Consent on social media and E-Commerce Platforms

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Abstract- **Consent is a person's willingness to do something or abstain from doing that thing, which the other person has offered. Thus, when two or more persons agreeing upon something in the same sense and the same manner, then the terms and conditions entered into between them about that matter is called as a contract. Consent is generally free, but it is seen that in most of the disputes arising in the e-commerce contracts, the acceptor and the offeror are not known to each other. The entering of the parties to the contract thus becomes questionable and the main points raised is whether the consent was voluntary and given without coercion, undue influence, fraud, misrepresentation, and mistake of facts. Further in these types of disputes, the first and foremost thing to be looked into is, whether both the parties were agreeing to the same thing in the same sense without ambiguity and any influence of others.**

Free Consent is defined in the Indian Contract Act, and it covers all the required aspects to show that when a consent is given without the elements of coercion, undue influence, fraud, misrepresentation and mistake of facts, then the same will be enforceable in the courts of law and the parties will be bound by the terms and conditions accepted by the offeror and acceptor of the same.

Consent is fundamental to all types of contracts including social and e-commerce. It has been variously described by Plato, Thomas Hobbes and John Locke in their writings. In the present world of e-commerce, actual consent both in modern moral and legal thought, is of great importance in determining the force of moral obligations and the validity of contracts. Consent may be expressed or tacit, in the sense that it can be assumed based on the circumstances and the situations concerned. Social Media and E-Commerce platforms have their own set of standardized contracts which the users of the sites and the e-commerce platforms should invariably accept, without any changes in the terms and conditions or otherwise the offerors of those sites will not allow the users to subscribed to their sites. This being so, the main point arises here is that, whether these contracts have been entered into, with the free consent of the parties concerned i.e. the acceptors, purchaser of the products and users of the services of the sites.

The answer for this whether there is free consent or not depends on different factors and situations. The same has been time and again dealt with, in the various judgements of the cases by the courts which have analyzed the issues involved, conducted the trial in an elaborate manner as per the procedures and stated that the e-contracts are valid and the persons entering into such standardized contracts are liable and should abide by the same.

The courts have deliberated on the issue of consent by stating that it does not lie in the mouth of the party concerned who has entered into a contract in the sites, to say he has not read the same or plead ignorance at a later period of time. Otherwise in all criminal cases, every accused will say that they are ignorant and not aware of the law, which will be against the maxim "Ignorance of law is no excuse". The Latin maxim Ignorantia legis neminem excusat or "ignorance of the law excuses no one".

Key words: consent, e-commerce platform, free consent, ignorance of law, social media, standardized contracts.

INTRODUCTION

CONSENT – MEANING, DEFINITIONS AND ITS NECESSITY

Consent is the most fundamental, important requirement necessary in contracts, to be enforceable in a Court of law. Any contract without consent of any one of the parties to the contract makes it either void or voidable at the instance of the party who has not given his consent.

Consent is acceptance by the parties concerned and should be voluntary, and not by any other means not recognized by any law, morality, or other considerations. Consent is a mutual agreement between persons to engage in an activity and forms the basis for a healthy and respectful relationship and acceptance. It ensures the parties involved are comfortable and willing.

Consent is elaborately defined in the Indian Contract Act, 1872 in its different sections. Section 13 of Indian Contract Act defines consent, which is, and means when two or more persons agree upon the same thing and in the same sense and enter to do it accordingly.

This definition comprehends and encompasses many important factors as per the various provisions in the Act, which need to be elaborated in detail to understand the word consent.

Consent is a widely misunderstood concept as everyone tries to read between the lines, and just because they have clicked the words "I Agree" or "I accept" in the online platforms to do the transactions, it is assumed that the person is agreeing, but this is because there is no alternative given for the person who wants to subscribe or enter into a transaction online unless he agrees to all the terms and conditions. Consent can be free, voluntary or it may be forced on the other party, due to various reasons. Sec. 14 of the Indian Contract Act, 1872 defines Free consent.

FREE CONSENT

Consent, is said to be free when it is not caused by any of the following:

a) Coercion as defined in Sec. 15
b) Undue influence as defined in Sec. 16
c) Fraud as defined in Sec. 17
d) Misrepresentation as defined in Sec. 18 and/or
e) Mistake as per the provisions of Secs. 20, 21 and 22.

Summing up both the Secs. 13 and 14, it can be said that free consent means when two or more persons agree to something in the same manner and sense, without coercion, undue influence, fraud, misrepresentation, and mistake of facts in the said dealing and enter into a contract to do the agreed thing. Sec. 90 of IPC describes what does not amount to consent. It states that consent given by a person under fear of injury, misconception of facts, by reason of unsoundness of mind, intoxication or under the age of 12 years is no consent at all.

Thus, Consent in short can be said to be given only when the person giving the consent to do a thing or agrees to refrain from doing a thing voluntarily, with free mind and intention agreeing to that particular thing and in the particular manner normally done by anyone.[1]

CONSENT IN SOCIAL MEDIA PLATFORMS

For Terms and Conditions of Service, Terms of Use, Statement of Rights and Liabilities

Social media platform is operated, maintained and supported by its owners, for the benefit and purpose of meeting of its users to exchange information and other matters relevant to each of the users, usually on the internet through electronic gadgets.

There are several social media platforms or sites namely Facebook, YouTube, WhatsApp, WeChat, Twitter now called X, LinkedIn, Snapchat, Pinterest, Instagram etc.,

Terms and conditions of the social media platforms are slightly different from one another though most of them are similar, they are but one sided and made for the benefit of the said platform operators. YouTube and Twitter now called X, calls it "Terms of Service", Instagram "Terms of Use", Facebook "Statement of Rights and Liabilities". It is better to look at the legal wordings used in the terms and conditions such as Non-exclusive, Royalty-free, Sub-licensable, Modification, incorporation into other works, perpetual and irrevocable than the general terms since the said legal wordings have inner meanings and prevent taking legal action against the operators.[2]

Social media allows interaction with customers and offers an unprecedented avenue to reach current and potential customers to shape how the public interacts with and views its brand. However, underlying every social media initiative is a contract in the form of one or more click-through agreements with the social media platform provider (Platform Agreements). These agreements are unilaterally presented, non-negotiable, frequently updated and revised, providing the platform provider with broad one-sided rights.

These terms and conditions of the social media platforms by whatever name it is called, primarily requires the persons who wants to subscribe to the platform for any purpose, either promoting its/his/her work to agree to its standardized terms and conditions giving it the right to use such contents in the manner it wants and will do so. Though generally copyrights belong to its owner but posting of the same in the social media platform gives a license to the owner of

[1] The Ethics of Consent – Theory and Practice Edited by Franklin G. Miller and Alan Wertheimer – Oxford University Press 2010.

[2] Social media: understanding the terms and conditions – Factsheet developed in co-operation with Own-it. DACS – dacs.org.uk/knowledge-base/factsheets/

the platform to use it in the way it has mentioned in their terms and conditions.

CONSENT ON E-COMMERCE SITES – TERMS AND CONDITIONS

The e-commerce sites such as Amazon, Flipkart, Alibaba, Snapdeal, etc., each have their own set of standardized terms and conditions which are to be signed and agreed to, by its users to do anything in such sites.

Flipkart states in its terms and conditions that it is only a website and not a market but allows users to utilize, interact and transact between themselves for their transactions. It further states that since it is not a party to the transactions it will not be liable for any of the transactions between the parties to the transactions. All the contracts and transactions between the buyers and sellers on the site will be between the parties to the transactions only. It does not give any guarantee or warranty for the products or services.

Amazon also states that it is only an online platform for the parties to buy and sell or interact with each other. It will be a bipartite agreement between the parties only and Amazon will act as a facilitator and nothing more than that.

Both Amazon and Flipkart agree and help in the redressal of the grievances of the parties concerned and have a redressal mechanism put in place as per the provisions of the Consumer Protection Rules, 2020.

Terms and conditions of Myntra site: Use of the Myntra Website is available only to persons who can form legally binding contracts under Indian Contract Act, 1872. Persons who are "incompetent to contract" within the meaning of the Indian Contract Act, 1872 including minors, un-discharged insolvents etc. are not eligible to use the website. Myntra reserves the right to terminate membership and/or refuse to provide access to the Website if it is brought to Myntra's notice or discovered that one is under the age of 18 years.

Snapdeal terms and conditions: It is not a third-party beneficiary and hence all the dealings between the buyer and seller are bipartite agreements between the parties concerned and Snapdeal will not be liable for any of the disputes in their dealings. Snapdeal is only an Intermediary and online marketplace limited to maintaining and managing the website for the benefit of seller and buyer to exhibit, market the products and services.

Thus, it can be said that anyone who wants to use the social media websites, or the internet service providers site will have to agree to all the terms and conditions mentioned in the site otherwise they will not be allowed to be either member or a subscriber. This very compulsion shows that there is no proper, valid consent from the person who has subscribed to the site or become a member of the site.

Further European General Data Protection Regulation expects that Consent by the end-users must be lawful, voluntary, freely given, specific, informed and active. European Commission's Special Eurobarometer conducted a survey titled "Data Protection" in 28 EU member states. 67 % of the participants submitted that the terms and conditions are too long to read while others stated that the policies are unclear and difficult to understand. So, they do not read fully the privacy policies and the terms and conditions. The end users should be given the option and right to withdraw the consent providing end-users' empowerment.

The Conference paper titled "A Human-centric Perspective on Digital Consenting" by Soheil Human and Florian Cech, studied the consent said to have been obtained by the big techies GAFAM i.e., Google, Amazon, Facebook, Apple and Microsoft and found that the GAFAM are getting the consent through Dark Pattern, a method which is considered illegal. The said Conference paper by Soheil Human and Florian Cech, explains the necessity and need for consenting in this digital world to be human-centric but at the same time the authors speak about its difficulty.

Dark patterns, a concept introduced by Brignull et al. in 2011, are a type of user interface that appears to have been carefully crafted to trick users into doing things and are carefully crafted with a solid understanding of human psychology, and they do not have the user's interests in mind but only their business interests.[3]

"The process of giving or withdrawing consent in the digital space (i.e. digital consenting or online consenting) is becoming an increasingly difficult

[3] (Brignull et al., cited by Greenberg et al. [24, p. 2]). Evaluation of the Cognitive Aspects. Reference: Human, S., & Cech, F. (2020)

cognitive task. Not only is the potential amount of information to be disclosed growing massively, but the number of service providers and companies that are collecting data and thus are subject to the GDPR are also growing. Subsequently, users are confronted with the necessity to either accept the companies' terms of services as-is or to undertake the arduous task of choosing when to share which of their private data through web interfaces provided by the data collectors themselves, meaning privacy and cookie consent forms."

The big tech companies do not bother about the requirements of proper, fair and free consent of the end-users but they somehow manage to obtain consent to show that it is doing things legally with their terms and conditions and the policy "one size fits all" which is not human-centric but against the privacy of the end-users, Further the big techies exploit those ill-informed and less fortunate, socially disadvantaged, technologically less adept, and also youngsters for their business improvements and growth. The consent obtained by the social media platforms and e-commerce big tech companies are not human-centric but by and through dark patterns using the human psychology and weaknesses.

> " Although privacy is a legal right granted equally to citizens, the exercise of this right in real life conditions is usually more complicated and not everyone benefits equally from protection. We therefore propose that a human-centric perspective, wherein individual needs, values, capabilities, and limits of every single individual end-user is taken into account, is a significant aspect that needs to be considered in consent-obtaining digital mechanisms, as one of the most important information systems which are expected to protect human rights and values." (Human & Cech, 01/01/2020)

Consent in any of the social media sites and the e-commerce sites are given by the parties without any objections to any of the terms and conditions prescribed in the standardized formats of the sites. The subscribers or the users of such sites are not provided with any options or opportunity to question any of the terms and conditions. The only alternative for the subscribers and users interested in such sites, is to keep away from such sites. In all these, one can very well say with authority that, there is no free consent of the parties but once they click on the button "I agree" they will be bound by all the terms and conditions. Here Secs. 14 and the other sections explaining the term free consent in the Indian Contract Act, will not help the parties but they will only be bound by the terms and conditions of the site. Even the courts will be helpless in these cases since the main contention of the parties will be based on the agreed terms and conditions.

In the case of LIC Vs. Consumer Education and Research Center, 1995 AIR 1811, the Supreme Court had rightly stated that in such type of standardized contracts there is unequal or no bargaining power and further it is an adhesion type of contract. The persons entering into standardized contracts will have to accept all the terms and conditions in it otherwise he cannot enter into a contract.

STANDARDIZED CONTRACTS

All the contracts in the e-commerce sites are standardized contracts helping and promoting the site operators, thereby avoiding multiple terms and conditions which will be voluminous and very cumbersome. These at times, in particular circumstances and instances, create a problem to both the parties, who cannot act beyond the terms and conditions mentioned. Either party will have no room and scope for reconciliation or discussion to adjust or modify the terms to suit their needs, requirements or for the purpose it is needed.

Now after scrutinizing and studying all the different terms and conditions of the various social media platforms and the e-commerce sites such as Amazon, Flipkart, Snapdeal etc., it can very well be said with precision that nowhere the social media platforms and the e-commerce sites have stated any provision and scope for the consumers and other users to give their consent or accent. It is simply mentioned that the users of the site should invariably agree to all the terms and conditions mentioned in the site, otherwise, the user will not be allowed to become a subscriber of that site. It shows that in all these sites, the users become the subscribers out of compulsion, inquisitiveness, entertainment and necessity and there is no open, agreed, outward consent of the users. The site operators only state and require the users, to prove that

they are not minors or robots by clicking the icon provided for the same in the sites.

Hence, it can be assumed for sure that there is no free consent as defined under the Indian Contract Act, 1872 in all these sites. The question that arises then is, how and why these contracts are taken to be enforceable in the courts of law. The answer lies in the affirmative that when anyone who is supposed to have entered into a contract with another for any purpose or reason, then he is required to have gone through all the terms and conditions in the contract. This is similar to the saying that "Ignorance of law is not an excuse" as per the latin maxim Ignorantia legis neminem excusat or "ignorance of the law excuses no one". Wikipedia.

> "The rationale of the doctrine is that if ignorance were an excuse, a person charged with criminal offenses or a subject of a civil lawsuit would merely claim that one was unaware of the law in question to avoid liability, even if that person really does know what the law in question is. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of a state's activities, this is the price paid to ensure that willful cannot become the basis of acquittal. Thus, it is well settled that persons engaged in any undertakings outside what is common for a normal person cannot avoid liability at a later date on the ground of ignorance of the law and the terms.
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> In the ancient phrase of Gratian, *Leges instituuntur cum promulgantur* ("Laws are instituted when they are promulgated"). In order that a law obtain the binding force which is proper to a law, it must be applied to the men who have to be ruled by it. Such application is made by their being given notice by promulgation. A law can bind only when it is reasonably possible for those to whom it applies to acquire knowledge of it in order to observe it, even if actual knowledge of the law is absent for a particular individual. A secret law is no law at all.
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> In criminal law, although ignorance may not clear a defendant of guilt, it can be a consideration in sentencing, particularly where the law is unclear, or the defendant sought advice from law enforcement or regulatory officials. For example, in one Canadian case, a person was charged with being in possession of gambling devices after they had been advised by customs officials that it was legal to import such devices into Canada. Although the defendant was convicted, the sentence was an absolute discharge.
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> In addition, there were, particularly in the days before satellite communication and cellular phones, persons who could genuinely be ignorant of the law due to distance or isolation. For example, in a case in British Columbia, four hunters were acquitted of game offenses where the law was changed during the period they were in the wilderness hunting. Another case, in early English law, involved a seaman on a clipper before the invention of radio who had shot another. Although he was found guilty, he was pardoned, as the law had been changed while he was at sea.
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> Although ignorance of the law, like other mistakes of law, is not a defense, a mistake of fact may well be, depending on the circumstances, that is, the false but sincerely held belief in a factual state of affairs which, had it been the case, would

have made the conduct innocent in law.

Exceptions to the rule Ignorance of law is no excuse

In some jurisdictions, there are exceptions to the general rule that ignorance of the law is not a valid defense. For example, under U.S. Federal criminal tax law, the element of *willfulness* required by the provisions of the internal revenue code, has been ruled by the courts to correspond to a "voluntary, intentional violation of a known legal duty" under which an "actual good faith belief based on a misunderstanding caused by the complexity of the tax law" is a valid legal defense. See Cheek Vs. United States.

In Lambart Vs. California (1957), the Supreme Court of the United States ruled that a person who is unaware of a malum prohibitum law cannot be convicted of violating it if there was no probability, he could have known the law existed. It was subsequently ruled in United States Vs. Freed (1971) that this exception does not apply when a reasonable person would expect their actions to be regulated, such as when possessing narcotics or dangerous weapons.

In Helen Vs. North Carolina (2014), the Supreme Court held that even if a police officer incorrectly believes that a person has violated the law due to a mistaken understanding of the law, the officer's “reasonable suspicion” " that a law was being broken does not violate the Fourth Amendment. From site Wikipedia

All these pinpoints to one thing in particular that is, everyone who is entering into an agreement or contract with another should at all circumstances be knowledgeable and aware about the terms and conditions in the contract and cannot afterwards plead ignorance but at certain circumstances there can be exceptions which will always depend on the situation and circumstances under scrutiny. It thus points out to one important fact that consent though should be free as per the law, the courts will look beyond that definition of free consent when two or more persons have entered a contract about certain dealing among themselves.

Now coming to consent in social media platforms, the users without getting permissions or consent from the persons concerned violate the Intellectual property rights of the owners and other rightful persons who have obtained proper permission from the owners. There are very many cases under the IPR which show the necessity of consent which proves that consent is an important factor for the users.

The Bombay High Court in an injunction suit filed by the Parachute Coconut Oil Company against the defendant Abhijeet Bhansali, who also operated a YouTube channel of his own posted disparaging comments about the quality of the parachute coconut oil violating the provisions of sec. 29 of the Trademarks Act, 1999. The use of the trademark name by the defendant violated the exclusive right conferred on the proprietor of the trademark amounting to infringement.

In most of the cases both in India and other countries’, Courts have routinely relied upon the duty to read doctrine in enforcing contracts. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. A contractor must stand by the words of his contract and, if he will not read what he signs, he alone is responsible for his omission. When the insured receives a policy, it is his duty to read it or have it read. Holding that allegedly unsophisticated‖ investors‘ failure to read securities disclosures was reckless as a matter of law and precluded them from bringing fraud claim. Holding that one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature. As scholars like Russell Korobkin have noted, this obligation applies even to illiterate buyers. The doctrine creates a conclusive presumption, except as against fraud, that the signer read, understood, and assented to the terms. The presumption has long been justified as a necessary attribute of contracting regimes grounded both on efficiency and equity.

The doctrine creates a conclusive presumption, except as against fraud, that the person who has signed has read, understood, and assented to the terms presuming and justifying the same as a necessary attribute both on efficiency and equity, otherwise that person will be disputing each and every word in the agreement when there arises any dispute.

In Lewis v. Great Western Railway, S.C.29 L.J.Ex.425, the Courts of Exchequer and Exchequer Chamber decided on 05.06.1860, unanimously rejected counsels' argument that plaintiff should not be bound by the terms of the contract. It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled-up, signed, and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this must know that he signs it for some purpose, and when he gives it to the Company must understand that it is to regulate the rights which it explains. Where the party does not pretend that he was deceived, he should never be allowed to set up such a defense that he did not read the terms and conditions. The duty to read doctrine is contract law's analog to the assumption of risk doctrine in tort, a buyer who could have read but did not assume the risk of being bound by any unfavorable terms. Consumer protection law responds to the doctrine by attempting to induce firms to create a real opportunity for consumers to read. Thus, firms cannot enforce terms that are hidden in fine print or written in obscure language; even prudent consumers who had diligently tried to apprise themselves of the offered terms would later be surprised. The question whether the consumer plausibly could have read the terms and conditions, also takes central stage when courts scrutinize the same.

Eventually, in majority of such disputes, the courts are with a holistic view that any person who enters such contract under the terms and conditions mentioned on the website should invariably have read the same and if not, it is the fault of those persons only. The responsibility is placed on the persons who are entering into the contract in e-commerce, so, one has to be very careful and vigilant while entering into e-contracts on the internet. Even in the very olden days the courts have held that a person who has signed the paper containing the terms and conditions is liable and bound by the same and he cannot later on say that he has not read the same or aware of the contents.

Peculiar outcome is expected out of the decided case of Amazon Seller Services Pvt. Ltd., Vs. Amway India Enterprises Pvt. Ltd., as decided by the 3 bench Division bench of the Delhi High Court. In that case FAO (OS) 133/2019, the Division Bench of Delhi High Court ruled that e-commerce platforms can sell and advertise products of Direct Selling Entities (DSEs) without their consent, thereby setting aside the Single Judge's order in Amway India Enterprises Pvt. Ltd., Vs. 1Mg Technologies Pvt. Ltd., & Anr. CS (OS) 410/2018 passed in July 2019 restraining various E-Commerce platforms including Amazon, Flipkart, Healthkart, Snapdeal and other independent sellers from selling, offering to sell, advertising, or displaying products in breach of third-party agreements. So, by this order the Division Bench has permitted the sale and advertisement to sell DSEs products without their consent though the sale of the Direct Selling Entities is bound by their Direct Selling Guidelines 2016 and the code of ethics/code of conduct regulated by the manufacturers.

This order may pave the way for everyone to stand up and say that though there are agreements between two parties, it was not with me and hence I am not bound by the agreements entered between other parties though in those agreements there are stipulations to abide by those terms and conditions when dealing with their products and services.

The said Order seems to open Pandora's box for several litigations and unwanted interpretations among the various entities such as e-commerce entity, Direct Selling Entities, manufacturers, distributors, sellers, consumers, government and even the judiciary. This order further tries to give room to one and all to argue, disagree, challenge, dispute, be at odds for everything and against every agreement. The purpose and the importance of the agreements will be lost. Every third person will start arguing that the agreement is only between the other two and that he should not be held liable for those things even if he is enjoying the proceeds and benefits from the agreement. Clauses will become non-obstante clause and this order will have an overriding effect over the agreements.

The purpose of the agreements will be nullified and the parties to the agreement will also start disputing the clauses and interpreting them in the way they want and suitable to their wants and requirements.

Further the provisions of consent, free consent defined and elaborated in the Indian Contract Act, 1872 will

get defeated and everyone will start arguing that all these are against the freedom of various rights guaranteed under the Constitution of India.

This order will create further hardships and will be referred in all the disputes, for interpretation of statutes, acts, rules, and regulations to be decided based on the rights guaranteed under the Constitution of India.

CONCLUSION

The study shows that in most of the online sites and transactions consent is thought to be only a "I agree" or "I Accept" which is not a correct one. Consent is not anything guessing or an assumption. It should be above all feelings and given after going through the particular transaction, feeling safe and understanding each and every word, knowing its consequences and the effect of consenting. So, there should be made a proper system to enable the participants in the online transactions to go through the dealings, understand them thoroughly, thoughtfully and with a clear intention of indulging in such an activity knowing its consequences. The activities on the internet should be made with mutual enthusiasm and free understanding knowing fully well the substance, purpose and the objectivity of the transaction.

To achieve this, the online platform operators, and others who offer things should provide sufficient time and clear cut policies and at least boxes in the subscription rules, statement of rights and liabilities, and other terms and conditions wherein the participants are made to provide some inputs, feedbacks accepting the same and opposing other terms with reasons.

The platform operators and others should understand that consent is not just about providing "yes" or "agree" and following whatever is stated in their terms and conditions but also it is giving due respect to the participants and understanding their requirements, feelings, their safety, value and their voices to be heard, by interacting in a proper, mutual way since the participants are the consumers who are all paying for the products and the services offered and without them no business can thrive.

So, both the participants and the business entities, have to do the transactions and activities, and build such an economy where everyone's voice will be heard, and rights protected while growing in the business world. The key or aim should be that everyone involved is on board and feels comfortable with the dealing and the activity involved.

Legislatures, and law makers should make it a point that certain specific words, terms and phrases in the said languages would and should mean such a particular thing and no other magical words to be used to confuse the participants for that said purpose. All the terms should be made more conspicuous and written in simpler language. The lawmakers should give priority for the concept of "consent" and to be acceded to compulsorily by the platform operators and others, while entering into any transactions, since India is the most populous country having large number of illiterate people needing protection.

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