[37] This is particularly true in areas of rapidly changing technology where it might be difficult for an individual to continually educate herself about the advances in technology and consequently their impact on her privacy. Finally, even if individuals manage to read and understand the

[32] Central Inland, *supra*, note 48
[33] *Infra* See: Misrepresentation, para 3-5
[34] Data Security Council of India, "*Data Protection Framework for India*" Available at: https://www.dsci.in/content/data-protection-framework-india#:~:text=Government%20of%20India%20has%20constituted,Data%20Protection%20Framework%20for%20India
[35] Ministry of Electronics and Information Technology (MeitY), "*White Paper of The Committee of Experts on A Data Protection Framework For India*" Available at: https://www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf
[36] *Id.* Pg. 80
[37] CGAP, Dalberg and Dvara Research, '*Privacy on the Line*' (November 2017), available at: https://dalberg.com/our-ideas/privacy-line

information contained in the notice, they will be able to make an informed choice only about the immediate use of their information. They may not be able to make an informed choice regarding the possible future uses of their information, and the harms that may arise as a result. **All these factors contribute towards decreasing the value of consent**[38]" [39](emphasis supplied)

Hence, it is trite that in terms of privacy policies, standard form contracts offer nothing but a watered-down version of consent at best. Testing this version of consent within the realm of contract law is crucial for analysing the legal validity of the contract.

2. Consent – Contractual Perspective:

Consensus ad idem or the meeting of minds[40] is the basis of contractual obligations.[41] It is trite that the conditions in a standard form contract are seldom perused by a layman. As Fredrick Kessler, one of the predominant scholars on the subject[42] would put it,

"He cannot alter those terms or even discuss them; they are there for him to take or leave. He, therefore, does not undertake the laborious and pointless task of discovering what the terms are."[43]

Corollary to that, Lord Denning once remarked,

"No customer in a thousand years ever read the conditions. If he had stopped to do so, he would have missed the train or the boat."[44]

Scholarly consensus also points towards the fact that imposing a duty to read makes little sense when there is no possibility of negotiating a change in terms.[45]

If one were to peruse the concept of assent through a traditionalist lens, it is also well established that traditional contract assent analysis is based on the paradigm of two parties with

[38] Daniel Solove, '*Privacy Self-management and the Consent Dilemma*', 126 Harvard Law Review 1880, 1881, (2013)
[39] Ministry of Electronics and Information Technology (MeitY), *supra* note 35, pg. 79-80
[40] Black's Law Dictionary, 919 (8th ed. 2004)
[41] David M. Walker, *Principles of Scottish Private Law*, 11 (4th ed. 1988).
[42] Priest, George L. "*Contracts Then and Now: An Appreciation of Friedrich Kessler*." The Yale Law Journal, vol. 104, no. 8, 1995, pages. 2145–2151.
[43] F Kessler, *Contract of Adhesion - Some Thoughts about Freedom of Contract*, 43 Columbia LR 629 (1943)
[44] Thornton v. Shoe Lane Parking Ltd. (1971) 1 All ER 686 (CA)
[45] Warkentine, *supra*¸ note 20 (See discussion of different scholarly approaches Part Ill)

relatively equal bargaining power who, through a bargaining process, "carve-out" particular contract terms to serve their respective self-interests.[46] While it is true that every standard form contract, including WhatsApp's Privacy Policy, by definition suffers from the derogation of the principle of the equal footing of bargaining power,[47] standard form contracts are still a valid form of contract.[48] Although valid, the Indian Supreme Court, in the case of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly (the 'Central Inland case') has ruled that a standard form contract would stand unenforceable when found to be in contravention of the 'Free Consent' principles enumerated in the Indian Contract Act, 1872.[49]

3. Misrepresentation:

The Indian Contract Act, 1872 (the 'Contract Act'), defines free consent as consent that is not a result of coercion, undue influence, fraud, misrepresentation, mistake.[50] The contract act further defined 'Misrepresentation' as:

> "'Misrepresentation' means and includes—
>
> (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
>
> (3) Causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement"[51]

It has been established that change in circumstances is a valid ground to constitute misrepresentation.[52] In the Court of Appeals case of With v. O'Flanagan,[53] (the 'O'Flanagan case') Lord Wright rescinded a contract through the doctrine of misrepresentation, because of

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[46] Robert Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 454 (2002) See also: Edward A. Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972).

[47] Warkentine, *supra,* note 20

[48] Henrioulle v. Marin Ventures, Inc. 20 Cal. 3d 512.

[49] Central Inland *supra* note 48

[50] Indian Contract Act, 1872 § 14

[51] Indian Contract Act, 1872 § 18

[52] Avtar Singh, Contract and Specific Relief, 12th Ed. Pg. 207

[53] With v. O'Flanagan, 1936 Ch 575 (CA)

the change in circumstances.[54] In this case, a contract for the sale of practice was being drafted. In the negotiations, the defendant intimated that his practice had brought in £2000 per annum for the preceding three years and that he had a specified number of patients on his panel. Negotiations resulted in a contract in about five months. During this time the defendant became ill and could not attend to his practice. This resulted in a serious loss of practice, but the purchaser could learn about it only after the completion of the sale. As a result, the premise under which the original price of £2000 was based did not exist anymore, and this change in circumstance had a clinical impact on the outcome of the contract. It was held that the plaintiff was entitled to rescind the contract, as it was an actionable misrepresentation.[55]

The facts of the O'Flanagan case find themselves to be in tandem with the misrepresentation in the WhatsApp case. In the aforementioned case, the sale of practice took place along the premise that the buyer would earn the figure of £2000 per annum alongside the specified list of patients. However, because of the illness and the subsequent loss of clients on behalf of the seller, the buyer ends up with a completely different result from what was promised, hence the buyer was allowed to rescind the contract through the remedy of misrepresentation. The court held that even if the statement was true at the time it was made, by the time the sale was completed; the exchange was worthless due to change in circumstances.[56] In the case of the updated policy, the acceptance of the contract had taken place along the premise that the user would have his/her account deleted in the instance of non-acceptance. However, upon the removal of the Boilerplate Clause, the user ends up agreeing to terms that he/she may not have agreed to otherwise. Hence, the consent through which the updated policy was made a contract cannot be considered as a 'Free Consent' within the meaning of Section 14 and 18 of the Indian Contract Act.

Concerning privacy policies, for the consent to be considered valid, it should be freely given, informed and specific to the processing of personal data by way of a well-designed notice.[57] Therefore, since the contract is tainted with misrepresentation, the consent cannot be considered to be free, informed or fair. When a contract suffers from misrepresentation, it becomes voidable at the option of the party whose consent was so caused.[58] Hence, to make

[54] Avtar Singh, Contract and Specific Relief, 12th Ed. Pg. 208; Lord Wright relied upon Davies v. London & Provincial Marine Insurance Co, (1878) LR 8 Ch D 469.
[55] *Id.* See also: E-Law Cases, UK "*Case Summaries, With v. O'Flanagan"* Available at: http://www.e-lawresources.co.uk/cases/With-v-O-Flanagan.php (the 'Case Summary')
[56] Case Summary, *supra*, note 55
[57] Ministry of Electronics and Information Technology (MeitY), *supra* note 35, pg. 83
[58] Indian Contract Act, 1872 § 19

this situation consistent with the Indian Contract Act, WhatsApp must either give the users a chance to offer consent based on the updated privacy policy or provide an opt-out option within the context of the same.

Therefore, citing the inconsistencies with the Indian Contract Act, the ratio of the Central Inland case in light of the 199th Law Commission Report, it is unequivocally clear, that the WhatsApp Privacy Policy must stand unenforceable because of procedural unconscionability.

4. Alteration:

Section 62 of the Indian Contract Act, provides for a mutual agreement between the parties for the terms of the contract to be altered.[59] Hence, parties may alter the terms of the contract only by way of mutual consent and no party can unilaterally alter contractual terms. If any one party unilaterally alters any material contractual term, then the effect would be that of the other party being discharged with respect to such contract.[60]

The meaning of the phrase 'material alteration' was discussed in the Privy Council judgement of Nathu Lai v Gomti Kuar.[61] It was held:

> "A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed."

The existing status of the WhatsApp Privacy Policy does not meet the standard of validity because the altered terms of the contract are material. On January 5, 2021, when the app's users were notified about the changes, the notification came with a Boilerplate Clause which guaranteed the deletion of the user's account in the instance of non-acceptance. The users were given till February 8, 2021, to review the policy.[62] Soon after that, on January 15, 2021, WhatsApp postponed the effect of the Boilerplate Clause till May 15, 2021.[63] Although almost 5 months had elapsed after the postponement, on May 10, 2021, WhatsApp unilaterally altered the contract vide elimination of the Boilerplate Clause; and stated that no account will be

[59] Indian Contract Act, 1872 § 62
[60] United India Insurance Co Ltd v M.K.J. Corpn, (1996) 6 SCC 428
[61] Nathu Lai v Gomti Kuar, (1939-40) 67 lA 318; See also: Halsbury's Laws of England, Vol II, 3rd Art. 599 at p. 368; See also: Avtar Singh, Contract and Specific Relief, 12th Ed. Pg. 448
[62] *Infra,* Part I – Summary of Events – point 3
[63] *Infra,* Part I – Summary of Events – point 4

deleted owing to the non-acceptance of the privacy policy.[64] However, this unilateral alteration of the Boilerplate Clause meant that the premise, under which the users had agreed to the updated policy before, did not exist anymore. Hence, the legal effect of non-acceptance changes. Every single user who accepted the app's updated policy from January 15, 2021, till May 10, 2021, had accepted the updated policy on the premise that their accounts would be deleted on non-acceptance. However, since that is no longer the case, the nature of the liabilities change as well. Therefore, because of the change in the nature of liabilities and legal effect, this alteration must be considered material. Hence, every user acceptance recorded between January 15, 2021, and May 10, 2021, can no longer be considered a consequence of meaningful consent because of the material alteration made without mutual consensus. The contract that the user agreed to, and the contract that the user ends up with, are two distinctly different contracts owing to the absence of the Boilerplate Clause in the latter.

Standard Form Contracts by their very nature have extreme inequalities in terms of equal footing in bargaining power.[65] Hence, whenever a person agrees to any standard form contract, he/she has a reasonable expectation to infer that the terms of the contract will be applicable to everyone on the same premise; and thus any alteration arising in due course of the contract, will be a result of mutual consent. However, WhatsApp did not demand consent from its users before changing the material terms of the contract. Therefore, users relied on WhatsApp's promise made by the Boilerplate Clause, when the Boilerplate Clause never came into effect. In this scenario, WhatsApp got to use the Boilerplate Clause as a means to get people to accept the policy, and to keep its entire user base regardless of acceptance. Therefore, this alteration results into a completely one sided contract thereby fitting into the definition of unconscionability being 'extremely one sided in favour of the person who has superior bargaining power'.[66] Hence, since the contract was unilaterally altered the material terms of the contract, every user who agreed to this policy from January 15, 2021 to May 10, 2021 should be discharged with the obligations arising as a result of the application of Section 62.

III. CONCLUSION:

The collection of information by WhatsApp has been achieved through a procedure that derogates the legally mandated provisions of Free Consent.[67] However, no provision in the

[64] *Infra,* Part I – Summary of Events – Para 5
[65] Kumari Shrilekha Vidyarthi And Others v. State Of U.P (991 SCC 1 212) para 21
[66] West's Encyclopaedia of American Law, "*Unconscionability*", Ed. 2, The Gale Group, 2008.
[67] *Infra*

Information Technology Act, 2000 or the SPDI Rules mandate a basic standard of valid consent. Sanjay Kishan Kaul, J recognised a lack of legislative reform within privacy in the Puttaswamy judgement:

> "There is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-state actors. There is also a need for protection of such information from the State."[68]

Hence, there is no specific law to deal with the validity of consent. Although the bill hasn't been passed yet, this privacy-based consent regulation has been addressed by the legislature through the Personal Data Protection Bill, 2019 (the 'Data Protection Bill').

Procedural Unconscionability:

The Data Protection Bill has addressed the issues relating to consent within the existing privacy-related legal framework. Section 11(2) of the Bill provides:

> "The consent of the data principal shall not be valid, unless such consent is—
>
> (a) Free, having regard to whether it complies with the standard specified under section 14 of the Indian Contract Act, 1872;
>
> (b) Informed, having regard to whether the data principal has been provided with the information required under section 7;
>
> (c) Specific, having regard to whether the data principal can determine the scope of consent in respect of the purpose of processing;
>
> (d) Clear, having regard to whether it is indicated through an affirmative action that is meaningful in a given context; and
>
> (e) Capable of being withdrawn, having regard to whether the ease of such withdrawal is comparable to the ease with which consent may be given."[69]

Although this consent-based regulation was indeed necessary, it does not fully rectify the existing loopholes within the Indian privacy regulation. An adequate rectification would

[68] S.K. Kaul, J. para. 20, Puttaswamy *supra* note 51
[69] Personal Data Protection Bill, 2019 § 11(2)

require a comprehensive addition into Section 18 of the Indian Contract Act.

Section 18 does not adequately address the issue of unilateral amendment to contractual terms, post conclusion of the contract. This loophole allowed WhatsApp to remove the Boilerplate Clause without requisite consent of the users who accepted the privacy policy on the very foundation of the existence of the Boilerplate Clause. In an ideal situation, WhatsApp would have informed the users who had accepted the privacy policy about the removal of the Boilerplate Clause and provided for an option to consent to the policy without the clause mandating deletion of the user's account in the instance of non-acceptance. This way, users would be able to decide to accept or reject the policy based on merit and not on the non-existent Boilerplate Clause.

Incorporation of a provision that prohibits unilateral amendments to contractual terms including amendments that are incorporated post conclusion of a standard form contract, will lead to the strengthening of the Free Consent principles of the Contract Act and thereby further fortify Section 11(2)(a) and (e) of the Data Protection Bill in effect.

The standards of consent can also be found adequate within the Consumer Protection (E-Commerce) Rules, 2020 (the 'E-Commerce Rules'). Rule 4(9) of the E-Commerce Rules, mandate explicit and affirmative action for the recording of consent. The rule also prohibits consent mechanisms that record consent through the avenue of pre-ticked boxes.[70] This threshold can be a valid benchmark to test the requirement mandated through Section 11(2)(b) of the Data Protection Bill.

C. Substantive Unconscionability:

Although the Indian Contract Act has provisions to deal with Substantive unfairness or unconscionability, a wider scope of this would it a better service. An obvious measure would be to implement the recommendations proposed by the 199th Law Commission Report along the lines of the UK's Unfair Contracts Act and the USA's Uniform Commercial Code. However, provisions relating to the unfairness of contract have been incorporated in the Consumer Protection Act, 2019:

> "'unfair contract' means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant

[70] Consumer Protection (E-Commerce) Rules, 2020, Rule 4(9)

change in the rights of such consumer, including the following, namely:— (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or

(ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or

(iii) refusing to accept early repayment of debts on payment of applicable penalty; or

(iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or

(v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or

(vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage”[71]

These protections although comprehensive, have an ambiguity regarding its application to social media services. WhatsApp’s business application may find itself consistent within the definition of an ‘electronic service provider’ enumerated under the Act,[72] but the ambiguity over social media services being considered within the meaning of the phrase ‘service provider’ in the definition of an unfair contract, remains. Recommendations to provide a comprehensive regulation to reduce harm in social media services have been made by civil servants in the UK.[73] Moreover, there is substantive ambiguity in regards to social media users being included within the definition of consumers concerning the Consumer Protection Act, 2019 (the ‘Consumer Protection Act’).[74] Hence it is trite that the standard for unfair contracts laid down in the Consumer Protection Act cannot be applied to privacy-related contracts. Therefore, owing to the non-application of the above standards, the requisite amendments must be made within the Contract Act to restrict unconscionability within privacy contracts.

[71] Consumer Protection Act, 2019 § 2(46)
[72] Consumer Protection Act, 2019 § 2(17)
[73] Good Faith Society, “*Reducing Harm In Social Media Through A Duty Of Care*” by William Perrin. Available at: https://www.carnegieuktrust.org.uk/blog/reducing-harm-social-media-duty-care/
[74] Consumer Protection Act, 2019 § 2(7)(ii)

D. Summary:

Owing to the aforementioned gaps within the existing and forthcoming legislative framework, the author finds it appropriate to recommend the following:

1. Adopt the recommendations given by the 199th Law Commission Report to introduce the concepts of unconscionability in the Indian Contractual Legislative framework.

2. Incorporation of a provision within the Indian Contracts Act, 1872, that prohibits unilateral amendments to contractual terms, including amendments that are incorporated post conclusion of a standard form contract on account of such not being free consent.

3. Incorporation of a provision in the Indian Contract Act, 1872, that prohibits any unilateral alteration in standard form contracts, which make the contract one-sided in favour of the party with the most bargaining power.

4. Setting well-defined standards within the meaning of the word 'informed' concerning Section 11(2)(b) of the Personal Data Protection Bill, 2019. Standards corollary to Rule 4(9) of the Consumer Protection (E-Commerce) Rules, 2020 would be ideal.

5. One of the reasons why the Information Technology Act, 2000 is regarded as a non-comprehensive legislation is because of lack of implementation. The Cyber Appellate Tribunal (CyAT) which hears appeals under the IT Act has issued its last order in 2011.[75] The absence of effective enforcement machinery, therefore, raises concerns about the implementation of the SPDI Rules. Hence, a robust administrative policy regarding privacy must be mandated.

[75] Ministry of Electronics and Information Technology (MeirtY) *supra* note 78