
STANDARD FORM CONTRACTS AND UNEQUAL BARGAINING POWER: RETHINKING FREEDOM OF CONTRACT UNDER INDIAN JURISPRUDENCE

Garvit Arora, Amity University Noida

ABSTRACT

Contractual freedom has long been treated as a foundational premise of private law because it enables individuals and commercial entities to organise their legal relationships according to voluntarily accepted obligations.¹ Traditional contract theory assumed that agreements emerged from meaningful bargaining between parties possessing relatively comparable negotiating strength. Contemporary commercial realities, however, reveal a significant disconnect between this theoretical assumption and actual market practices. The extensive reliance upon standardised contractual arrangements in sectors such as banking, insurance, transportation, digital commerce, employment, and telecommunications has substantially weakened the practical significance of negotiation and intensified structural imbalances between contracting parties.

This paper critically evaluates the interaction between contractual autonomy and bargaining inequality within the framework of Indian contract law. It argues that the modern contractual environment increasingly reflects institutional dominance rather than reciprocal negotiation. Standard form agreements, while commercially efficient, frequently impose terms drafted exclusively by economically superior parties upon consumers and employees who possess limited practical alternatives. The paper examines the judicial evolution of doctrines relating to public policy, unconscionability, fairness, and reasonableness in order to assess how Indian courts have attempted to respond to exploitative contractual practices.

The study further analyses comparative developments in the United Kingdom and the United States concerning unfair contract terms and consumer protection. It demonstrates that unlike jurisdictions possessing specialised statutory regulation, India continues to rely predominantly upon judicial creativity and constitutional principles for addressing contractual inequality. Such dependence upon discretionary adjudication has generated uncertainty and doctrinal inconsistency.

¹ Sir George Jessel MR, *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462.

The paper additionally explores contemporary challenges associated with digital contracting, algorithmic decision-making, artificial intelligence, and blockchain-based contractual systems. It concludes that the existing Indian framework is insufficient for regulating technologically mediated contractual relationships characterised by informational asymmetry and reduced transparency. The study, therefore, advocates comprehensive legislative reform capable of balancing commercial certainty with substantive fairness and meaningful consent.

Keywords: Freedom of Contract, Bargaining Inequality, Adhesion Contracts, Unconscionability, Consumer Protection, Digital Contracting, Contractual Fairness.

1. INTRODUCTION

Contract law historically developed upon the belief that private individuals should possess the freedom to determine the legal consequences of their voluntary exchanges.² Classical jurists viewed contracts as manifestations of personal autonomy and considered state interference in contractual arrangements inconsistent with liberal economic values. The emergence of laissezfaire philosophy during the nineteenth century further strengthened this position by promoting unrestricted market interaction and minimal governmental regulation of commercial activity.

Within this intellectual framework, courts generally assumed that contracting parties negotiated from relatively equal positions and voluntarily accepted contractual obligations after evaluating their respective interests. Judicial enforcement of agreements was therefore justified on the basis that contracts represented mutually advantageous bargains reached through informed consent.

The transformation of modern economies, however, fundamentally altered the practical realities of contractual relationships. Industrialisation, technological advancement, and concentration of commercial power enabled large corporations and institutional entities to dominate markets involving essential goods and services. As commercial activity expanded on a mass scale, individually negotiated agreements gradually became impractical. Businesses increasingly adopted standardised contractual documentation to regulate repetitive transactions efficiently and uniformly.

² P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

Although standard form contracts improved administrative convenience and reduced transactional costs, they simultaneously diminished opportunities for meaningful negotiation.

In contemporary commerce, consumers rarely participate in determining contractual terms.

Agreements are ordinarily drafted exclusively by the stronger party and presented on a predetermined basis. The weaker party is typically compelled either to accept the conditions entirely or to forego access to the relevant goods or services.

This shift from negotiated bargaining to institutional standardisation has significantly weakened the traditional understanding of contractual consent. Modern contractual acceptance frequently reflects economic dependence or practical necessity rather than genuine voluntary agreement. Consumers seeking employment, internet services, insurance coverage, transportation facilities, or digital platform access often possess no realistic capacity to challenge contractual provisions imposed upon them.

The rise of digital commerce has further intensified these concerns. Online transactions are now routinely governed by click-wrap and browse-wrap agreements containing extensive contractual terms that consumers neither read nor understand. Algorithmic contracting systems, automated pricing mechanisms, and blockchain-based smart contracts have additionally complicated traditional notions of consent, fairness, and accountability.³

Indian contract law has attempted to address these developments primarily through judicial intervention rather than through comprehensive statutory reform. Courts have progressively expanded doctrines relating to public policy, unconscionability, reasonableness, and constitutional fairness to prevent enforcement of oppressive contractual provisions. Nevertheless, India continues to lack a dedicated legislative framework specifically regulating unfair contractual terms in standard form agreements.

The present paper therefore examines whether Indian contract jurisprudence adequately responds to structural inequality arising within modern contractual relationships. It analyses the historical foundations of contractual freedom, the emergence of standard form contracting, judicial developments in India, comparative international approaches, and contemporary

³ Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013).

challenges associated with digital and automated contractual systems. The paper ultimately argues that meaningful contractual autonomy cannot exist in the absence of substantive fairness and informed consent.

2. THEORETICAL FOUNDATIONS OF CONTRACTUAL AUTONOMY

2.1 Liberal Contract Theory and Market Individualism

The doctrine of freedom of contract emerged alongside liberal political theory and market-oriented economic thought.⁴ Classical contract jurisprudence treated individuals as autonomous decision-makers capable of rationally pursuing their economic interests through voluntary exchange. Contractual obligations were therefore regarded as legitimate because they originated from consensual private ordering rather than external coercion.

Nineteenth-century courts generally refrained from scrutinising the fairness of contractual terms. Judicial intervention was considered unnecessary because competitive market conditions were presumed to discourage exploitative behaviour. According to this perspective, parties dissatisfied with particular contractual arrangements could simply seek alternatives elsewhere within the marketplace.

The classical model rested upon several interconnected assumptions. First, contracting parties were presumed to possess relatively equal bargaining capacity. Second, contractual consent was assumed to be informed and voluntary. Third, market competition was expected to operate as an effective corrective mechanism against unfair practices.

These assumptions gradually became unsustainable with the expansion of industrial capitalism and concentration of economic power. Increasingly complex commercial relationships generated significant disparities between corporations and consumers, employers and employees, insurers and policyholders, as well as digital platforms and users.

2.2 Decline of Negotiated Contractual Relationships

The growth of industrial economies transformed contracts from individually negotiated instruments into standardised regulatory mechanisms governing mass transactions.⁵

⁴ Patrick S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press 2005).

⁵ G.H. Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015).

Commercial efficiency increasingly required businesses to adopt uniform contractual frameworks capable of handling large volumes of transactions without individual bargaining. As a consequence, the practical significance of negotiation substantially declined. Consumers ordinarily encountered pre-drafted agreements containing detailed legal provisions prepared exclusively by institutional actors. Such contracts were generally presented on a “take-it-orleave-it” basis, leaving weaker parties with no realistic opportunity to modify contractual terms.⁶

The decline of negotiated bargaining undermined the moral justification traditionally associated with contractual enforcement. If contractual obligations are no longer products of reciprocal negotiation, the assumption that enforcement necessarily reflects individual autonomy becomes increasingly problematic.

Modern contractual relationships frequently involve structural dependence rather than voluntary bargaining. Consumers accept contractual terms not because they genuinely approve of them but because refusal may prevent access to essential economic or technological services.

2.3 Contracts of Adhesion and Structural Inequality

Standard form agreements are commonly described as contracts of adhesion because the weaker party merely adheres to terms prepared by the dominant contracting entity.⁷

Such contracts have become pervasive across banking, transportation, telecommunications, software licensing, insurance, and digital commerce.

The problem associated with adhesion contracts lies not merely in standardisation itself but in the concentration of contractual power. The stronger party possesses control over drafting, interpretation, implementation, and often dispute resolution mechanisms. Consumers generally lack both informational access and bargaining leverage necessary to protect their interests effectively.

Structural inequality in contractual arrangements frequently emerges from disparities in economic strength, concentrated market dominance, unequal access to information, and the use

⁶ P.S. Atiyah, *An Introduction to the Law of Contract* (6th edn., Clarendon Press 2005) 297–302.

⁷ Friedrich Kessler, “Contracts of Adhesion—Some Thoughts About Freedom of Contract” (1943) 43 *Columbia Law Review* 629.

of highly technical or obscure contractual terminology. Such imbalance is further intensified where parties lack meaningful bargaining choices or adequate legal assistance to fully understand the implications of contractual terms. In many contemporary transactions, these conditions diminish the element of genuine negotiation and transform contracts into instruments shaped predominantly by institutional or commercial power rather than mutual consent. As a result, judicial institutions and legislative bodies in numerous jurisdictions have increasingly reassessed the extent to which unrestricted contractual freedom should be recognised within modern contract law.

3. JUDICIAL RESPONSES TO CONTRACTUAL INEQUALITY IN INDIA

3.1 Public Policy as a Mechanism of Fairness Control

Indian courts have progressively adopted a broader interpretation of public policy in order to regulate oppressive contractual arrangements.⁸

Section 23 of the Indian Contract Act, 1872 has enabled courts to invalidate agreements inconsistent with justice, morality, or public welfare.

A significant doctrinal shift occurred in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, where the Supreme Court acknowledged that agreements imposed upon weaker parties under conditions of unequal bargaining power may be invalidated as unconscionable and contrary to public policy.⁹

The Court rejected the rigid assumption that formal acceptance necessarily indicates meaningful consent.

The judgment represented an important movement away from classical contractual formalism. The Court recognised that substantive fairness constitutes an essential component of contractual legitimacy, particularly where one party lacks realistic negotiating capacity.

Subsequent judicial decisions further expanded this approach by emphasising that contractual enforcement cannot be separated entirely from constitutional values of fairness, equality, and

⁸ Indian Contract Act 1872, s 23.

⁹ *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* AIR 1986 SC 1571.

non-arbitrariness.

3.2 Unconscionability and Judicial Equity

The doctrine of unconscionability operates as a judicial safeguard against oppressive bargains and exploitative contractual practices.¹⁰ Indian courts increasingly examine whether contractual provisions are excessively one-sided or imposed through unfair bargaining methods.

Judicial scrutiny in cases involving unfair contractual practices commonly centres on the relative bargaining positions of the parties and whether genuine consent was realistically possible. Courts often examine the existence of meaningful choice, the presence of concealed or excessively technical contractual provisions, and terms that confer an unreasonable advantage upon the dominant party. Consideration is also given to procedural improprieties in the formation of the agreement, particularly where contractual mechanisms restrict or exclude the weaker party's access to legal remedies or effective recourse.¹¹

The doctrine reflects the understanding that formal consent alone cannot legitimise substantively unjust contractual outcomes. Courts therefore examine the broader context within which agreements are formed rather than limiting scrutiny solely to literal contractual wording.

However, the Indian approach continues to suffer from doctrinal inconsistency because unconscionability lacks precise statutory definition. Different courts often apply varying standards while determining whether contractual terms are unfair. Excessive reliance upon discretionary adjudication therefore weakens predictability within commercial relationships.

3.3 Constitutional Principles and Contractual Justice

Indian courts have increasingly incorporated constitutional principles into contractual adjudication, particularly in disputes involving public authorities and state instrumentalities.¹²

The judiciary has repeatedly emphasised that state entities cannot impose arbitrary or

¹⁰ M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (17th edn, Oxford University Press 2017).

¹¹ *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; *LIC of India v. Consumer Education and Research Centre*, (1995) 5 SCC 482.

¹² *LIC of India v. Consumer Education and Research Centre* (1995) 5 SCC 482.

unreasonable contractual conditions upon individuals possessing weaker bargaining positions.

This constitutionalisation of contract law reflects a broader transition within Indian jurisprudence towards integrating social justice concerns into private law relationships. Courts increasingly recognise that contractual arrangements may have wider public implications, especially where access to essential services is involved.

Although constitutional intervention has strengthened protection against exploitative agreements, it has also generated concerns regarding excessive judicial interference in commercial transactions. Critics argue that overexpansion of fairness review may undermine commercial certainty and contractual predictability.

3.4 Consumer Protection and Regulatory Oversight

The Consumer Protection Act, 2019 represents an important legislative development in addressing unfair contractual practices.¹³ The legislation empowers consumer commissions to examine contractual terms that create substantial imbalance between parties or impose unreasonable obligations upon consumers.

The statute reflects legislative acknowledgment that modern market relationships frequently involve structural inequality requiring regulatory intervention. Consumer protection mechanisms therefore supplement traditional contract law doctrines by providing specialised remedies against exploitative commercial conduct.

Despite these developments, India still lacks a comprehensive statutory regime specifically governing unfair contractual terms across all sectors. Existing protections remain fragmented and dependent upon judicial interpretation.

4. COMPARATIVE LEGAL DEVELOPMENTS

4.1 United Kingdom

The United Kingdom has adopted an extensive statutory approach towards regulating unfair contractual terms through legislation such as the Unfair Contract Terms Act, 1977 and the

¹³ Consumer Protection Act 2019, s 2(46).

Consumer Rights Act, 2015.¹⁴ These enactments subject exclusion clauses and standard form agreements to statutory standards of fairness and reasonableness.

British courts examine factors including bargaining strength, transparency of contractual language, commercial necessity, and availability of alternatives while assessing enforceability. The UK framework demonstrates how legislative regulation can balance commercial certainty with substantive fairness.

The existence of codified standards significantly reduces uncertainty because businesses and consumers possess clearer guidance regarding permissible contractual practices.

4.2 United States

The United States primarily addresses unfair contractual practices through the doctrine of unconscionability under the Uniform Commercial Code and judicial interpretation.¹⁵

American courts distinguish between procedural unconscionability and substantive unconscionability. Procedural unconscionability concerns defects within the bargaining process, whereas substantive unconscionability examines the oppressive nature of contractual terms themselves. This dual framework permits courts to evaluate both the formation and content of agreements.

The American approach provides flexibility but may also produce inconsistent outcomes because fairness determinations depend heavily upon judicial discretion.

4.3 India in Comparative Perspective

India occupies an intermediate position between legislative regulation and judicial equity. Unlike the United Kingdom, India lacks a specialised statutory framework comprehensively governing unfair contract terms. At the same time, Indian courts have embraced broader fairness-oriented principles than many traditional common law jurisdictions.

Judicial innovation has undoubtedly strengthened protection against exploitative agreements. However, the absence of clear legislative standards continues to generate doctrinal uncertainty

¹⁴ Unfair Contract Terms Act 1977 (UK); Consumer Rights Act 2015 (UK).

¹⁵ Uniform Commercial Code § 2-302 (United States).

and inconsistent enforcement patterns.

5. DIGITAL CONTRACTING AND TECHNOLOGICAL CHALLENGES

5.1 Click-Wrap Agreements and Digital Consent

Digital commerce has transformed contractual relationships by replacing physical negotiation with automated electronic acceptance mechanisms.¹⁶ Online users routinely encounter clickwrap agreements requiring acceptance of extensive contractual terms before accessing services or applications.

Most users neither read nor understand such agreements because of their complexity and excessive length. Digital contracts frequently contain provisions relating to mandatory arbitration, unilateral modification rights, data collection practices, and broad exclusions of liability.

The concept of informed consent therefore becomes increasingly questionable within digital environments. Consumers frequently accept contractual terms merely to obtain access to technological services rather than because they meaningfully agree with the conditions imposed.

5.2 Artificial Intelligence and Algorithmic Governance

Artificial intelligence systems are increasingly utilised for pricing decisions, consumer profiling, credit evaluation, and automated dispute resolution.¹⁷ Although algorithmic systems improve efficiency, they also intensify informational asymmetry and reduce transparency.

Consumers frequently lack awareness regarding how automated systems influence contractual outcomes. Algorithmic decision-making may additionally produce discriminatory or unfair consequences without providing adequate opportunities for challenge or review.

Traditional contractual doctrines were not designed to regulate technologically mediated commercial relationships characterised by opaque automated systems. Future legal frameworks must therefore incorporate standards relating to transparency, accountability, and

¹⁶ Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press 2013).

¹⁷ Frank Pasquale, *The Black Box Society* (Harvard University Press 2015).

explainability.

5.3 Smart Contracts and Blockchain Transactions

Blockchain technology has introduced self-executing contractual mechanisms commonly described as smart contracts.¹⁸ These systems automatically implement contractual obligations once predetermined conditions are fulfilled.

While smart contracts reduce transactional delays and intermediary involvement, they also generate significant legal concerns relating to interpretation, jurisdiction, enforceability, and equitable remedies. Automated execution mechanisms may create injustice where unforeseen circumstances arise or where contextual interpretation becomes necessary.

India presently lacks a detailed legal framework governing a blockchain-based contractual system. Regulatory clarification is therefore necessary to ensure compatibility between technological innovation and principles of contractual fairness.

6. REFORM PROPOSALS

India requires a more coherent regulatory framework capable of addressing structural inequality within modern contractual relationships. Existing judicial doctrines, although valuable, remain insufficient for ensuring consistency and predictability across commercial sectors.

A specialised statute regulating unfair contractual terms should therefore be introduced. Such legislation should define unfair contractual practices, establish enforceability standards, and regulate exclusion clauses, unilateral modification provisions, arbitration requirements, and liability limitations.¹⁹

A statutory fairness test similar to the UK reasonableness standard should additionally be incorporated into Indian contract law. Codified standards would improve doctrinal clarity while reducing uncertainty associated with excessive judicial discretion.

Digital contracting should also receive specific legislative attention. Businesses operating

¹⁸ Kevin Werbach and Nicolas Cornell, “Contracts Ex Machina” (2017) 67 *Duke Law Journal* 313.

¹⁹ *Unfair Contract Terms Act 1977* (UK); *Consumer Rights Act 2015* (UK).

electronic platforms should be required to present contractual terms in accessible language and disclose significant obligations in transparent formats. Consumers must additionally possess meaningful opportunities to review contractual consequences before acceptance.

Regulatory frameworks governing artificial intelligence and algorithmic contracting systems should incorporate obligations relating to transparency, accountability, and procedural fairness. Automated systems affecting contractual outcomes must remain subject to legal oversight and review mechanisms.²⁰

Finally, judicial guidelines concerning unconscionability and bargaining inequality should be developed to promote greater consistency in contractual adjudication.

7. CONCLUSION

The doctrine of freedom of contract remains an important foundation of commercial activity and private ordering. However, contemporary contractual relationships increasingly operate within conditions characterised by substantial structural inequality. The widespread use of standard form agreements has significantly weakened the practical relevance of negotiation and transformed contractual consent into a largely formal exercise.

Indian courts have attempted to address these concerns through doctrines relating to unconscionability, public policy, constitutional fairness, and reasonableness. Judicial intervention has played a crucial role in protecting weaker parties against oppressive contractual practices. Nevertheless, the absence of a comprehensive statutory framework continues to generate doctrinal fragmentation and uncertainty. Technological developments including digital commerce, artificial intelligence, and blockchain-based contracting systems further intensify concerns regarding transparency, informed consent, and procedural fairness. Traditional contractual doctrines alone are insufficient for regulating these emerging forms of commercial interaction.

A modern contractual framework must therefore move beyond purely formal notions of consent and recognise that meaningful autonomy cannot exist in the absence of substantive fairness and equality of bargaining opportunity. Ensuring justice within standard form contracts is not merely a matter of consumer protection but a fundamental requirement for preserving legitimacy within contemporary commercial relationships.

²⁰ *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, AIR 1986 SC 1571.