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Regulating Dark Patterns

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ABSTRACT

Dark patterns are the manipulative tactics employed by companies to trick users into agreeing certain conditions which can later be used by companies to their advantage, also sometime referred to as deceptive patterns. Dark patterns cover a wide ambit of tactics including manipulative agreements, purposely making difficult to cancel services/subscriptions, sponsored ad campaigns, pop ups, etc. Not just the small companies but multinational tech giants are accused of employing deceptive patterns over its users. Dark patterns are negatively treated and their usage is absolutely discouraged but it is of significant importance to the companies. Laws in India are more consumer centric rather than favouring businesses in ambit of dark patterns.

This paper focuses on understanding the areas constituting dark patterns and the latest developments relating to regulation of dark patterns taking reference from the European Union, the United States and the Indian stance on the same. Also in this paper the importance of dark patterns are enshrined and how it becomes an essential part of business transactions. Essential for both users as well as the companies.

Keywords: *FTC- Federal Trade Commission , nagging, attentional theft, consent, commercial setback.*

I. INTRODUCTION

Dark patterns are the manipulative tactics employed by companies to trick users into agreeing certain conditions which can later be used by companies to their advantage, also sometime referred to as deceptive patterns. Dark patterns cover a wide ambit of tactics including manipulative agreements, purposely making difficult to cancel services/subscriptions, sponsored ad campaigns, pop ups, etc. Not just the small companies but multinational tech giants are accused of employing deceptive patterns over its users.

With the growth of internet users around the world and business transactions by way of e-commerce and m-commerce has facilitated buying and selling of goods and services online over a platform under an agreement, but every platform requires profit to keep its business in operation and major chunk of that profit comes from retention of customers and continuously adding new customers to the platform. This serves as a major driving factor for companies to

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use dark patterns. It is difficult for companies to retain customers especially when there are so many alternatives available therefore companies make it difficult for customers to leave their platform in the first place.

Companies argue to justify their stance on using dark patterns as consensual. It is only the users that agree and give their consent or willingly click into the terms of usage of their services based on which the companies act.

Currently it is being employed by e-commerce and m-commerce companies such as Amazon, Flipkart and such other e-commerce platforms and there are no such regulations and/or enactments regulating the same. Recently department of consumer affairs have issued guidelines regarding use of dark patterns by companies and their treatment under the Consumer Protection Act.

The object of this study is to understand global approach on dark patterns to derive legal methods which can be employed to curtail usage dark patterns in India, to Consolidate laws on dark patterns among existing legal system and to determine the advantages companies gain using dark patterns over users and to what extent it can be permitted.

This paper will find out different tactics used by companies which forms part of dark patterns and whether is it possible to curtail usage of dark patterns without discouraging companies engaging in E-Commerce?

(A) Literature Review

1. G.S. Bajpai and Ankit Shrivastava “*EXPLAINED, UNDERSTANDING DARK PATTERNS*” (Published by The Hindu 6th July 2023)²
2. The article determines what constitutes dark patterns and the recent regulations notified by the department of consumer affairs and Advertising Standards Council of India along with global developments on the issue. Global regulators restricting dark patterns in e-market. Article categorised any use of deceptive patterns that interferes with user behaviour to the advantage of companies or the platforms employing deceptive patterns.
3. Hung, Alison. “*KEEPING CONSUMERS IN THE DARK: ADDRESSING ‘NAGGING’ CONCERNS AND INJURY.*” *Columbia Law Review*, vol. 121, no. 8, 2021, pp. 2483–520³.

² G.S. Bajpai and Ankit Shrivastava “*EXPLAINED, UNDERSTANDING DARK PATTERNS*” (Published by The Hindu 6th July 2023)

³ Hung, Alison. “*KEEPING CONSUMERS IN THE DARK: ADDRESSING ‘NAGGING’ CONCERNS AND INJURY.*” *Columbia Law Review*, vol. 121, no. 8, 2021, pp. 2483–520³. *JSTOR*,

4. This journal analyses FTC stance on unfair or deceptive practises as provided under sec. 5 to recognise and penalize use of dark patterns. Along with that the journal has addressed number of cases including linked in case, practises by online platform, nagging patterns, google prompts, etc. And how legally it's a problem as it constitutes attentional theft, bypassing consent and how it leads to undue influence. European Union General Data Protection Regulation stance on dark pattern gave six legal bases on which the companies must define the use of dark patterns using consent of users.
5. Kornbluh, Karen, et al. *Safeguarding Digital Democracy: Digital Innovation and Democracy Initiative Roadmap*. German Marshall Fund of the United States, 2020⁴.
6. The journal throws light on disinformation, civil rights and privacy. It also suggests strategies to contain the use of dark patterns and legal intervention with this regard including preparation of code of conduct. It mentions amplification via algorithms, networks of bots, click farms, fake accounts and other similar ways to employ dark patterns.

(B) Statement of Problem

In a country like India where there is lack of awareness among people regarding technology it becomes easy for tech companies engaged in e-commerce to exploit people to their advantage and charge them for products and services which they do not desire. This is where legal intervention is required to regulate such practises, protect consumers and maintain competition in the market. However, in the case of dark patterns as it is a fairly new concept there is a lack of legal intervention. This paper aims to consolidate the legal provisions available to curb dark patterns, relief available to users and further suggestions to regulate dark patterns.

(C) Scope of Study

This paper will include the results of empirical research conducted on dark patterns mentioned in journals and the global stance on the issue. The paper will limit itself to the suggestive strategies analysed during research on dark patterns. It is a fairly new legal issue being addressed recently but has been practised by platforms for a very long time. It becomes an important issue when it comes to e-commerce and m-commerce as it influences customers into something that they might not have undertaken. Dark patterns are not only the deceptive picturisation used by companies but it also includes strategies employed by them which makes

<https://www.jstor.org/stable/27093855>. Accessed 4 Oct. 2023.

⁴ Kornbluh, Karen, et al. *Safeguarding Digital Democracy: Digital Innovation and Democracy Initiative Roadmap*. German Marshall Fund of the United States, 2020. *JSTOR*, <http://www.jstor.org/stable/resrep24545>. Accessed 5 Oct. 2023

users difficult to exit their platform or make it seem impossible to switch.

II. WHAT CONSTITUTES DARK PATTERN AND ITS APPLICATION?

Dark patterns cannot be accurately classified rather it can be understood from a scale of troubling to clearly manipulative capable of influencing consumer behaviour. The influence on consumer behaviour cannot be accurately calculated or monitored in real time but the inclination of a consumer towards a particular product or service can be inferred. If a user visits apparel shopping website it is clear that that the user has intention to buy apparel but what type of apparel is known only to the customer, now if the shopping platform pushes customer to buy a particular apparel and can influence consumer behaviour can only be done by using dark patterns but these kinds of dark patterns can be considered as fair use.

According to Indian Laws i.e. the guidelines for prevention and regulation of dark patterns, 2023 has identified ten different types of dark patterns namely:

- False urgency – False urgency is where a situation or environment of false urgency is created around a user to take prompt action or else the desired offer will vanish immediately leaving the user with no options. This is a manipulative technique to sell a product or service. A false narrative is created around the product to make the user fall for it and make impulsive decision.

One might have observed while checking hotel rooms or online shopping where it says 50 more people are viewing this room/product right now limited stock only.

- Basket sneaking – When an additional cost is added during checkout for any reason such as donations, unreasonable platform fee, and other such practises constitute basket sneaking.
- Confirm Shaming – Usage of phrases, videos, audios and such other techniques to instigate apparition among users to make them buy product or service or make any such other purchase decision. Like the use of phrase I prefer to be unsecured for the trip while booking flight tickets.
- Forced action – Getting a user to buy an extra or additional product, service or subscription at the time when user intended to buy other good. Amazon uses this tactic where it offers prime subscription during checkout of any product bought from their platform.
- Subscription trap – Making cancellation of subscription difficult by making the cancellation process difficult, lengthy or hiding the process of cancellation. Any practise

to purposely avoid cancellation of subscription of the company by the user.

- Interface interference – Interfering with the interactive system between user and site or platform directing user towards taking an action not previously desired by the user. It also includes misdirecting to some other platform.
- Bait and switch – Where an offer is made and when accepted by the user it is denied by the seller and instead other alternative is offered at a higher value stating reasons for non availability of previous offer.
- Drip pricing – When a service or product is offered at a lower price or free as a promotional strategy but is not revealed upfront but later on expiration of such offer which usually extends to a few days an amount is charged to continue with the service which had already begun. User sometimes might not be able to leave it in the middle.
- Disguised advertising – It also includes misleading advertising. Where a fake reviews are posted, fake adverts.
- Nagging – Nagging includes receiving of spams, or other related or unrelated information, advertisements which interferes with the intended transaction⁵.

III. LIMITATIONS IN INDIAN LAW

The limited scope of nagging, which does not cover social proof (false or misleading claims that others are buying the similar product), preselected defaults. It is difficult to categorise every possible practise that constitutes dark patterns, therefore a series of patterns must be observed where the outcome expected by the companies can be clubbed and such practises if go beyond permissible limit must be curbed instead of prohibiting the usage of dark patterns completely. A complete prohibition might negatively effect companies and has a potential to discourage business transactions through e-commerce and m-commerce modes. Like in the case of Linked in where the users email id and password which was collected for their experience in linked in profile was used by linked in to send invites to the contacts of the users via their email id on their behalf to join linked in and increase connections is a type of dark pattern but it cannot be categorised to any of the classifications of dark patterns provided in annexure A of the guidelines for prevention and regulation of dark patterns, 2023. Which explains that it is difficult or almost impossible to regulate all the kinds of dark patterns as it will be dependent on type of business companies are engaged in, the circumstances or the situations which forced

⁵ Draft Dark Patterns Guidelines, 2023 (Ministry of Consumer Affairs, Food and Public distribution, Department of Consumer Affairs. GOI)

those companies to employ dark patterns, and the kind of dark pattern used by companies to curb the problems in their business in a situation. The analysis part of this paper covers the situational aspects in employing dark patterns and to what extent such usage is justified by the companies.

Recently RBI deputy governor M. Rajeshwar Rao has notified about the usage of dark patterns in mis selling of digital loans where the customers are deceived into availing high cost loans⁶. There is also a proposal pending to look into the matter. Financial service and banking sectors are the most crucial sectors as it involves monetary transactions and the chances of fraud in these areas are colossal. Therefore dark patterns used in these sectors must be specifically regulated. It is one such area where dark patterns can be clearly and specifically classified to curb their usage. There are limited possibility of use of dark pattern in banking and financial service sector or to put it in another way there are no possible situations where usage of dark patterns becomes necessary. Similarly with the insurance business as well. Because the substance of these sectors lie in full disclosures made by the contracting parties and the concept of consent is significantly important and nuanced in nature. The collection of data in these sectors forms an essential part of the transaction unlike in other sectors where the collection of data is mostly done for research, development and forecasting purposes or at least that's what the companies mention in the standing agreement.

IV. ANALYSIS OF LEGAL PROVISIONS RELATING TO DARK PATTERNS (TO DETERMINE ADEQUACY OF LAW)

In India dark patterns are considered as a matter of consumer affairs and hence comes under the regulation purview of Ministry of Consumer Affairs and is governed by Consumer Protection Act. Recently on 5th October 2023 MCA had issued notifications regarding usage of dark patterns guidelines named as Guidelines for Prevention and Regulation of Dark Patterns, 2023. The Annexure I contains practises which constitute dark patterns.

Consent model in India is inadequate thereby completely disallowing dark patterns. Consent can be easily circumvented by companies.

Similar acts such as Deceptive Experience to Online Users Reduction Act (DETOUR) was passed in the U.S. but was unsuccessful in curbing deceptive patterns. Abusive conduct category must be developed where dark patterns must be segregated but the process must be contained to exclude extreme conducts which pushes users to change their behaviour. There is a difference

⁶ *RBI Seeks Dark Patterns In Mis selling of Digital Loans* (Published by The Times of India 24th Nov. 2023)

between unwanted and substitutable products or services a user chooses as per his/her requirements. Change in consumer behaviour using dark patterns which makes the user undertake unwanted actions must be curbed/prohibited.

Dark patterns as specified in annexure A of the draft dark patterns guidelines completely prohibit the usage of dark patterns as specified in annexure A of the guidelines. It can be observed from various instances around the world that dark patterns are not completely inappropriate. Moreover, it is difficult to identify all possible types of dark patterns. It depends on the type of business a company is engaged in to identify the dark pattern employed. Also services like banking, financial services, insurance must have strict guidelines towards usage of dark patterns and should try to regulate the process of application of dark patterns.

Areas in different business must be identified where dark patterns can be utilised. In some instances it becomes necessary as a part of business or becomes essential to conduct business or for the customer/user of the product or service to utilise the product or service to its full potential to achieve the sole purpose for which the user bought the product or service. In these possible areas or situations dark patterns are utilised.

The major drawback in the current draft notification is that it recognises all the different types of dark patterns available or previously established and has generalized their usage across all platforms engaged in e commerce and m commerce. All the companies cannot be treated in the same parlance. Users themselves visit unauthorised sites where they witness deceptive patterns used by the unauthorised platforms/companies and fall prey for the same. Whereas global companies only makes use of authorised patterns and engage themselves in genuine work like in the case of Tile or Apple Inc. Because of these unauthorised platforms using dark patterns with the sole intention to defraud the users, regulations tend to prohibit the whole activity altogether.

V. CASE STUDIES ON DARK PATTERNS FROM AROUND THE WORLD (STANCE BY DIFFERENT COUNTRIES)

The usage of dark patterns came into limelight in the case of linked in. Where the users signed up for add connections feature in linked in and linked in using the emails of its users sent invitations to the user's contacts on their behalf to join linked in. Linked in was ordered to pay a settlement amount of \$13 million.

According to European Union General data protection Regulation (GDPR) consent is "any freely given, specific, informed and unambiguous indication of data's subject wishes by which

he or she by statement or clear affirmative action signifies agreement to processing of personal data relating to him/her". This definition in itself clears a lot of confusion regarding the usage of personal data and dark patterns. Now within this ambit dark patterns can be utilised. It does not outrightly reject the usage of dark patterns instead permits it within limits. If it goes beyond the specified limits it is considered as attentional theft.

Tile filed an application against apple in European Commission Antitrust for its monopolistic practises. Apple launched air tags and started favouring its tracking app find my device and gave users always allow option by default whereas Tile equivalent had to ask again and again for permissions or set it as default from settings where the option was deep buried. Both the companies employed nagging. Both of them are justified to some extent.

In banking and financial services sector consent obtained by using dark patterns is considered unfair and deceptive and contract is rendered void. At any given point of time an order from court can be obtained against such contracts. Sec. 5 of FTC provides for unfair and deceptive acts or practises affecting commerce⁷. This section has been subjected to judicial scrutiny and a three part test has been established to determine unfairness⁸. First the practise causes or likely to cause substantial injury, second that is not reasonably avoidable by consumers and third that is not outweighed by countervailing benefits to consumers or to competition along with that FTC will also look into public policy, common law, industry practise or otherwise. All this to determine consumer injury⁹.

Privacy intrusions by unwanted sales calls also constitute deceptive pattern¹⁰. To avoid these deceptive patterns blanked solutions are suggested such as do not call (to opt out from telemarketing), do not tract options in browser to avoid selective advertising, do not nag (to opt out from repeated notifications, intrusions).

Dark Patterns are an essential part of e-commerce and m-commerce. It cannot be completely striped away from companies. Companies expand their business and increase revenue through customer retention and dark patterns assist companies to retain customer for future. Regulating dark patterns stringently and completely disallowing its usage may lead to commercial setback for companies. Companies also argue that using dark patterns enhances their digital experience more rather than influencing consumer behaviour.

⁷ Sec. 5 of the Federal Trade Commission Act, 1914

⁸ "*Federal Trade Commission Act section 5 Unfair of Deceptive Acts or Practises*" (Published by Federal Reserve) (federalreserve.gov)

⁹ Supra 3

¹⁰ Supra 4

VI. CONCLUSION AND SUGGESTIONS

The Indian laws must include other practises as well which constitute dark patterns as well such as false pop ups ads, the ambit of nagging must be increased and the concepts of unfair and deceptive practises must be developed, along with the introduction of attentional theft. Consent must be clearly defined in terms of dark patterns. The major drawback of the current draft notification guidelines issued by the department of consumer affairs is complete prohibition on the usage of dark patterns specified in the annexure A of the guidelines. First and the foremost this is that dark patterns cannot be specifically identified. It practise and type of dark patterns changes from business to business. If a dark pattern is utilised which is detrimental to the users but is not specified in the annexure then such patterns can be excused causing turmoil in the e market place.

Dark patterns are customised to suit the needs of every business through e-commerce and forms an integrant part of e-commerce therefore a complete restriction of its operation might discourage business through e-commerce. The laws are inadequate and the concepts governing the same are also at the stage of development on the other hand complete disregard to dark patterns are detrimental to businesses as well, therefore a middle ground must be brought to encourage commercial activities and to use dark patterns as a tool rather than completely depending on dark patterns to run the business.

Dark patterns must not be considered as a threat instead it must be seen as an enabler. An effective and efficient way to carry on and expand business. But its usage must be within the permissible limits which is able to justify the concepts of consent, attentional theft, privacy concerns. As mentioned earlier as well regulating dark patterns stringently and completely disallowing its usage may lead to commercial setback for companies. Companies also argue that using dark patterns enhances their digital experience more rather than influencing consumer behaviour.

In some instances it becomes necessary for companies to use dark patterns like in the of Tile where it had to ask for permissions again and again for the devices bought by customers to use. It becomes essential for the company to nag to allow customers to use their device. On the other hand it was essential for Apple as well to expand its product portfolio. Companies cannot be questioned for taking commercial decisions to grow their business like expanding their product portfolio, diversification and if it becomes necessary for the companies to undertake usage of dark patterns in a civilised manner to conduct their business and forms an essential part of user experience then dark patterns must be permitted.

To regulate one must analyse the pattern in all these deceptive practises. What's common in all these. The common thing or pattern is making it difficult for the user to undertake the desired activity. Therefore any act making in lengthy, complicated or redirecting the user towards taking a related but undesired action to execute the desired action shall constitute dark or deceptive pattern.

Now the length, complication or relatability of redirection will reveal the intensity of dark pattern utilised in changing the consumer behaviour. Economic theory of consumer behaviour.
