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## Dark Patterns in a bright world : An analysis of the Indian Consumer Legal Architecture

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# DARK PATTERNS IN A BRIGHT WORLD: AN ANALYSIS OF THE INDIAN CONSUMER LEGAL ARCHITECTURE

—Sandeep Sharma J.\* & Dr. Ishita Sharma\*\*

**Abstract** 'Dark patterns' are consumer targeted marketing strategies that capitalize on cognitive biases of consumers, propelling them to make decisions contrary to their intended preferences. The term dark patterns, coined by user designer Harry Brignull, has gained traction recently, due to its correlation with psychological responses that are produced through nudges that are unaligned to the consumers' original preference. The consumer responses elicited through the use of such dubious nudges have a direct correlation with the way the human brain functions. These covert strategies employed by digital marketing platforms capitalize through behavioral science, aimed at their economic growth compromising the consumers' free, fair and independent decision-making capacity. The use of these algorithmic strategies to drive businesses has multiple legal tangents with a direct bearing on competition, contract, privacy and consumer law. The authors in the first section of the paper examine the various forms of dark patterns with the aid of graphical representations, that augment the argument that dark patterns are manipulative tools employed to economically disempower consumers'. In the second section of the article, the authors highlight the erosion of decisional privacy of the consumers, a phenomenon that overtly seems to be an exercise of free will but is a tacit capitalization of cognitive biases of consumers spurring them to inadvertently take actions against their preferred interest. In the third section of the article, the authors analyze the existing Indian regulatory architecture and propose relevant provisions that can be used to address these algorithmically induced marketing strategies. In the final section of the paper, the authors propose the changes that can be brought in the Indian regulatory architecture, specifically under the Consumer Protection

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*Act 2019, to protect the consumers from the jeopardizing impact of dark patterns.*

**Keywords:** Consumer, Dark Patterns, Decisional Privacy, Consumer Protection Act 2019.

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**I. INTRODUCTION**

The neurological reflex for an appetizing morsel of the south Indian delicacy dosa, coupled with the forces of consumerism, spurred the author to an online search for cookware to satiate their desire. A leisurely stroll through the digital space, in lieu of the same, generated numerous links. A random click on one of the links generated the below window.<sup>1</sup>

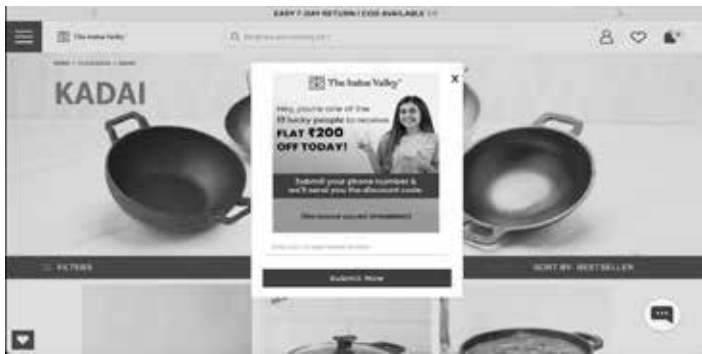


Figure 1 (indusvalley.in)

<sup>1</sup> 'Buy Best Kadai/Kadhai & Woks Online in India @ Best Prices'(The Indus Valley, 26 March 2023). <[www.theindusvalley.in/collections/kadai?filter.p.m.my\\_fields.product\\_material=Cast+Iron&utm\\_source=perf&utm\\_medium=google\\_search&utm\\_campaign=google\\_Search\\_Kadai&utm\\_source=adyogi&utm\\_medium=google-search&utm\\_campaign=GOOD\\_9123\\_adyogi\\_BrandSearch\\_Engage\\_Kadai&gclid=Cj0KCQjw2v-gBhC1ARIsAOQdKY3DMMsr05\\_IBpiYIKNshE\\_5uDM14yfxh2NH\\_4DoB78xeHvGW8lJpWcaAiKEEALw\\_wcB](http://www.theindusvalley.in/collections/kadai?filter.p.m.my_fields.product_material=Cast+Iron&utm_source=perf&utm_medium=google_search&utm_campaign=google_Search_Kadai&utm_source=adyogi&utm_medium=google-search&utm_campaign=GOOD_9123_adyogi_BrandSearch_Engage_Kadai&gclid=Cj0KCQjw2v-gBhC1ARIsAOQdKY3DMMsr05_IBpiYIKNshE_5uDM14yfxh2NH_4DoB78xeHvGW8lJpWcaAiKEEALw_wcB)> accessed 26 March 2023.

The above visual is an expression of a novel marketing strategy resonant in the digital marketing space that manoeuvres the cognitive perceptions of the consumers toward spreader mined targets, alien to consumers' interests, identified as dark patterns.<sup>2</sup> The below image is another instance of a dark pattern.<sup>3</sup>

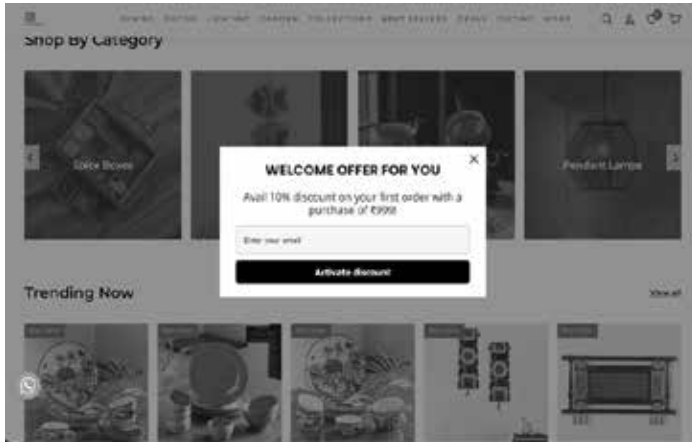


Figure 2 (*exclusivelane.com*)

Thus, dark patterns' are consumer targeted marketing strategies that capitalize on cognitive biases of consumers' propelling them to make decisions, contrary to their intended preferences. The term dark patterns, coined by user designer Harry Brignull, has gained traction recently, due to its correlation with psychological responses that are produced through nudges that are unaligned to the consumers' original preference. The consumer responses elicited through the use of such dubious nudges have a direct correlation with the way the human brain functions. The mental faculties of an individual are enacted by two agents, christened as System 1 and System 2 by famous economist Daniel Kahneman in his book *Thinking Fast and Slow*.<sup>4</sup> The first actor prompts an individual to produce quick, impulsive, convoluted responses whereas the second actor is calm, subtle, rational and patient.<sup>5</sup> These covert strategies employed by digital marketing platforms capitalize through behavioral science, aimed at their economic growth compromising the consumers' free, fair and independent decision making capacity.

<sup>2</sup> Harry Brignull, 'Dark Patterns: Inside the Interfaces Designed to Trick You' (*The Verge*, 29 August 2013). <[www.theverge.com/2013/8/29/4640308/dark-patterns-inside-the-interfaces-designed-to-trick-you](http://www.theverge.com/2013/8/29/4640308/dark-patterns-inside-the-interfaces-designed-to-trick-you)> accessed 02 March 2023.

<sup>3</sup> 'IndianHandicrafts Online- Buy Handicraft Items |Exclusive Lane' (ExclusiveLane) <<https://exclusivelane.com/>> accessed 6 March 2023.

<sup>4</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Anchor Canada 2013) 2.

<sup>5</sup> *ibid* 2.

The above graphic visual presented by the author clearly provokes the consumer to compromise their privacy by nudging them to enter their number to avail the discount, by activating the System 1 response system. This alliance of the digital marketing space with information technology has raised certain pertinent questions that have ethical as well as legal underpinnings. Cass Sunstein has highlighted the diabolical nature of the alliance as raising fundamental questions of ethics of influence.<sup>6</sup> The use of these algorithmic strategies to drive businesses has multiple legal tangents with a direct bearing on competition, contract, privacy and consumer law.

The authors' in the first section of the paper examine the various forms of dark patterns with the aid of graphical representations, that augment the argument that dark patterns are manipulative tools employed to economically disempower consumers, exploiting the System 1 mental faculties of an individual. In the second section of the article, the authors' highlight the erosion of decisional privacy of the consumers', a phenomenon that overtly seems to be an exercise of free will but is a tacit capitalization of cognitive biases of consumers spurring them to inadvertently take actions against their preferred interest. In the third section of the article, the authors' analyze the existing Indian regulatory architecture and propose the relevant provisions that can be used to address these algorithmically induced marketing strategies. In the final section of the paper, the authors propose the changes that can be brought in the Indian regulatory architecture, specifically under the Consumer Protection Act 2019, to protect the consumers' from the jeopardizing impact of dark pattern.

## II. DARK PATTERNS RUN AMOK: TO CLICKOR NOT TO CLICK

Novel advertising strategies employed by companies by cleverly crafting their interfaces, have brought the issue of dark patterns to light. Companies employ various methods to retain their consumer base, which shall be highlighted through supportive graphic visuals on the prevalence of various kinds of dark patterns. Cluttered mail in boxes are a common phenomenon these days. This clutter is partially attributable to eye sore advertising mails that are regularly sent, as a part of companies' promotional strategies, after the consumer has initially filled in their sign up form to subscribe to a company's services'. Below is a screenshot of a promotional advertisement sent by Grammarly.<sup>7</sup>

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<sup>6</sup> Cass R Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* (Cambridge University Press 2016) 18.

<sup>7</sup> These are screenshots taken by the authors' as of March 2023 from the authors' inbox of a promotional e-mail received from Grammarly, an AI powered proofreading website. A click on the unsubscribe option leads to the second visual where it prompts the user to update their preferences rather than dropping the mail of the consumer from the unsubscribe list.



Figure 3 (gmail.com)

A click on the unsubscribe option brings up the following window:



Figure 4 (gmail.com)



Figure 5 (gmail.com)

The above visual clearly shows that the company has made it harder for the consumer to avail the unsubscribe option, along with default check boxes, also known as check box treachery.<sup>8</sup> This strategy employed by corporates is an example of obstruction dark patterns.<sup>9</sup> Another instance of a dark pattern is bait and switch,<sup>10</sup> which is a pattern wherein a website endorses a particular action, but when the customer avails the option endorsed, they are redirected to some other action or product. The below visuals are examples of the same.<sup>11</sup>



Figure 6 (pagalworld.nl)

The website *pagalworld.nl* hosts it self as a website for downloading songs for free, where as on clicking the download option, the user is redirected to the below visual. Apart from being indicative of bait and switch, the above visual

<sup>8</sup> Seerat Bhutani and Ashima Obhan, 'Dark Patterns on Digital Platforms: Are 'your' Online Decisions 'Really' your Own, Obhan & Associates' (*Obhan & Associates*, 30 November 2022). <[www.obhanandassociates.com/blog/dark-patterns-on-digital-platforms-are-your-online-decisions-really-your-own/#:~:text=Use%20of%20dark%20patterns%20may,means%20to%20address%20dark%20patterns.](http://www.obhanandassociates.com/blog/dark-patterns-on-digital-platforms-are-your-online-decisions-really-your-own/#:~:text=Use%20of%20dark%20patterns%20may,means%20to%20address%20dark%20patterns.)> accessed 12 March 2023.

<sup>9</sup> Colin M Gray and others, 'The Dark (Patterns) Side of UX Design', *CHI '18: CHI Conference on Human Factors in Computing Systems* (ACM 2018) XXXX <<http://dx.doi.org/10.1145/3173574.3174108>> accessed 8 March 2023.

<sup>10</sup> Bhutani & Obhan (n 8).

<sup>11</sup> The graphics are screenshots taken by the author on 21st of March 2023, of a website to download songs. But on clicking the option to avail the same, the user is redirected to some other website offering other services.

is also a depiction of another model of dark pattern, roadblock,<sup>12</sup> wherein the author encountered the above obnoxious pop-up before availing the download song option.<sup>13</sup>



Figure 7

The above visuals are classic examples of the bait and switch dark pattern. The choice of architecture employed by the websites capitalizes on the cognitive biases of the consumers as well as creating a nuisance, making idle web-surfing a cumbersome and taxing task. Another most widely used dark pattern employed by companies to lure customers to maximize their.

Profits is pre-selection<sup>14</sup> and confirm-shaming.<sup>15</sup> The below visualis an example that summarizes both the forms of dark patterns.<sup>16</sup>

<sup>12</sup> Advertising Standards Council of India, *Dark Patterns the new threat to Consumer Protection-Discussion Document* (November 2022).

<sup>13</sup> The graphics are screenshots taken by the author on 21st of March 2023, of a website to download songs. Prior to availing the download song option, there emerges an obnoxious road block.

<sup>14</sup> Wolfgang Stefani, 'Dark Patterns Examples: How to uncover them' (*raidboxes*®, 20 January 2023). <<https://raidboxes.io/en/blog/security/dark-patterns/>> accessed 18 March 2023.

<sup>15</sup> Ibid.

<sup>16</sup> The above visual is the screenshot taken by the author as of March 2023 of a popular fitness website [gl.ketocycle.diet](http://gl.ketocycle.diet).



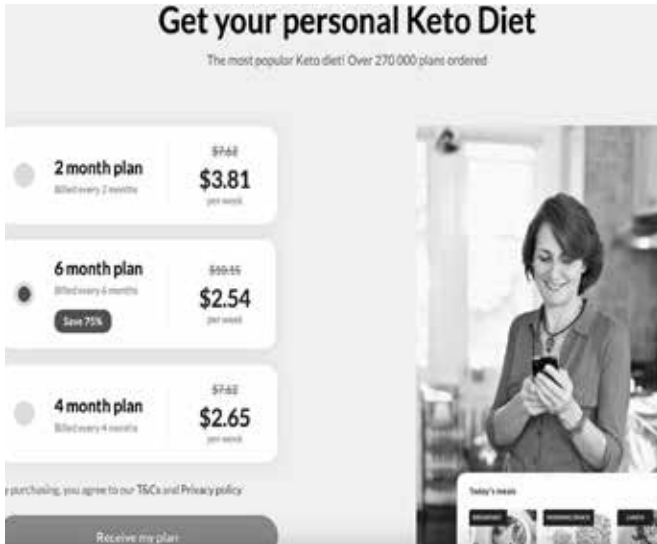


Figure 8 (*gl.ketocycle.diet*)

Firstly, the website pre-selects the longest plan as a default plan, further enticing the customers to retain the same through a discount of 75%. Furthermore, it uses numbers to grab the attention of the customers, inducing a sense of guilt among them, leading the customer to avail the plan by highlighting its popularity index. An interesting pattern emerges after accessing the website, when the author declines to avail any of the plans as in the visual. Immediately within minutes of leaving the website, the following promotional mail pops up in the author's inbox.<sup>17</sup>

Hi,

It's Christine, Head of Nutrition at Keto Cycle. I was about to start preparing your custom keto meal plan, but I noticed you didn't complete your order.

From woman to woman, I want you to trust and believe that you can reach 60kg by the end of April, 2023.

Since you're a keto expert, you know, how much knowledge and time this diet requires. I'll be here to make it a think-free experience!

I'll support you every step of the way during this 1-month journey and ensure your meals not only taste delicious but also keep you energized, full, and healthier than you've ever been before.

<sup>17</sup> The promotional mail was received by the author as soon as the author declined to avail any of the plans highlighted on their website.

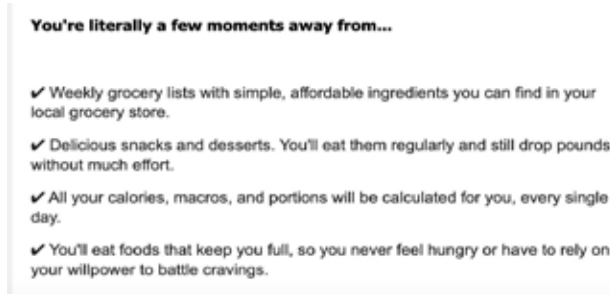


Figure 9 (gmail.com)

**Whenever you have questions or need help to stay motivated, it will be like having me in your pocket.**

You may think losing weight is a long and cruel process, but it's really not when you follow a personalized keto meal plan.

With this plan, you can achieve your goal by April.

Trust me, you're not the first woman that I've helped!

The weight will come off. With healthy habits and determination, you'll also reach those 60kg pretty easily.

You'll struggle to believe your very own eyes. And just when you start doubting yourself and think you'll stop losing and gain all the weight you lost back... you'll keep losing until you achieve the dream body you want.

**I know you're going to make the right choice, so I just sneaked into our system and got you an exclusive 75% OFF discount.**

This means you'll only pay 18 cents a day.

As soon as you click the big button below, you'll be able to review your plan and place your order.

The offer is valid for 15 minutes only... then I'll have to change it back in the system.

Remember: Something brought you here for a reason. I can only open the door for you. You're the one who needs to go through it.

**It's time to get the body you deserve with the help of an innovative tool that is constantly being improved by expert nutritionists.**

**[=> Click here to start moving from 65kg to 60kg immediately.](#)**

Figure 10 (gmail.com)

This is a classic example of confirm shaming,<sup>18</sup> wherein guilt is induced in the consumer through such mails when the author declines to avail their offers, to induce the customer to avail their plans. Yet another classic example of a dark pattern is the creation of a sense of urgency and artificial scarcity as illustrated below.<sup>19</sup> A false sense of urgency is created by imposing a time period to avail the discount, and the option to decline the offer is quite imperceptible, with the decline button indicated by a cross too transparent to be visible (as indicated by red colour in the graphic visual by the author).



Figure 11

These are some of the classic dark patterns as illustrated through various visuals, employed by companies' to lure the customers and alter their preferences. An overview of the various kinds of dark patterns as also illustrated through the visuals above, brings out certain significant characteristics of these

<sup>18</sup> Ram Sagar, 'Confirm-Shaming, Privacy Zuckering & Sneak Adding: E-Tailers are Using these Dark Patterns to Make you buy Junk' (*Analytics India Magazine*, 16 October 2019) <<https://analyticsindiamag.com/confirm-shaming-privacy-zuckering-sneak-adding-e-tailers-dark-patterns-machine-learning/>> accessed 12 March 2023.

<sup>19</sup> The visual is of an advertisement of an online game Impulse taken by the author as of March 2023 wherein a false sense of urgency is created.

patterns. These characteristics have also been highlighted by existing scholarship<sup>20</sup> that exists on dark patterns<sup>21</sup> as mentioned below:

Choice Architecture	Attribute	Description
Modifying the decision space	Asymmetric	Unequal burdens on choices available to the user
	Restrictive	Eliminate certain choices that should be available to users
	Disparate Treatment	Disadvantage and treat one group of users differently from another
	Covert	Hiding the influence mechanism from users
Manipulation the information flow	Deceptive	Induce false beliefs in users either through affirmative misstatements, misleading statements, or omissions
	Information Hiding	Obscure or delay the presentation of necessary information to users

Figure 12

The above figure succinctly summarizes the various characteristics of dark patterns.

### III. DARK PATTERNS AND THEIR ATTRIBUTES

A detailed description of these characteristics deserves mention:

- **Asymmetric:** These kinds of dark patterns confuse the consumer through contrasting choices. The choices that are favorable to the marketer are prominently highlighted, with the other options either shrouded through the use of imperceptible color choices or an unfavorable positioning of the other options. For example, Figure 9 & 10 are typical of the asymmetric pattern wherein the consumer is induced to alter their preference and avail the plan by taking them on a guilt trip.
- **Covert:** Figure 4 & 5 of the visuals outlined above are an instance of covert dark patterns where in the marketers capitalize on the cognitive biases of the consumers through prechecked boxes, camouflaging the real impact of such choices on the consumers by prechecking certain boxes by default and keeping other options unchecked. Such interfaces heavily impact and alter the decision making capacity of the consumers through the activation of the System 1<sup>22</sup> pattern of decision making. The below visual as seen on Agoda is an example of a covert dark pattern wherein

<sup>20</sup> Arunesh Mathur, Mihir Kshirsagar and Jonathan Mayer, 'What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and Measurement Methods' in *CHI '21: Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems* (Association for Computing Machinery 2021) 360 <<https://doi.org/10.1145/3411764.3445610>> accessed 2 March 2023.

<sup>21</sup> *ibid.*

<sup>22</sup> Kahneman (n 4).

the cognitive biases' of consumers are exploited, by making certain choices more appealing through placement of those options.<sup>23</sup>



Figure 13 (agoda.com)

The choice to avail the coupon is highlighted in a catchy blue tab where as the option to decline in a dull grey colour.

- **Deceptive:** As the name suggests, deceptive dark patterns deceive or trick the consumer into entering into a transaction by creating a false sense of urgency or an artificial scarcity. The use of timers to avail discounts puts the consumers' into a complicated situation where in the consumer, under pressure created due to the fake urgency created, avails the offers, incentivizing the marketer. Figure 11 is illustrative of such a kind of dark pattern.
- **Restrictive:** Restrictive dark patterns limit choice availability to the consumer. Forced Action dark pattern falls under this category. The below visual is illustrative of the same:



Figure 14 (Grammarly.com)

<sup>23</sup> The screenshot taken by the author is as of March 2023.

The above visual is a screenshot of the proof-reading website Grammarly,<sup>24</sup> wherein while signing up for the website, the user has no option but to receive their promotional emails as well, with the option to unsubscribe to be availed only at a later stage. Figure 2 is also illustrative of such a dark pattern.

The scholarship on the various kinds of design interfaces that marketers employ to alter consumer preferences has been collated by Ashish Mathur and his team<sup>25</sup> which comprises of all the earlier works on the aspect, succinctly summarized by them in the table as under,:

Prior Work	Dark Pattern Type	Choice Architecture					
		Modify the Decision Space				Manipulate the Info. Flow	
		Asymme.	Restri.	Dis. Treat.	Covert	Decept.	Info. Hiding
	Bait and Switch					●	
	Confirmation Bias	●					
	Disguised Ads					●	
	Forced Continuity					Ⓜ	●
	Friend Spam					●	
	Hidden Costs					Ⓜ	●
	Misdirection				●		
	Price Comp. Prevention		●				●
	Privacy Zuckering	Ⓜ	Ⓜ				Ⓜ
	Reach Motel		■				

Prior Work	Dark Pattern Type	Choice Architecture					
		Modify the Decision Space				Manipulate the Info. Flow	
		Asymme.	Restri.	Dis. Treat.	Covert	Decept.	Info. Hiding
	Snak into Basket					Ⓜ	●
	Trick Questions	●			●		
	Coercion		●				
	Confusion	●			●		
	Distraction	Ⓜ			●		
	Forced Work	Ⓜ	Ⓜ				
	Interruption	Ⓜ	Ⓜ				
	Manipulating Navigation	Ⓜ			Ⓜ		
	Obfuscation	Ⓜ			Ⓜ		
	Restricting Functionality	Ⓜ	Ⓜ				
	Trick				Ⓜ	Ⓜ	
	Grading		●				
	Inpersonation					●	
	Standardized Evaluates			●			
	Pay to Skip			●			
	Playing by Appointment		●				
	Pre-Delivered Content			●		Ⓜ	●
	Social Pyramid Schemes		●				

<sup>24</sup> The screenshot is of March 2023.

<sup>25</sup> Mathuretal. (n 20).

Grossberg et al. [13]	Attention Grabber	○		●		
	Bait and Switch					●
	Captive Audience	○	●			
	Deigned Data Collection			●		○
	Milk Packer		●			
	Never Forget			●		
	Personal Info. Public		●			
	Unintended Relationships			●		
Brock et al. [4]	Address Book Locking					●
	Bad Defaults	●				
	Forced Registration		●			
	Hidden Legal Slip					●
	Immortal Accounts	○	○			
	Privacy Zuckering	○	○			○
Gony et al. [11]	Shadow User Profiles		●	●		
	Forced Action		●			
	Interface Interference	○		○		○
	Nagging	●				
	Obstruction		○	○		
Soaking					○	●

Prior Work	Dark Pattern Type	Choice Architecture					
		Modify the Decision Space				Manipulate the Info. Flow	
		Asymm.	Restr.	Dis. Treat.	Covert	Decept.	Info. Hiding
NCC [19]	Default Settings	●					
	Ease	●					
	Framing	●			○		
	Rewards & Punishment	●	○				
	Forced Action		●				
	Attention Diversion	○			○		
	Bait & Change					●	
	Blaming the Individual	●					
	Camouflaged Advertising					●	
	Chameleon Strategy	○					●
CNL [42]	Comparison Obfuscation		●				●
	Default Sharing	●					
	False Continuity					○	●
	Hard to Adjust Privacy	●					
	Impenetrable Wall		●				
	Improving Experience				○		○
	Just You and Us				○		○
	Last Minute Consent		○		○		
	Obfuscating Settings	●					
	Repetitive Incentive	○					○
	Safety Hackmail					●	
	Trick Question	●			●		
Wrong Signal						●	

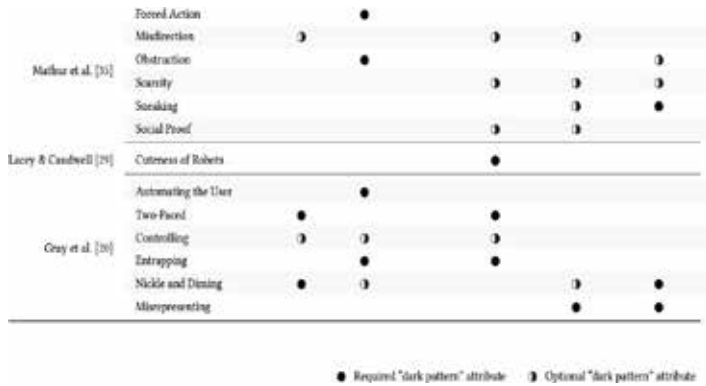


Figure 15

As far as India is concerned, recently the Advertising Standards Council of India has published a discussion paper<sup>26</sup> on dark patterns wherein it has highlighted the various kinds of dark patterns as being detrimental to the interests of the consumers. After an analysis of the various kinds of dark patterns with the aid of supporting visuals as well as the existing scholarship on the same, the authors’ do not intend to propose any new taxonomical classification of dark patterns due to existence of significant scholarship over the same. Recently, after an analysis of existing scholarship on dark pattern taxonomy, Mark Leiser and Wen-Ting Yang proposed their own unique four-level hierarchical model.<sup>27</sup> Hence, there is no dearth of scholarship on the taxonomy of dark patterns. However, it becomes essential to understand the problem that these practices pose for the consumer which shall be dealt with in the subsequent part of the paper.

#### IV. A GULLIBLE CLICK OR AN EROSION OF AUTONOMY: WHAT’S THE REAL DEAL?

As already mentioned by the authors’, dark patterns are akin to nudges that insinuate the consumers’ to act in a particular manner, contrary to their originally intended action. The term nudges is a collaborative brainchild of two luminaries from the field of behavioral economics and law i.e. Richard Thaler and Cass Sunstein.<sup>28</sup> According to them, nudges are any kind of interface that

<sup>26</sup> Advertising Standards Council of India (n 12).

<sup>27</sup> Mark Leiser and Wen-Ting Yang, ‘Illuminating Manipulative Design: From ‘Dark Patterns’ to Information asymmetry and the repression of free choice under the Unfair Commercial Practices Directive’ [2022] SocArXiv16.

<sup>28</sup> Daniel Susser, Beate Roessler and Helen F Nissenbaum, ‘Online Manipulation: Hidden Influences in a Digital World’ [2018] SSRN Electronic Journal 23 <<http://dx.doi.org/10.2139/>



significantly impact the decision making capacity of people, without compromising their financial faculties. The proper terminology used by them for interface is choice architecture.<sup>29</sup> The decision-making capacity, through the use of a particular choice architecture, can occur in both online as well as the offline space.

The impact of the choice on the behaviour of the consumers' in the online world has been illustrated by the authors' in the preceding section of the paper. An analogy can be drawn in the offline world as well. As a customer enters into a bakery, the placement of the merchandise on the shelves of the bakery greatly impacts the purchasing patterns of the customers. Another instance can be the placement of chocolates and small goodies such as fancy chewing gums, mint chiclets alongside the billing counter induce the customers' to pick any one of the goodies randomly and insert them in their shopping cart or the same act being done by the children while waiting alongside their parents near the billing counter. The placement of the merchandise unknowingly inflates the purchases of the consumers'.

The question that arises after a perusal of the instances outlined above is regarding the thin line of difference between benign nudging and manipulation that erodes the decision making capacity of the consumer. This is where the System 1 mode of action is activated<sup>30</sup>, making the hovering of cursor as well as subsequent clicks, an act of free will of the consumer. This leads to the erosion of decisional privacy of the consumer, or the ability to make decisions without any coercion.<sup>31</sup> As already seen in the preceding section of the paper, dark patterns used by the digital marketing companies capitalize themselves at the expense of the consumer and assert their influence in the online market space through the use of such technologies. The essence of the entire scheme is to grab the attention of the consumer, directing him/her towards a targeted choice, contrary to the consumers' original choice. This attention-grabbing phenomenon and its significance can also be illustrated graphically:<sup>32</sup>

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ssrn.3306006> accessed 3 March 2023.

<sup>29</sup> *ibid.*

<sup>30</sup> Kahneman (n 4) 2.

<sup>31</sup> Gregory Day and Abbey Stemler, 'Are Dark Patterns Anticompetitive?' [2019] SSRN Electronic Journal 2. <http://dx.doi.org/10.2139/ssrn.3468321> accessed 13 March 2023.

<sup>32</sup> *ibid.*

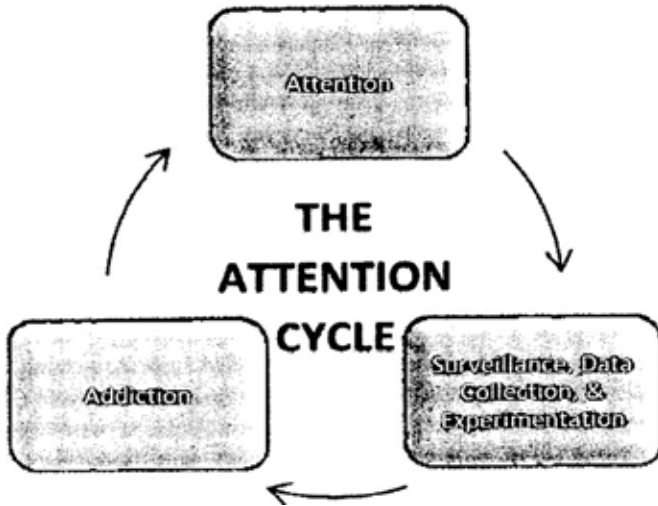


Figure 16

Thus, grabbing the attention of the consumers is the essence behind the capitalization of revenue in the online space, and the same is fulfilled through advertising and promotional emails that capitalize that employ dark patterns to fulfil the abovestated objective. This algorithmically induced labour employed in the online marketing space is highly powerful as it beguiles the consumer to take decisions that albeit appears to be an overt expression of one's will, but is covertly an alteration of the consumers' actual preference. This phenomenon is called decisional privacy.<sup>33</sup> As the decisional privacy of the consumers' is hijacked by the online marketing platforms, an intrusion is made into the personal data of the consumers' such as synchronising their phone number, email and contact list with their platform as a condition precedent to availing or hiring any of their services. Thus, the usage of dark patterns highlights dual issues of privacy, i.e. an erosion of traditional privacy<sup>34</sup> through the unwarranted synchronisation of personal data with the digital platforms, as well as decisional privacy.

The above discussion highlights the failure of Indian Consumer Laws to recognise the right to privacy<sup>35</sup> as a consumer right. This aspect shall be exam-

<sup>33</sup> Day and Stemler (n 32) 4.

<sup>34</sup> Daniel J Solove, 'A Taxonomy of Privacy' (2006) 154(3) University of Pennsylvania Law Review 477, 567. <<http://dx.doi.org/10.2307/40041279>> accessed 13 March 2023.

<sup>35</sup> In 2017, Supreme Court personal information, in any form, is an essential aspect of privacy and it is a constitutional right of the citizens to keep it private. Personal data is a national asset (*KS Puttaswamy v Union of India* (2017) 10 SCC 1 : AIR 2017 SC 4161).

ined by the authors in the subsequent part of the paper. The welfare of the consumers' is jeopardised when an interface uses dubious strategies to be guile the consumer in to spending more time on the platform, compromising their money and personal data, leading to an extraction of wealth from the consumers to the firm. This is the kind of harm inflicted by dark patterns on the interests of the consumers, exploiting their cognitive biases by tapping as well as tailoring the physiological responses of the nervous system to suit their own vested economic interests. Thus, hijacking of decision making is the essence of dark patterns with the activation of System I response system of the brain, which is impulsive, hasty and prompt.<sup>36</sup>

Thus, certain important issues emerge from the usage of dark patterns. Firstly, the collation and use of collated information. Secondly, analysing the information to use it to one's own advantage. Lastly, using the systematized data to alter the consumers' preference. The decisional privacy of the consumers is jeopardized to a great extent when it alters the physiological processes of the human brain, altering the preferences' of the consumers' that are detrimental to their self-interest and attuned to the vested economic interests of the marketing corporate. Autonomy in the true sense of the term implies that the consumers' must not be subjected to any kind of dubious manipulation that alters their original preferences.

## **V. REGULATION OF DARK PATTERNS: AN INDIAN REGULATORY PERSPECTIVE**

As far as the scholarship on dark patterns is concerned, it has heavily focused on the taxonomic classification of dark patterns primarily carried out by computer scientists analysing this Human-Computer Interaction (hereinafter referred to as HCI).<sup>37</sup> There is a dearth of literature on the regulation of dark patterns purely from an Indian perspective, although legal literature on the regulation of dark patterns in other jurisdictions such as the United States of America and European Union exists.<sup>38</sup> At the same time, there have been attempts by computer scientists to lay down the normative considerations to the issue of dark patterns.<sup>39</sup> As far as the Indian regulatory space is concerned, the issue of dark patterns was recently highlighted through a discussion paper by the Advertising Standards Council of India (hereinafter referred to as ASCI),

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<sup>36</sup> Kahneman (n 4).

<sup>37</sup> Human Computer Interaction is a multidisciplinary field of study within information technology whose subject matter is analyzing the interaction between humans and computers.

<sup>38</sup> See Dayand Stemler (n 32); Susser, Roessler and Nissenbaum (n 29); Leiser and Yang (n 28); Jamie Luginand Lior Strahilevitz, 'Shininga Lighton Dark Patterns' [2019] SSRN Electronic Journal 44. <<http://dx.doi.org/10.2139/ssrn.3431205>> accessed 3 March 2023.

<sup>39</sup> See Mathuretal (n 20).

wherein it highlighted the use of dark patterns as misleading for the consumers as well as an infringement of their right to be informed under the Consumer Protection Act 2019.<sup>40</sup> Furthermore, the practice amongst the online marketing community of using dark patterns to boost revenue has also caught the eye of the government. Recently, the Secretary to the Ministry of Consumer Affairs, Government of India, issued a statement: “Dark Patterns are unfair trade practice and cause of concern.”<sup>41</sup> There are speculations of the government to come out with a set of guidelines for online marketing platforms over the use of dark patterns.

### A. Regulation of Dark Patterns And Global Practices

As far as the other jurisdictions are concerned, the issue of dark patterns has received attention primarily in United States of America. To regulate the menace of dark patterns the state of California banned its usage through an amendment in the California Consumer Privacy Act. The amendment has been introduced to protect the interests of the consumers through misleading and deliberate collation of personal information.<sup>42</sup> In case of the European Union, the law that governs this aspect is the General Data Protection Regulation, specifically Article 25 sub-clauses 1 and 2. Article 25 of the General Data Protection Regulation talks of maintenance of privacy by data controllers in their interfaces by default as well as by design. The provision can be construed to protect the consumers from unfriendly default settings, imperceptible decline options and strategies to guilt the consumer to compromise personal data. However, the same cannot be viewed as a holistic mechanism to regulate dark patterns.<sup>43</sup>

Another jurisdiction that deserves mention in the context of dark patterns is Australia.<sup>44</sup> Australia has coined the term Consumer Data Rights (hereinafter referred to as CDR) which is a safe secure online system wherein the consumers’ consent of sharing the data with third parties’ is prime

<sup>40</sup> Advertising Standards Council of India (n12).

<sup>41</sup> Jaspreet Kaur, ‘Govt to Frame Guidelines to Regulate ‘Dark Patterns’ Practiced on Ecom Sites’ (*Inc42Media*, 28 December 2022) <<https://inc42.com/buzz/govt-to-frame-guidelines-to-regulate-dark-patterns-practiced-on-ecom-sites/>> accessed 13 March 2023.

<sup>42</sup> Sriya Sridhar, ‘Regulation of Dark Patterns: Lessons for India [PARTII]’ (*IJLT*, 3 April 2021) <[www.ijlt.in/post/regulation-of-dark-patterns-lessons-for-india-part-ii](http://www.ijlt.in/post/regulation-of-dark-patterns-lessons-for-india-part-ii)> accessed 12 March 2023.

<sup>43</sup> Jamie Luguri and Lior Strahilevitz, ‘Shining Light on Dark Patterns’ [2019] *SSRN Electronic Journal* 44. <http://dx.doi.org/10.2139/ssrn.3431205> accessed 3 March 2023.

<sup>44</sup> FS Dhiman, ‘Consumer Data Rights & Protection Laws in India’ (*CAclubindia*, 1 July 2021) <[www.caclubindia.com/articles/consumer-data-rights-protection-laws-india-45073.asp](http://www.caclubindia.com/articles/consumer-data-rights-protection-laws-india-45073.asp)> accessed 3 March 2023.

mandate before availing any goods and services.<sup>45</sup> The primary functionaries in the implementation of the CDR mechanism in Australia are the Treasury, Australian Competition and Consumer Commission, Office of the Australian Information Commissioner and the Data Standards Body.<sup>46</sup> The responsibilities of them can be summarised as under:-

<b>Responsibilities</b>	
<b>Minister (advice by Treasury)</b>	Policy settings Sectoral designation CDR Rules
<b>Data Standards Chair and body</b>	Technical standards Consumer experience standards
<b>Australian Competition and Consumer Commission</b>	CDR Register and accreditation application platform Accreditation decisions Enforcement and compliance
<b>Office of the Australian Information Commissioner</b>	Privacy safeguard guidance Privacy enforcement and compliance Privacy complaints handling

Figure 17 (treasury.gov.au)

The legislations dealing with the same are the Treasury Laws Amendment (Consumer Data Right) Bill 2019, Part IVD of the Competition and Consumer Act 2010, Competition and Consumer Act (Consumer Data Right Rules 2020) as well as watchdogs namely Consumer Data Right (Authorised Deposit Taking Institutions) Designation 2019, Consumer Data Right (Energy Sector) Designation 2020 and Consumer Data Right (Telecommunications Sector) Designation 2022.<sup>47</sup> At the same time, there are regular mandatory reviews as well as periodic assessments to oversee the implementation of the above structured mechanism. The Australian regulatory architecture is a perfect example of the recognition of the symmetry among the various regulatory bodies to regulate the issue of dark patterns. The same lessons have to be imported into the Indian regulatory and legislative architecture as shall be proposed by the authors in the subsequent sub-section.

## **B. Dark Patterns And Indian Regulatory Architecture**

Before delving into the Indian regulatory space, a recent decision of the Hyderabad District Disputes Redressal Commission (hereinafter referred to as

<sup>45</sup> Consumer Data Right, Treasury.gov.au' (Treasury.gov.au) <<https://treasury.gov.au/policy-topics/economy/consumer-data-right>> accessed 3 March 2023.

<sup>46</sup> *ibid.*

<sup>47</sup> 'Consumer Data Right| Treasury.gov.au' (n 46).

HDDRDC) deserves mention. The HDDRDC levied penalty on online ticket aggregator BookMyShow and PVR cinemas for imposition of internet handling charges on the customers.<sup>48</sup> A penalty of Rs. 5000 was imposed on the corporates to be credited to the Consumer Legal Aid Account of the court. Further, a compensation of Rs. 25,000 along with Rs. 1000 as costs to be paid to the litigant.<sup>49</sup> The imposition of internet handling charges in the final bill amount is akin to *hidden cost* practice of dark pattern. The court used Section 2(47) of the Consumer Protection Act, 2019 (hereinafter referred to as CPA) which defines unfair trade practice. The Commission's order highlighted that the imposition of internet handling charges in the final bill amount without clearly segregating them is tantamount to an unfair trade practice. This is one of the first cases where an issue incidental to the practice of dark patterns has come to the fore, wherein the interest of the consumer was taken into consideration. However, still no concrete and robust regulatory mechanism exists as of now in India to regulate dark patterns.

The authors' examine the existing Indian regulatory architecture and propose the existing provisions that can be effectively brought into operation to regulate the same with the incorporation of certain best practices from other jurisdictions. As already mentioned by the authors, the issue of dark patterns involves an interaction of consumer, data protection competition and contract law. The various legislations in India that deal with the same are Consumer Protection Act 2019, Indian Contract Act 1872, Competition Commission of India Act 2002, and recently, passed Digital Personal Data Protection Act, 2023.<sup>50</sup> Firstly, it is essential to know as to what a restrictive and unfair trade practice is. The word restrictive and unfair trade practice is defined under Section 2(41)-defines restrictive trade practice and Section 2(47)- defines unfair trade practice of CPA 2019. The essential ingredients under Section 2(41) are:

- A practice that orchestrates price, delivery of goods or services as well as its supply.
- The impact of such price orchestration is through the employment of such practice forces the consumer to avail such practice as a condition precedent to either buy, hire or avail any good or service.

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<sup>48</sup> Balakrishna Ganeshan, 'BookMyShow, PVR Fined by Hyderabad Court For 'Unfair' Internet Handling Fees' (*The News Minute*, 15 March 2021) <[www.thenewsminute.com/article/book-myshow-pvr-fined-by-hyderabad-court-unfair-internet-handling-fees-145265](http://www.thenewsminute.com/article/book-myshow-pvr-fined-by-hyderabad-court-unfair-internet-handling-fees-145265)> accessed 23 March 2023.

<sup>49</sup> *ibid.*

<sup>50</sup> MeITY, 'The Digital Personal Data Protection Act 2023'. <<https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>> accessed 15 August 2023.

Thus, dark patterns fulfil the dual attribute of manipulation of price and the subsequent impact on the consumer as a condition precedent to buy, avail or hire such goods or services. The ingredients of Section 2(47) that deserve mention are:-

- A trade practice that entices the consumers through tools such as,
  - Unfair Method
  - Unfair Practice
  - Deceptive Practice

Thus, a combined reading of Sections 2(41) and 2(47), along with the various attributes of dark patterns that are outlined by the authors' in the preceding section put dark patterns squarely under restrictive and unfair trade practices under the CPA 2019. The other relevant section under the CPA 2019 that shall aid in the regulation of unfair trade practices of such a nature is section 94 of the CPA 2019. Section 94 empowers the Central Government to under take measures for the prevention of unfair trade practices in e-commerce as well as protect the consumers' rights' as well as interests'. The inclusive definition of unfair trade practices under Section 2(47) read with Section 94 of the Consumer Protection Act 2019 can be effectively used by the government to formulate rules to protect the consumers from the menace of dark patterns.

However, alongside the Consumer Protection Act 2019, the Indian Contract Act 1872 (hereinafter referred to as ICA) can also be effectively used as the agreements entered into through the use of dark patterns, can be rendered voidable under the undue influence doctrine of contract law. The relevant provisions of the Indian Contract Act, 1872 deserve mention here.

Section 13, 16, 17 and 19 of the Indian Contract Act, 1872 read along with Section 100 of the Consumer Protection Act 2019 can be effectively used to regulate the issue of dark patterns, till a concrete and robust set of regulations is in place. Section 13 of ICA defines consent as meeting of two minds over the same thing in the same sense. The use of dark patterns vitiates the element of consent. Dark Patterns' such as hidden charges as seen in the Bookmyshow ticket case outlined above vitiate the element of consent, where in the user gets a false impression of price at the instance, but on the final computation of the charges, receives an inflated bill. Dark patterns and their use also fairly falls under Section 17(4) which says that when one of the parties' to a contract enters into the same through an act of deception, then by virtue of Section 19 of the ICA 1872, the contract or the agreement can be rendered voidable. Thus, using the abovementioned provisions alongside Section 100<sup>59</sup> of the CPA 2019 can be effectively used to regulate instances of dark patterns. Thus, the authors

argue that the argument that the Indian regulatory landscape lack an architecture to regulate dark patterns does not hold true as outlined by the authors' above.

There is no dearth of literature on the taxonomy of dark patterns. Using the same along with the relevant provisions outlined above can be used to effectively tackle the menace of dark patterns. Hence, the argument that the Indian regulatory landscape in relation to dark patterns is an untreaded space does not hold true. The ruling of HDDRC using unfair trade practice argument is a step in a positive direction in this regard.

## VI. CONCLUSION & SUGGESTIONS

The authors' have proposed the relevant provisions under the Indian regulatory landscape that can be effectively utilised to regulate dark patterns. Thus, regulatory pluralism<sup>51</sup> is an effective strategy to regulate dark patterns since the issue involves several legal tangents. However, there are certain grey areas in the Indian regulatory landscape as well that need to be looked into in order to make the regulatory architecture more robust and concrete. As outlined by the authors' in the preceding section of the paper that dark patterns lead to an erosion of decisional privacy. This is also an infringement of the rights of the consumer. Section 2(9) of the CPA 2019 defines consumer rights'. One of the facets of consumer rights is the right to consumer awareness under Section 2(9)(v). Thus, protection of privacy of the consumers' which is compromised as a result of the use of dark patterns by e-commerce entities is a violation of the right to privacy of the consumers. The current draft Digital Personal Data Protection Bill of 2022, released by the Ministry of Electronics & Information Technology talks of consent as well as defines processing of data. The bill is a step in a positive direction. However, Section 5 of CPA 2019 talks of the mandate of the Central Consumer Protection Council, to bolster and augment the rights and interests' of the consumers. The need of the hour is for the all the three Councils i.e. the Central, State and District Consumer Council to under take a comprehensive study on the lines of Norwegian Consumer Council.<sup>52</sup> Exercises of such a nature can result in a concrete and robust Indian regulatory landscape to regulate dark patterns as well as the recognition of right to privacy as a consumer right. Going by the spirit of the theme of World Consumer Rights Day 2022 celebrated on March 15 every year, the theme of 2022 was

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<sup>51</sup> Sridhar (n 42).

<sup>52</sup> Forbrukerradet, 'Deceived by Design' (*Forbrukerradet.no*, 27 June 2018) <<https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>> accessed 3 March 2023.



Fair Digital Finance,<sup>53</sup> thus, also raising the importance of the issue of dark patterns, encouraging the digital marketing space to engage in fair financial transactions with the consumers'. To end with the quote of Adam Smith,<sup>54</sup>

“Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.”

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<sup>53</sup> Shikha Goyal, 'World Consumer Rights Day' (*Jagran Josh*, 15 March 2023) <<https://www.jagranjosh.com/general-knowledge/world-consumer-rights-day-1615785749-1>> accessed 19 March 2023.

<sup>54</sup> *ibid.*