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NMIMS Law Review

Volume III

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FROM THE DEAN'S DESK

This publication serves as a significant milestone in our mission to institutionalise research and lays out the foundation for promoting open and objective quality legal discourse. I say with utmost pride that when review articles were solicited, we were surprised with the huge response from across the country. After a rigorous peer-review process, we have meticulously curated a distinguished compilation of original research articles. I am certain that these contributions will elicit profound appreciation and foster constructive dialogue amongst our readers. This year, our journal embarks on an insightful exploration of various contemporary debacles, thereby offering a meticulous legal analysis of these pressing issues. Encompassing a wide spectrum of current topics, our publication not only presents diverse perspectives on noteworthy subjects but also serves as a catalyst for raising awareness, creating an intellectual delight for our readership.

Kirit P. Mehta School of Law has garnered commendable endorsements from esteemed entities across the industry, academia, judiciary, bar, law firms, MNCs and regulatory bodies like SEBI. On behalf of the institution, I extend my warm welcome and heartfelt gratitude to our esteemed Board of Advisors and Peers, whose invaluable guidance has played an instrumental role in shaping this edition into a vital platform that generates and challenges existing paradigms of legal jurisprudence.

I congratulate the Editorial Board for their unwavering dedication and significant contribution to the growth of NMIMS Student Law Review. I earnestly encourage our readers to embrace and elevate the thoughts presented by our contributors, allowing them to soar and inspire fresh perspectives in the realm of legal scholarship.

- **Dr. Durgambini Patel**

MENTOR'S MESSAGE

It was a moment of pride for us when the Law Review was launched, in 2021, under the guidance of our Dean and Faculty In-Charge. That the Journal has received such an overwhelming response from authors, all budding professionals, is a sign that we are going in the right direction. I congratulate all the authors whose works have made it here, after a thorough and lengthy process of review. The experience of researching, writing, formatting, and eagerly waiting for a response from the Editorial Team must be worth the wait. The sense of elation is incomparable.

To those who missed out, I hope that you keep going with your writing endeavours. The experience of researching and writing on the numerous questions of law is in itself a rewarding and enriching experience, and a skillset of immense value in our industry. Unfortunately, the Editorial Team can choose only a handful of articles from the entries received. I am sure they had a hard time choosing which papers edged out the others by the slightest of margins.

To the Editorial Team, I congratulate you on successfully publishing this Volume, the culmination of a year of planning, waiting, reviewing, editing, proofreading, and piecing together a manuscript that will contribute significantly to the literature of our noble industry. I hope each one of you found the experience enlightening and will go on to play a role in developing the research culture in the field of law.

- **Mr. Harshal Shah**

ACKNOWLEDGMENT

This Third Issue of NMIMS Law Review has been a collective effort right from the moment we conceptualised its theme. We are filled with anticipation as we envision this issue to establish an unprecedented benchmark, surpassing all prior boundaries in terms of its comprehensive scope and profound depth. The chosen theme, explored with utmost precision and intellectual rigor, promises to deliver an unparalleled examination of contemporary issues.

We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and unwavering encouragement throughout the process. Furthermore, we are immensely thankful to Dr. Durgambini Patel, the Dean of NMIMS Kirit P. Mehta School of Law, for entrusting us with this responsibility of overseeing the curation of this edition of the NMIMS Student Law Review. Her support has been instrumental in the realization of this endeavour.

We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this special issue special.

Our team also deserves a very special mention: Our Student Head, Ms. Aashirwa Baburaj; Student Co-head, Ms. Prerna Hegde; Student Editor-In-Chief, Ms. Anushka Bhardwaj, Student Co-Editor in-Chief, Mr. Abhay; Student Blogs-Head, Ms. Riya Karkera; along with the entire team of Content Editors. Their unwavering dedication and professionalism have been instrumental in bringing this issue to fruition. Lastly, we extend our sincere gratitude to our Mentor, Mr. Harshal Shah, whose intellectual engagement and thought-provoking guidance have played a vital role in upholding the theoretical rigor of our publication.

- **Prof. Richa Kashyap**

Editor-in-Chief

FOREWORD

It gives us immense pleasure in publishing the third volume of the NMIMS Law Review. With the inclusion of this edition in our scholarly repertoire, we remain steadfast in our unwavering commitment to elevate legal discourse on pertinent issues. Our fervent ambition is for this volume to serve as a dynamic catalyst stimulating profound intellectual exploration, fostering consequential dialogues, and leaving an indelible imprint on the trajectory of legal scholarship for the years that lie ahead. This edition sets a remarkable precedent, as the authors have demonstrated exceptional depth of insight and critical analysis while addressing a wide spectrum of legal inquiries.

Sri Nikila M in their article '*Dark Patterns – the Digital trap Sacking Consumer Rights*' has deftly analysed the intersection between modern-day media marketing techniques equipped by digital commercial retailers and the provisions of consumer protection law. The article addresses pertinent questions regarding the efficacy of the current leal framework in this respect, along with providing solutions to any inadequacies *qua* consumer protection law in India. To that end, the article undertakes an analysis of global consumer rights standards.

Nitin Kumar in their article '*Case comment on Reena Hazarika v. State of Assam*' undertakes a crucial analysis of the standard of ocular evidence presented in criminal trials. To that effect, the article provides a holistic summary of *Reena Hazarika*, along with its *ratio*. Further, the article supplies crucial suggestions and recommendations for the appreciation of ocular evidence in criminal trials.

Md Rehaan Danish and Huma Wasim in their article '*Demystifying the Labyrinth of Anti-Defection Law: A toothless Law*' present a doctrinal study of crossing the floor, covering its origins in the House of Commons, its popularisation in the Indian Parliament, and law contemplated to curb defection, culminating with Schedule X to the Indian Constitution. Further, the article provides an international perspective on anti-defection law and emphasises the role of the judiciary in curbing defection.

Lastly, it would be remiss not to mention that the collective endeavor of the entire team involved in this edition warrants utmost admiration for their unwavering commitment, tireless perseverance, and unwavering dedication to fostering the dissemination of exemplary legal scholarship.

Board of Editors

DARK PATTERNS - THE DIGITAL TRAP SACKING CONSUMER RIGHTS

- Sri Nikila M

ABSTRACT

A majority of companies use dark patterns as a go-to mechanism for luring or forcing their customers into digital traps created by the companies' website. Dark patterns are commonly defined as deceptive trade practices that employ a user interface that influences customers to behave in a certain way, in which they normally would not. Dark patterns take various forms, coercing and ensnaring consumers in a vicious maze that preys not only on the resources of the consumers, but also emotionally impacts them. Regrettably, Indian law does not curb dark. The Consumer Protection Act, 2019 has only placed an implied recognition wherein it requires that the consumers should be protected from false advertising and unfair commercial practices.

This article evaluates the distinction between dark patterns and persuasive advertisements, as well as the extent of their influence consumer decision making. By preventing users from exercising their rights on digital interfaces, dark patterns have the capacity to facilitate commercial abuse of people and their disenfranchisement, this undermines regulation. It is crucial for legislators to recognize the severity of the violations caused by dark patterns and establish comprehensive regulations in the form of laws or directives that would effectively address the use of dark patterns by e-commerce entities on their websites.

KEYWORDS: Dark Patterns, E-consumers, Consumer protection, Consumer rights, User manipulation

I. INTRODUCTION

Gone are the days when tradesmen were appreciated for retaining customers within their shops by using wise tactics to influence customers to buy their products or use their services. The era of e-commerce has created a paradigm shift from influencing customers to virtually forcing customers to stay on a particular platform. While the term "dark patterns" may sound *ex-facie* alien the reality is that almost all internet users have encountered this cyber-trap at least once. Simply put, dark patterns are practices that companies use as a go-to mechanism for luring and, perhaps more accurately, coercing their customers into the digital traps created by their websites.[1] The practice of using dark patterns is heavily impairing the rights of the consumers as they are virtually tying up the consumers in a helpless situation and that the consumers are unable to freely exercise their right of choice in purchasing products of their own preference. Dark patterns nudge consumers digitally and obtain their personal data, which is then used by the companies for their own benefit.[2] The legal status of dark patterns gained significant attention across various jurisdictions when the Federal Trade Commission ("**FTC**") introduced enforcement policies to curb these deceptive practices.[3] This article analyses Indian law concerning dark patterns and identifies how the Consumer Protection Act, 2019[4] and the Consumer Protection (E-Commerce) Rules, 2020 implicitly address dark patterns. The methodology adopted to carry out this research article is doctrinal research, as the design of the article demands a thorough analysis of the existing legal provisions with regard to dark patterns. The research is confined to understanding how dark patterns are interfering

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[1] Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM HUM.-COMPUT. INTERACT (2019).

[2] Beni Chugh & Pranjal Jain, *Unpacking Dark Patterns: Understanding Dark Patterns and Their Implications For Consumer Protection In The Digital Economy*, 7 RGNUL STUDENT RES. REV. (2021).

[3] FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers Tactics Include Disguised Ads, Difficult-to-Cancel Subscriptions, Buried Terms, and Tricks to Obtain Data, https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers, FTC (Oct. 30, 2022).

[4] The Consumer Protection Act, 2019, No.35, Acts of Parliament, 2019 (India).

with the consumer rights and is largely based on the primary sources such as the Consumer protection laws collectively with secondary sources that include various scholarly articles and empirical studies.

II. DARK PATTERNS IN E-COMMERCE PLATFORMS

Dark patterns are commonly defined as deceptive trade practices that employ a user interface that influences customers to behave in a certain way which they normally would not.[5] They are generally employed by websites in furtherance of commercial aims, where they (i) either influence consumers to buy or use a product or service sold by the website; or (ii) they sell the consumer's data in exchange for money.[6] E-commerce platforms are more in need of dark patterns; it is very common for an online shopper to abandon their cart. To prevent such abandonment, e-commerce websites employ a wide range of dark patterns. These include, *inter alia*, implementing sales countdowns, creating a perception of product scarcity, and making the product socially desirable.[7]

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[5] Harry Brignull, WHAT ARE DARK PATTERNS? DECEPTIVE DESIGN (2010), https://darkpatterns.org/ (last visited Nov 1, 2022); Stigler Center, STIGLER COMMITTEE ON DIGITAL PLATFORMS, FINAL REPORT CHICAGO BOOTH: THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS (2019), https://publicknowledge.org/wp-content/uploads/2021/11/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf (last visited Oct 30, 2022); J. Luguri& L. Strahilevitz, SHINING A LIGHT ON DARK PATTERNS SSRN (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205 (last visited Oct 30, 2022).

[6] "DARK PATTERNS" AND THE EU CONSUMER LAW ACQUIS Recommendations for better enforcement and reform BEUC, BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL (2022), https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-013_dark_patters_paper.pdf (last visited Nov 1, 2022).

[7] Emma Nevala, *Dark patterns and their use in e-commerce*, JYVÄSKYLÄNYLIOPISTOINFORMAATIOTEKNOLOGIANTIEDEKUNTA, May 10, 2022, https://jyx.jyu.fi/bitstream/handle/123456789/72034/1/URN%3ANBN%3Afi%3Ajyu-202010066090.pdf; J. Luguri& L. Strahilevitz, *Shining a light on Dark Patterns*, SSRN (2019).

III. PERSUASIVE ADVERTISEMENTS INHERENTLY DARK PATTERNS?

Dark patterns are distinct from persuasive advertisements.[8] While all dark patterns are persuasive in nature, not all persuasive advertisements are dark patterns. Persuasive advertisements seek to influence a customer's choices to some extent, but they do so through open-ended questions and explicit practices, rather than through deceptive tactics.[9] The key difference between the two lies in the intention to deceive consumers. While persuasive design techniques should not be inherently feared, it is crucial to recognize that the same understanding of human psychology can also be employed for harmful purposes. This opens the door to manipulating people's decision-making in ways that contradict their genuine intentions and preferences.[10] Dark patterns are *per se* created with an intention to manipulate consumer expectations.[11] Studies indicate that dark patterns have a powerful impact on consumer behaviour. A study where dark patterns led to twice as many consumers signing up for a questionable identity theft protection service compared to those exposed to a neutral interface. Moreover, the influence of dark patterns grew significantly when users encountered multiple deceptive design techniques.[12] For instance, Instagram which has millions of users across the world often involves in employing these deceitful practices. The app designed a pop-up notification for its users asking whether they are willing to let the service to "use the app and website activity" to "provide a better ads experience." [13] While this may be disguised as a

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[8] Persuasive design vs. dark patterns: Where to draw the line, SYSTEM CONCEPTS, https://www.system-concepts.com/insights/persuasive-design-vs-dark-patterns/- (Nov 4, 2022).

[9] Maier, M. Harr, R, *Dark Design Patterns: An End-User Perspective*, 16 HUMAN TECH,170–179 (2020)

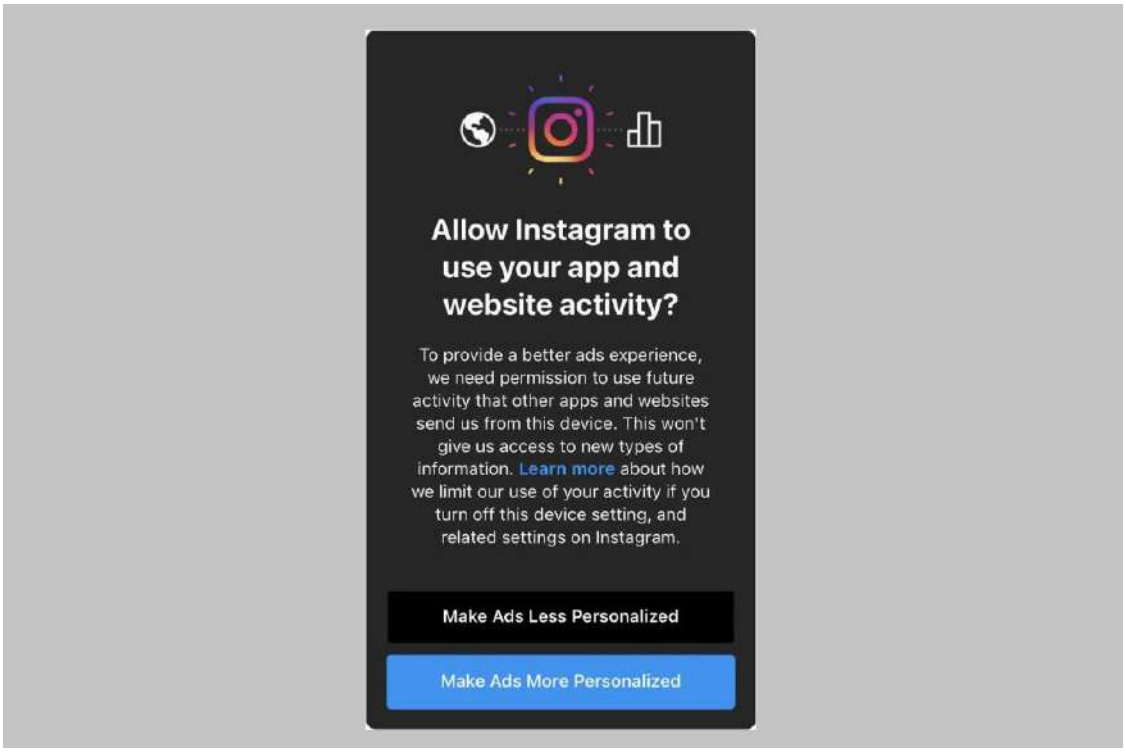
[10] *Id*

[11] *Persuasive design vs. dark patterns: Where to draw the line*, SYSTEM CONCEPTS (Nov. 4, 2022), https://www.system-concepts.com/insights/persuasive-design-vs-dark-patterns

[12] FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers Tactics Include Disguised Ads, Difficult-to-Cancel Subscriptions, Buried Terms, and Tricks to Obtain Data, https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers(2022) (last visited Oct 30, 2022).

[13] Arooj Ahmed, HOW DARK PATTERNS TRICK PEOPLE ON THE INTERNET WITHOUT THEM REALIZING DIGITAL INFORMATION WORLD (2021), https://www.digitalinformationworld.com/2021/04/how-dark-patterns-trick-people-on.html (last visited Nov 12, 2022).

genuine attempt to obtain the user's permission to track his activity in the app, the manipulation lies behind the way the pop-up is designed.



The platform has deliberately opted in for a catchy blue shade for more personalised ad box, wherein the less personalised box is given a dull black colour which is slightly darker than the pop-up's background colour.[14] The careful choice of words such as personalised and better experience will manipulate the user to believe that allowing the app to track will greatly benefit him, but the reality is that it is the platform that will gain heaps of revenue by linking up the user with the ads of preference. Whilst this may prove to be beneficial for a company in the initial run, this will lead to adverse consequences in the long term. Dark patterns undermine the trust that consumers place in a company or platform.[15] When users feel misled or manipulated, their confidence in the organization responsible for the design diminishes. It is a known

[14] Sara Morrison, DARK PATTERNS, THE TRICKS WEBSITES USE TO MAKE YOU SAY YES, EXPLAINED VOX (2021), https://www.vox.com/recode/22351108/dark-patterns-ui-web-design-privacy (last visited Nov 10, 2022).

[15] *Supra* note 1.

fact that trust is a crucial element in any business relationship, and once it's compromised, it becomes difficult to earn it back. This loss of trust may cause consumers to be wary of interacting with the company's products or services in the future, resulting in reduced customer loyalty and the risk of losing business opportunities.[16]

Some of the most common techniques used in dark patterns are:

First. Confirmshaming is commonly used to sway users towards opting into services, subscribing to newsletters, or accepting specific terms. This is achieved by portraying the alternative option as undesirable or morally questionable, aiming to evoke feelings of shame or guilt in users who consider not complying with the desired action.[17]

Second. Roachmotel: This technique is employed to digitally trap the consumers once they subscribe for the services offered by the organisation. The technique typically involves a set up wherein it is made relatively easier for the user to sign up or opt in for a service, but cancelling the subscription or opting out of the service is made really harder and complicated.[18]

Third. Forced continuity is yet another technique that has been widely used e-commerce platforms. Forced continuity involves users unknowingly signing up for a continuous subscription or recurring charges while initially intending to access a free trial or make a one-time purchase. The details about the ongoing commitment are often concealed in fine print, obscured, or presented in a confusing way, making it hard for users to

[16] *Supra* note 7.

[17] Zarina Majidova, CONFIRMSHAMING: HOW TO GET USERS TO HATE YOUR PRODUCT? MEDIUM (2022), https://uxplanet.org/confirmshaming-how-to-get-people-to-hate-your-product-45ab371828c5 (last visited Nov. 9, 2022).

[18] *Supra* note 2.

grasp the terms fully. This practice not only limits users' control over their financial commitments but also gives rise to ethical issues concerning transparency and honesty in business conduct.[19]

Fourth. The "sneak into basket" dark design takes use of customers' propensity to make impulsive decisions and stick with them in e-commerce environments. This sneaky practise, which frequently aims to upsell or increase the order's total value, automatically adds irrelevant or undesirable goods to the cart when a user adds one without the user's explicit agreement. This deceptive strategy's main goal is to improve the possibility that customers will complete the transaction because they think the extra items are a part of a suggested package or bundled offer. Unfortunately, some customers could fail to notice these extra things and mistakenly purchase them, incurring unforeseen costs and having a disappointing shopping experience.[20]

A. Interference with the Rights of the Consumers

The nature of dark patterns, which is described as being "*ubiquitous, invisible, and proactive*"[21], seemingly interferes with the rights of e-consumers. Section 2(9) of the Consumer Protection Act,2019 ("**the Act**"), stipulates that consumers have the right to (i) safety, (ii) be informed of the characteristics of the goods, (iii)choose products, (iv) be heard, (v) seek grievance redressal, and (vi)consumer education.[22]

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[19] David Martinson, *UX dark design pattern-forced continuity* (MEDIUM, Nov. 10, 2023) https://davidmartinsonnyc.medium.com/ux-dark-design-pattern-forced-continuity-6c7af78682ad.

[20] Sneaking Into Basket, INTERACTION DESIGN FOUNDATION (Nov. 7, 2022), https://www.interaction-design.org/literature/topics/sneaking-into-basket

[21] SENG LOKE, CONTEXT AWARE PERVASIVE SYSTEMS (2007); M. Weiser, *Hot topics-ubiquitous computing*, 26 COMPUTER 71–72 (1993; NORMAN D.A, THE INVISIBLE COMPUTER : WHY GOOD PRODUCTS CAN FAIL, THE PERSONAL COMPUTER IS SO COMPLEX, AND INFORMATION APPLIANCES ARE THE SOLUTION (1st ed. 1998); David Tennenhouse, *Proactive computing*, 43 COMMUNICATIONS OF THE ACM 43–50 (2000).

[22] Hina Kausar, *E–Commerce and the Rights of E–Consumers*, MANUPATRA (2015).

i. The Right to Choose and be Informed

The right to choose and the right to be informed are enervated by dark patterns.[23] For example, by employing the sneak into basket technique the e-commerce platform seriously intervenes with the consumer's right to be informed as the pattern involves adding additional items to the basket without the knowledge of the consumer. Another instance of a dark pattern intervening the consumer's right to choose is the usage of pre-checked option boxes. The fact that pre-checked boxes will have leverage upon the user's cognitive bias was identified by the Insurance and Regulatory Development Authority of India ("**IRDAI**") which consequently resulted in the authority prohibiting the travel insurance portals from using these.[24] It may be argued that consumers who are conscious can escape dark patterns. However, between two systems of human thinking,[25] one being prompt, unconscious and automatic and the other less conscious,[26]dark patterns exploit the latter.[27] When cognition is influenced, the obvious consequence is that the consumer is manipulated to choose something they would not have chosen if their thinking had not been interfered with.

The right of the consumer to know about the product being purchased is also vitiated when dark patterns employ certain practices that trick consumers into subscribing to a service without their informed consent.[28]

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[23] *Supra* note 2.

[24]*Circular on Travel Insurance Products and operational matters,* IRDAI, https://irdai.gov.in/documents/37343/365525/Circular+on+Travel+Insurance+Products+and+operational+matters.pdf/c3e86389-5ac5-5724-1b51-c1a1fa0e68f5?version=1.1&t=1665656159363&download=true (last visited Nov. 5, 2022)

[25]A. Tversky & D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124–1131 (1974).

[26]Christoph Bösch et. al., *Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns*, 4 DE GRUYTER OPEN 237–254 (2016); J. Luguri& L. Strahilevitz, *Shining a light on Dark Patterns*,SSRN (2019); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARVARD L. REV. 1420–1570 (1999).

[27]*Supra* note 2.

[28] Sneaking Into Basket, INTERACTION DESIGN FOUNDATION (Nov. 7, 2022), https://www.interaction-design.org/literature/topics/sneaking-into-basket

ii. Exploitation of Personal Information

The right to privacy has been recognized as an integral part of the right to life and personal liberty as envisaged under Article 21 of the Constitution of India, 1950 ("**Constitution**").[29] Having considered the assumption that once consumers enter into an e-commerce platform their privacy is said to be gone for good, it is reiterated that dark patterns prey upon the personal information of the consumers which is gauged out without the consumer's conscious willingness.[30] One popular instance wherein the fact that dark patterns threaten the privacy of an individual came into limelight was when LinkedIn was fined USD 13 million for sending invitation mails to potential users. The method adopted by LinkedIn was that while a new user was registering in the platform, as a part of the registration process nudges the user to submit his e-mail id. Most users were manipulated to provide in their mail address as they were made to believe that it was a part of registration process and the option of skipping the step was given at the bottom of page in a smaller font. Once the user clicks on the continue button, LinkedIn will import the user's email address book and then send solicitation mails to users who have not yet registered. Dark patterns don't merely end with invitation spam, rather go on a long way in utilising the extracted information. Dark patterns have the ability to deceive users into sharing sensitive personal information, like login details or financial data, by presenting themselves as authentic interactions.[31] Privacy zuckering is a common example of dark pattern that preys upon the personal information of a user.[32] It employs a deceptive design pattern that

[29] Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors. ((2017) 10 SCC 1), (Puttaswamy I)

[30]Christoph Bösch, Benjamin Erb& Frank Karg, *Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns*, 4 DE GRUYTER OPEN 237–254 (2016), https://www.petsymposium.org/2016/files/papers/Tales_from_the_Dark_Side__Privacy_Dark_Strategies_and_Privacy_Dark_Patterns.pdf (last visited Nov 6, 2022)

[31] Johanna Gunawan et al., *A Comparative Study of Dark Patterns Across Mobile and Web Modalities*, 5 PROC. ACM HUM.-COMPUT. INTERACT (2021).

[32] Nikole Wintermeier, *Dark Patterns Examples in eCommerce: What they are & why to avoid them Crobox* (Nov. 6, 2020), https://blog.crobox.com/article/dark-patterns.

encourages consumers to share more personal information publicly.[33] For instance, WhatsApp, through its updates pushes users to agree to its terms and conditions, which includes complicated jargon that demands more time and concentration from users to understand and provide their consent. Pursuant to this, WhatsApp extracts more information than what is required and uses it for establishing a potential network of consumers or for other beneficial purposes. Platforms can use manipulation[34] through dark patterns to collect an infinite amount of data by taking advantage of the attention cycle, using or sharing the data collected, profiting from the data by profiling users and their behaviour,[35] and exploiting the privacy costs associated with decisional privacy.[36]

IV. THE UNITED STATES' RESPONSE TO DARK PATTERNS

The illegality of dark patterns garnered significant attention in the United States ("**US**") when the FTC introduced its enforcement policy to curb the practices. In September 2020, Rohit Chopra, the current director of the Consumer Financial Protection Bureau ("**CFPB**") and a former commissioner of the FTC, released a statement regarding the use of dark patterns in an enforcement action against an online subscription service that made cancelling recurring subscription fees difficult.

In the statement, Chopra asserted that "*[d]ark pattern tricks entail an online sleight of hand employing visual misdirection, unclear wording, concealed alternatives, or faux urgency to lead consumers toward or away from specific decisions*."[37] While leading the CFPB, Chopra continues to investigate claims relating to digital dark patterns.

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[33] Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 JOURNAL OF LEGAL ANALYSIS 43–109 (2021).
[34] Ryan Calo, *Digital Market Manipulation*, 82 GEORGE WASHINGTON L. REV. (2013).
[35] Siri Harish, *Yes, or Yes? The Reality of Dark Patterns*, SCC ONLINE BLOG (2022).
[36] Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*,72 ALA L REV 1–45 (2020).
[37] CFPB issues guidance to address abusive conduct in Consumer Financial Markets, CONSUMER FINANCIAL PROTECTION BUREAU (2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-address-abusive-conduct-in-consumer-financial-markets/.

Further, the Deceptive Experiences to Online Users Reduction ("**DETOUR**") Act,[38] introduced in the Senate is currently under consideration in the House of Representatives. The DETOUR Act prohibits interface features that purposefully limit consumers' autonomy, decision-making capacity, and freedom of choice in order to reduce the usage of dark patterns[39] It gives the FTC more power to control such behaviours and give platforms instructions on good design principles.

V. EFFICACY OF EXISTING PROVISIONS

While there is no explicit mention of dark patterns anywhere in the Act, some forms of dark patterns can be implicitly understood to be within the ambit of the Act. For instance, the dark pattern of hidden costs can be placed within the ambit of the Act as consequently the Central Consumer Protection Authority ("**CCPA**").

A close reading of Section 11(ii) of the Act with Section 28(iv) of the Act reveals that the Act labels a service as "deficient" and levies a penalty if there is deliberate withholding of information. The latter considers the same as "a *misleading advertisement*".[40] Further, Rule 5(4) of the Consumer Protection (E-Commerce) Rules, 2020("**the Rules**") mandates an e-commerce entity to not publish or allow promotion of misleading advertisements. The Act and the Rules do not essentially address all the other practices which form dark patterns such as privacy zuckering, trick questions, and other such practices.

India partially regulates dark patterns through the provisions of the Act and the Rules. The use of dark patterns interferes with consumer rights and data privacy. Mere

[38] S.3330 - 117th Congress (2021-2022): Detour Act

[39]Mark R. Warner, *Senators Introduce Bipartisan Legislation to Ban Manipulative 'Dark Patterns' US Senator from the Commonwealth of Virginia* (Nov. 8, 2022), https://www.warner.senate.gov/public/index.cfm/2019/4/senators-introducebipartisan-legislation-to-ban-manipulative-dark-patterns.

[40] *Supra* note 2.

implicit recognition of dark patterns is insufficient to effectively address the issues surrounding dark patterns and curb their impact.

Regulators should conduct regular audits of digital interfaces to assess the impact of dark patterns on the ability of users to make decisions. There is a pressing need for a stricter law for data protection, given the explosion of e-commerce websites that have been witnessed in the era of e-commerce. Explicit regulation of dark patterns within ambit of the Act and the Rules would be highly effective in addressing these concerns.

VI. CONCLUSION

The practice of manipulating the marketplace is not new to a business entity. However, the degree of manipulation that persisted in the conventional trade setting was not as severe as dark patterns. The offline scenario merely involved vivid images, structurally manipulating the store layout to attract the consumers, and using colours and odours to their advantage. *Per contra*, online platforms involve a greater degree of manipulation, by way of directing consumers to act in the manner which the entities are expecting them to do. Dark patterns are designed such that the consumers are not aware that these practices are against core concepts of law and ethics and that they are severely undermining the rights of the consumers. Anotherissue in regulating dark patterns is that not all dark patterns are illegal, as certain patterns that are essentially nagging in nature can sophisticatedly fit into the regulations mandated by the law. Dark patterns, while frustrating consumers not the ones that needs to be focused upon. The consequence that consumers are putting up with such practices needs attention.

Even though dark patterns may sound appealing to entities and they can boost sales or engagement in the short term, it should be understood that they may not be as successful in the long run. With the country's market being opened up for accommodating international trade, the digitalisation of marketplace has become an

inevitable phenomenon. Consumers are left with no option but to adapt. By preventing consumers from exercising their rights on digital interfaces, dark patterns might facilitate commercial abuse of people and their disenfranchisement, and this undermines regulation.

It is high time that the legislators understand the gravity of the violations that are caused by dark patterns and effect regulations that would address the exercise of dark patterns by e-commerce entities

CASE COMMENT – REENA HAZARIKA V. STATE OF ASSAM, (2019) 13 SCC 289

- Nitin Kumar

ABSTRACT

The importance of evidence provided by witnesses and that recovered from the place of occurrence cannot be narrowed, especially in the case where conviction has to be made based on circumstantial evidence. For a case to be proved by circumstantial evidence, the circumstances from which the guilt is to be drawn must be fully established, and the facts so established must be consistent not only with the hypothesis of guilt of the accused but also with the evidences discovered and recovered during investigation. Further, the circumstances must be of a conclusive nature, that is, they should exclude every possible hypothesis except the one to be proved. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for the innocence of the accused. Reena Hazarika's case is one of the decisions by the Hon'ble Supreme Court, reiterating their importance, where a wife was accused of murdering her husband. This paper tries to analyse the case through facts, issues, arguments advanced on behalf of parties and analysis done by the court. It further tries to analyse the judgement passed and provide some feasible suggestions to prevent a similar situation in future.

KEYWORDS: Evidence, Last-Seen Theory, Murder, Weapon, Witness

I. INTRODUCTION

Evidence is a crucial part of any case. Neither party can sustain sans evidence. Section 3 of the Evidence Act, 1872 defines evidence and categorises it into two, *viz.*

First. Oral evidence, including statements made by parties, witnesses and any other person related to the case; and

Second. Documentary evidence.

Courts must consider and scrutinize the relevance and admissibility of each statement made before it. Failure to do so may drastically impact the decision of the court. *Reena Hazarika's* case, decided by a division bench comprising of R.F. Nariman and Navin Sinha, JJ. sheds light thereupon.[1]

II. FACTUAL MATRIX

The instant Special Leave Petition was preferred by the accused facing charges under Section 302[2] of the Penal Code, 1860 ("**IPC**") ("**Appellant**"). The Appellant is the wife of the deceased victim ("**Victim**"). The Victim, the Appellant and their minor daughter, aged about nine (9) years resided at a rented apartment belonging to three brothers *viz* (i) Mr. Manoj Kumar Deka (prosecution witness 1, "**PW 1**"), (ii) Mr. Dipen Deka (prosecution witness 2, "**PW 2**"), and (iii) Mr. Bhrigumoni Deka (prosecution witness 3, "**PW 3**") (collectively "**Prosecution Witnesses**").

The Appellant was accused of assaulting the Victim on the night of 10th May, 2013. The Prosecution Witnesses stated that they heard noises and on reaching the location of the act, found the Victim with his head injured, but otherwise uninjured. It was further stated that they were unable to take the Victim to the hospital at that time due to unavailability of ambulance on account of heavy rainfall.

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[1] Reena Hazarika v. State of Assam, (2019) 13 SCC 289 ¶3.

[2] Indian Penal Code, 1860, No. 45, Acts of Parliament (India), §302.

The post-mortem report of the Victim reported that the Victim had various "chop wounds" and some fractures. It was reported that "*All injuries were ante-mortem and caused by moderately heavy sharp cutting weapon and homicidal in nature.*"

Sub-Inspector Nilomani Milakar ("**PW 7**") recovered a small knife from the place of occurrence of the act. PW 7 noted that the Appellant was not crying.

The trial court and the Gauhati High Court placed reliance upon circumstantial evidence. Citing last-seen theory,[3] the trial court and the High Court held that the Appellant was present with the Victim that night. Further, the Appellant not crying at the time of such event demonstrated unnatural conduct. Therefore, she was the assailant of the Victim. The Appellant was convicted under Section 302 of IPC.[4] The Appellant was awarded a punishment of life imprisonment and a fine of Rs. 1,000, and if there is default for paying fine, then one month imprisonment for the same.

III. ISSUES FRAMED

The Sup. Ct. framed the following issues for contemplation:

First. Whether the Appellant has committed murder amounting to culpable homicide in respect of the Victim?

IV. ARGUMENTS ADVANCED ON BEHALF OF THE APPELLANT

The injuries were caused by a moderately heavy and sharp cutting weapon as stated by, Dr. Ritu Raj Chaliha ("**PW 6**") who prepared the post-mortem report of the Victim, but only an ordinary knife was recovered from the place of occurrence by PW 7 Sub-Inspector Malakar, who was the investigating officer in the case. According to the details submitted, the knife recovered was an ordinary knife which is used for cutting betel nut, one feet long with a sharp bent point and Chop injuries were not possible through the same. Also, it was not shown to PW 6 for her opinion that whether such

[3] Nizam v. State of Rajasthan, (2016) 1 SCC 550.

[4] *Supra* note 2.

injury can be caused by the ordinary knife or not. Therefore, the courts below, namely, the trial court and the High Court have mistaken in holding that the chain of circumstances which have been established for the purpose of proving circumstantial evidences lead to the only inescapable solution that Appellant is the assailant in this case and that no other conjecture is possible in the instant case. This opens up the possibility that certain hypothesis for innocence of the Appellant exists, consequently, circumstantial evidence is not sufficient for the conviction of the Appellant and a benefit of doubt arises in favour of the Appellant, as a result, she must be acquitted.

V. ARGUMENTS ADVANCED BY THE PROSECUTION

The State, from the side of prosecution relied on the following factums:

First. The Appellant was last-seen with the Victim in the room, as confirmed by Victim's minor daughter, Miss Puja Hazarika ("CW 1"), aged about 9 years who resided with the Appellant and the Victim, as a result last-seen theory applies in the facts of this case and the Appellant was rightly convicted by the trial court and the High Court.;

Second. No satisfactory explanation has been offered by the Appellant as to how the death of the Victim occurred, on that account, no hypothesis for the Appellant being innocent can be made out;

Third. The Appellant showed an unnatural conduct of not weeping at the death of her husband, that is, the Victim. The same was noticed and observed by PW 7; and

Fourth. The purported weapon used i.e. the knife and blood-soaked clothes of the Victim were recovered.

VI. ANALYSIS BY THE COURT

To rule a conviction, a court must consider (i) circumstantial evidence, (ii) continuity in the links of chain of circumstances, and (iii) the inescapable conclusion that the accused is the assailant. No other hypothesis regarding the innocence of the accused

should be possible or compatible. Therefore, unless the prosecution establishes an airtight case, without leaving any possibility that the act may have occurred in any other manner, the onus of proof will not shift to the accused.[5]

In Reena Hazarika, the court relied on the statements of the Prosecution Witnesses, *viz*,

First. PW 1 stated that at around 11:00 PM, he was told by the Victim himself that he had suffered head injury due to a fall and PW 1 along with PW 2 tried to call an ambulance at around 12:00 AM. It was further deposed that he informed the police about the occurrence at around 8:00 AM. next morning.

Second. PW 2 deposed that the Appellant woke him up at between 2:00 AM and 3:00 AM. The Appellant was crying and told him that her husband, i.e., the Victim, has suffered a head injury. It was further deposed that PW 2 was told by the Victim himself that the injury was not serious.

Third. PW 3 deposed that PW 2 told him about the Victim's injury at around 12:00 AM.

Fourth. PW 7 deposed that the information was given to the police at around 12:00 PM. The general diary entry reflects the time of 12:20 PM.

Fifth. The "chop wounds" reported in the post-mortem report could not have been made by the small knife recovered from the place of occurrence of the act. Further, the fracture of the temporal bone with that small knife was nearly impossible. The multiple "chop injuries" on the deceased create a strong possibility that there may have been more than one assailant.

Sixth. It is difficult to accept according to the normal human behaviour that the Appellant, being a woman, could have made severe and repeated assaults on the Victim, who was an average built man, and faced no resistance and suffered no injury herself.

[5] Rukia Begum v. State of Karnataka, (2011) 4 SCC 779

Seventh. PW 7 deposed that he did not notice tears in the eyes of the Appellant. The trial court and the High Court deemed this to be unnatural conduct. However, this is not sufficient to hold the Appellant guilty of the offence of murder. The Appellant might have got into a situation of shock and was stunned by the death of her husband due to which she came into a condition of complete silence.

Eighth. The general diary entry was made at around 12:20 PM. The First Information Report ("FIR") was registered at 7:45 PM. This opens room for suspicion; seven hours is sufficient time to make allegations contrary to the actual commission of crime.

The Sup. Ct. further relied the statement of the Appellant which was made under section 313 of CrPC,[6]

> *On the day of occurrence, she returned home from work at around 8-8:30 p.m. and saw that the lock of her room was broken and her husband was lying in the room with bleeding injury, when she cried then PWs 1, 2 and 3 came there with drink in the hand of one of the brother. PW 1 started putting Dettol on the injury of her husband, and when the Appellant tried to call the police, then PW 1 snatched the phone from her. She tried to take her husband to the hospital but PW 1 and others did not cooperate with her due to which she failed to take him to the hospital. She pleaded that she has not killed her husband.*

The Sup. Ct. further discussed the importance of statements made under Section 313. The Sup. Ct. opined that it is more than a statutory right and comes under the Constitutional right of "fair trial" under Article 21 of the Indian Constitution, even though it is not regarded as a substantive piece of evidence. The court specified that:

[6] Code of Criminal Procedure, 1973, No. 2, Acts of Parliament (India), §313.

"[i]*f the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) CrPC the Court is duty-bound under Section 313(4) CrPC to consider the same.*"[7]

VII. DECISION

The Sup. Ct. held that the circumstantial evidence fails to establish the inescapable conclusion that the Appellant was the assailant of the Victim; therefore, the Appellant is acquitted on the benefit of doubt.

VIII. ANALYSIS OF THE JUDGMENT AND SUGGESTIONS

A. THE SUP. CT.'S EXAMINATION OF THE STATEMENTS OF WITNESSES

The trial court and the High Court failed to observe the plethora of lacunae and/ or gaps in the statements made and the evidences produced before them. These were rightly pointed out and discussed by the Sup. Ct. Although the Sup. Ct. was not bound to, and generally does not, re-consider the statements of the witnesses, it decided to dedicate judicial time and efforts in the interest of justice.

B. SECTION 313 OF THE CRPC

The Sup. Ct. elevated the importance of the statements made by the Appellant under Section 313 of Code of Criminal Procedure[8] from mere a statutory right to a Constitutional right under Article 21 of the Constitution.[9] This expands the scope of a fair trial and strengthens adherence to the principles of natural justice.

The court read the use of "may" in Section 313(4) to be "shall"; the court is duty-bound to consider the statement made by the accused and has no discretionary power to either consider or not consider the statement.

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[7] (2019) 13 SCC 289, ¶19

[8] *Supra* 6.

[9] IND. CONST., Article 21.

C. THE ASPECT OF TIME

While the decision in *Reena Hazarika's* was satisfactory, it took nearly five (5) years for the matter to reach its conclusion. This led to the Appellant being in unjustified custody for that time period. Therefore, the judiciary must set certain guidelines for disposal of matters.

D. SUGGESTIONS

Although the Appellant was acquitted, the facts and circumstances of the case, casts doubt on the role of the Prosecution Witnesses. The court must contemplate a fast-track action against suspicious witnesses. The court, particularly the Sup. Ct. in view of its plenary powers under Article 142[10] should have power to initiate proceedings at against such witnesses.

IX. CONCLUSION

The Sup. Ct. applied the principle that "*several accused may go free, but an innocent person should not be punished.*"[11] Decisions such as *Reena Hazarika* increase faith of the general public in the judiciary as the sentinel of justice. At the same time, the trial court and the High Court, also a part of the same judiciary, issued their decision without adverting to the facts and convicted the Appellant of a grave offence without sufficient evidence. The Sup. Ct. proved to be the torch-bearer of justice.

[10] IND. CONST., Article 142.
[11] (2019) 13 SCC 289 ¶7.

DEMYSTIFYING THE LABYRINTH OF ANTI-DEFECTION LAW: A TOOTHLESS LAW

- Md Rehaan Danish & Huma Wasim

ABSTRACT

*The obfuscating provisions of schedule X have kept the matter of defection in mayhem. The legislation tried to curb defection but was not able to shun it. The speaker of the house ("**Speaker**") enjoys immense power concerning any wrong under the purview of defection per se. Further, there is no prescribed time limit under which a case of defection shall be decided by the Speaker. The Speaker can sit over the matter for as long as he wants. Non-intervention of the judiciary in matters of defection results in no judicial remedy for the aggrieved party.*

*The legal precedents concerning defection have not set the matter straight. The judgment of P.V. Narasimha Rao v. State, (1998) 4 SCC 626 by upholding Article 105(2) of the Constitution of India ("**Constitution**") has resulted in greater corruption. Hence, this article shall extensively discuss defection and how it can be subverted.*

KEYWORDS: Anti defection law, Schedule X, Constitution, P.V. Narasimha Rao, Article 105(2)

I. INTRODUCTION

"Unity in diversity" pushed India into freedom. Independent India lacked a political framework; it adopted the democratic form of government and formed parties.[1] Parties were formed on the basis of common ideology. But, members of parliament (each an "**MP**", collectively "**MPs**") started to defect, motivated either by (i) their own personal interest; or (ii) non-alignment of their thought process. When MPs defect from their political parties, they not only break the party cohesion upon whose manifesto they were elected, but also breach the trust of the electorate that voted for the concerned MP, thereby tossing the essence of democracy.

Even now, there is no watertight mechanism to solve defection. The term defection sees its origin from the Latin word "*defecito*," indicating the act in which a person tends to abandon and align with another person by reason or cause. Defection was first seen in the House of Commons where an MP crossed the floor and moved from one side to the other. Colloquially, "floor crossing" entered common parlance.

India is not an exception to defection. Prior to the enactment of Schedule X to the Constitution, 142 defections[2] were witnessed in the parliament within a span of four (4) years (1967-71) and 1969 defections in state assemblies. In view thereof, a committee was formed under the leadership of Y.B. Chavan by the then Prime Minister, Rajiv Gandhi to prevent defection. Schedule X was introduced to the Constitution by way of the 52nd Amendment Act, of 1985.

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[1] *Chapter 3 Why Do We Need a Parliament?*, CEO DELHI, https://ceodelhi.gov.in/eLearningv2/admin/EnglishPDF/Chapter%203%20Why%20Do%20We%20Need%20a%20Parliament.pdf.

[2] *Politics of defection*, PRS INDIA, https://prsindia.org/theprsblog/politics-of-defection.

In the context of Manish Tewari's private bill, it is suggested that anti-defection should be restricted to votes of confidence and money bills.[3] This will maintain the essence of democracy i.e. the MPs can vote freely.

II. THE CONUNDRUM OF MEMBERS SHIFTING PARTIES

Schedule X has been able to curb defection to an extent; But does it protect parliamentary democracy?

It certainly does not. Indian democracy is close to Lincoln's definition: "*Democracy is the government of the people by the people and for the people*." However, India ought to have adopted definition given by C. Rajagoplacharya, i.e. "*democracy is a government by discussion*".

This can be remedied by issuing whips into three parts.

1. Whips concerning financial and administrative functions can be issued as per the desire of the political party;
2. The majority opinion should be to issue the whip;
3. In some areas of concern, such as Constitutional amendments, [4] no whip should be issued.[5]

III. PARLIAMENTARY PRIVILEGES AND WHIP

The word privilege comes sees its origin in the Latin word "*privilegium*", i.e. a law made to safeguard the interest of a single person. MPs are subject to privileges to effectively discharge their duties. These privileges are available to the MPs only when they are holding the position of MP and discharging their duties. The MPs would be handicapped if these privileges were not provided to them. These rights

[3] M R Madhavan, *The Anti-Defection Law needs a relook*, PRS INDIA https://www.prsindia.org/media/articles-by-prs-team/the-anti-defection-law-needs-a-relook-2777.
[4] Justice K.T.Thomas, *Anti-Defection Law*, NUALS L.J. 3 (2009).
[5] Kartik Khanna and Dhvani Shah, *Anti-defection law: a death knell for parliamentary dissent?*, NUJS L. REV. 103 (2012).

are enjoyed collectively by the house and by the individual MPs as well. Hence, these privileges are of necessity to secure the proper functioning of the legislature.

Parliamentary privileges enjoyed by the Britishers gained popularity in India. India borrowed privilege from the House of Commons.[6] Article 105 and Article 194 of the Constitution confer the same parliamentary privileges upon MPs as they were enjoyed by the House of Commons at the commencement of the Constitution.[7]

The term "Whip" was first used by Edmund Bruke in the 18th century on the floor of the British House of Commons.[8] A party whip ("**Whip**") is an MP who acts as a channel of communication between party leaders and MPs.[9] A Whip's primary duty is to keep the MPs informed about party activities, issue timely advisories of voting on specific issues, and be responsible for enforcing the attendance of its members.

In the context of the Indian Parliament, a Whip's duty is to ensure that the MPs are present in an adequate number to vote on an important issue according to the party line. The Minister of Parliamentary Affairs in the Lok Sabha and Rajya Sabha is the chief Whip of the governing party responsible to the leaders of the house. *Inter alia*, a Whip's duty also includes the responsibility to keep the party united and strong.

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[6] Sinha, N. K. P. "THE NATURE OF PARLIAMENTARY PRIVILEGES IN THE INDIAN CONSTITUTION." *The Indian Journal of Political Science* 26.3 (1965): 58-66.

[7] Singh, Dalip. "Parliamentary privileges in India." *The Indian Journal of Political Science* 26.1 (1965): 75-85.

[8] Burke, Edmund. *Speech of Edmund Burke, esq. on American taxation, April 14, 1774*. 1775.

[9] "GOVERNMENT OF INDIA MINISTRY OF PARLIAMENTARY AFFAIRS PRESS RELEASE Organizing the All India Whips Conference is one of the func." *Ministry of Parliamentary Affairs*, https://www.mpa.gov.in/sites/default/files/Agenda1.pdf. Accessed 28 November 2022.

IV. INTERNATIONAL PERSPECTIVE OF ANTI-DEFECTION LAW

Defection is common across countries. However, several countries never desired to ban defection.

A. UNITED KINGDOM

Defection is common in the United Kingdom ("**UK**"). there is no separate defection law; it is considered to be an internal matter and thus IS governed internally. Notably, Edmund Burke said, "[y]*our representative owes you, not his industry only, but his judgment; and he betrays you instead of serving you if he sacrifices it to your opinion*."[10]

This principle urges an MP to hold the interest of the electorate even to the detriment of the party. It is for this reason that if an MP differs from the party line on a particular bill, he is allowed to dissent. This is not welcomed in India, as the electorate's concern mainly lies with the party and not the individual MP. For good governance, an MP's judgment should be paid heed before putting first when taking decisions, so that a balance can be built between individual MPs and the party in the collective.[11]

B. UNITED STATES OF AMERICA

The United States of America ("**The US**") follows a Presidential form of government. The members of its legislature cast their vote on policy according to their will without the fear of being disqualified. Despite the US not having any anti-defection laws, it has maintained a party discipline. Like India, party leaders in the US ensure that its members vote as a bloc on policy. Sanctions are imposed,

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[10] *Your representative owes you, not his industry only, but his judgement; and he betrays you instead of serving you if he sacrifices it to your opinion." --Edmund Burke, Speech to the Electors of Bristol, November 3, 1774*, SMITHSONIAN AMERICAN ART MUSEUM, https://americanart.si.edu/artwork/your-representative-owes-you-not-his-industry-only-his-judgement-and-he-betrays-you-instead.

[11] DR.K.S. CHAUHAND, PARLIAMENT, POWER, FUNCTION AND PRIVILEGES (2013) 359.

including removal from key positions, functionary part, loss of perspective appointment.

However, these sanctions are challenged before the Supreme Court of the US ("**SCOTUS**") in terms of right to free speech as guaranteed by the First Amendment to the US Constitution.[12]

V. DEDUCED ANALOGY ON DEFECTION LAWS OF DIFFERENT COUNTRIES

Anti-defection laws are often enshrined in the constitution of the relevant jurisdiction. Malhotra's list of twenty-three (23) commonwealth nations shares information about their defection laws.[13] The International Institute for Democracy and Electoral Assistance ("**IDEA**") compiled data of sixty-four (64) nations where it asked: "*Is it possible for a member of parliament to leave the party with which he/she was elected and join another party or become an independent MP (floor-crossing)?*"[14]

Malhotra observed that some countries do not see defection as a threat, while some take it very seriously and thus formed law to curb defection.[15] Janda has classified nations and into different categories by classifying nations as per their age into (i) older democracies, (ii) newer democracies, (iii) semi-democracies, and (iv) non-democracies.[16] It is suggested that defection laws differ significantly between nascent and established democracies. Defection gives the impression that party does not matter.

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[12] Ramit Mehta and Tejas Bhandari. *Legislative coups & intricacies of anti-defection law*. THE DAILY GUARDIAN (Jan. 6, 2021), https://thedailyguardian.com/legislative-coups-intricacies-of-anti-defection-law/.

[13] G.C. MALHOTRA, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH (2005).

[14] International Institute for Democracy and Electoral Assistance (IDEA), INTERNATIONAL IDEA, https://www.idea.int/sites/default/files/reference_docs/Annual-Report-2005-PDF.pdf.

[15] PUNEET BHARGAVA, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH *Parliament Digital Library* (2005).

[16] Kenneth Janda, Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments, http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf accessed on 28 May, 2020.

1. Switching parties makes it evident that political parties do matter and the MP is not the sole concern. Had it not mattered, MPs would not have chosen to change the party.
2. Switching parties provide the MP with new incentives.
3. Parties are the primary nexus linking voters to the MPs.[17]

Unlike any other country, the Indian Constitution provides a mechanism to protect both the government and the opposition from defection. While there are countries that have adopted to regulate these matters internally. Also, expulsion from the party is altogether more draconian. As these rules have little to no effect if a member has chosen to defect anyway.

If we assume that these anti-defection laws are of utmost importance for functional democracy to achieve stable, competitive party politics in nascent democracies. Then it may give rise to an established democracy. But if we follow the countries with older democracies, such a law would not fit the democratic values as it would violate the freedom of expression and association of MPs. Thus, it can be held that the anti-defection law depends upon the functioning of the party system and the nature of society.

VI. ROLE OF JUDICIARY BEFORE ANTI-DEFECTION LAW

Over the years the judiciary has made various judgments shaping the defection law and giving some power to this toothless law. One of those cases is of *Mian Bashir Ahmed v. State of Jammu and Kashmir*[18], in which the high court of Jammu and Kashmir took notice of the evil of defection even before the enactment of Anti Defection Law.

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[17] *The purpose of political parties | Democracy*, GOVERNMENT OF THE NETHERLANDS, https://www.government.nl/topics/democracy/the-purpose-of-political-parties.
[18] *Mian Bashir Ahmad And Etc. v. State Of J. & K. And Ors.*, C. M. P. No. 509 of 1980

In the state general elections of Jammu and Kashmir held in July 1977, the National Conference Party gained the majority and formed the government. The party leader of the National Conference made a representation to the Speaker on 30th June 1980 that one of the MLAs, Mian Bashir Ahmed had voluntarily left the party's membership and joined Congress.

The then-speaker of the house Mr. Malik Mohi-ud-din, taking into account of the application made before him in relation to an MLA defecting to the Congress party, disqualified him, Mr. Mian Bashir Ahmed, under section 24G of the J&K Representation of People Act. A petition was filed by him challenging the said section. Further, in due course of time, the vote of 'no confidence' was made against the speaker Mr. Malik Mohi-ud-din. Following this, he too defected from his parent party on which he contested the election, National Conference Party, to the Congress party. Having defected, he too met with the same fate as Mian Bashir Ahmed. Eventually he also challenged the section 24G on the grounds that it ultra vires Article 19(i) (a) and 19(i) (c), Article 14, and the basic structure doctrine.

The High Court of J&K on deciding the matter referred to the case of *State of West Bengal v. Anwar Ali Sarkar*[19] and came to the decision that section 24G of the J&K Representation of People Act is within the limit and does not go beyond the constitution. In addition to it, the said section provides for the cessation of membership of a legislator of the house to which he belongs in the event he resigns membership of the party on whose platform he contested the election and was elected, does not violate the right to freedom of speech and right to freedom of association of the legislator.

[19] *West Bengal v. Anwar Ali Sarkar*, 1952 AIR 75.

A. S.R. BOMMAI CASE

In the year 1988, Janta Party and Lok Dal Party formed a coalition government which was headed by S.R. Bommai. After few months, in 1989, MLA, K.R. Molakery, wrote letter to the Governor, P. Venkatasubbaiah stating that 19 MLAs wanted to quit the ruling government as they were not satisfied with the coalition government, hence, presidential rule should be established. The Governor wrote letter to the President stating that the MLAs are not satisfied with the ruling government and also the ruling party had lost the majority. Therefore, using Article 356(a), presidential rule should be enforced. Herein, the S.R. Bommai government did not get the opportunity to conduct a floor test. Consequently, presidential rule was imposed.

Bommai first approached the High Court of Karnataka but there his plea was dismissed. Then Bommai then moved to the Supreme Court. In March 1994 the Supreme Court comprising of 9 judge bench gave a landmark judgment[20] with respect to Article 356 on the Constitution of India with respect to the authoritative usage of powers by the Centre.

The decision made it clear that the president cannot suspend a government and impose presidential rule until such a proclamation gets approved by both the house of the assembly. At most, the president can suspend the legislative assembly which gets lapsed on the expiry of two months and the assembly gets revived. In addition to it, the supreme court also stated that this proclamation is subject to judicial review.

[20] *S. R. Bommai v. Union of India,* 1994 AIR 1918.

B. KIHOTA HOLLOHAN CASE

On 12th December 1990, MLA of Nagaland Legislative Assembly, Kihota Hollohan[21] gave five petitions against the MLAs namely Sarvashi Konngam, Khusatho, T.Miachieo, L.Mekiye Serna and Zachilhu under the tenth schedule for voluntarily giving up the membership from Congress in order to cause split in the party.

The resignation of those 5 members was accepted by the Speaker and subsequently disqualified from Nagaland Legislative Assembly by the Speaker.

The decision of the Speaker along with the validity of the Anti-defection Law. The petition was made by Zachilhu and others in the High Court of Guwahati. In the meantime, the varied interpretations of the newly enacted law by presiding officers of different legislatures were challenged in the various High Courts throughout the country. So, all the petitions were transferred to the Supreme Court.

The Supreme Court upon hearing, upheld the constitutional validity of the 52nd amendment and the 10th Schedule, except paragraph 7. Para 7 bars the jurisdiction of the Court dealing matters of defection, on account of this, it was struck down as it is ultra vires of the constitution. It was also held that the, *"Speaker or chairmen while exercising powers and discharging functions under the Tenth schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are subject to judicial review."*[22]

[21] *Kihoto Hollohan v. Zachillhu And Others*, 1992 SCR (1) 686.
[22] *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651.

C. MADHYA PRADESH SCENARIO

Jyotiraditya Scindia, a senior Congress leader from Madhya Pradesh, joined BJP on 11th March 2020; in support of him, 22 MLAs resigned from the government. This led the Congress government into a minority. So, the Congress government led by Kamal Nath resigned on 20th March 2020 before proving their majority in the assembly, which paved the path for the BJP to form the government under the leadership of Mr. Shivraj Singh Chouhan on 23rd March, 2020. The strength of congress was reduced from 114 to 92 as Speaker N P Prajapati accepted the resignation of these 22 MLAs.

On 19th March 2020, the Supreme Court intervened following the principle laid down in *S.R. Bommai v. Union of India*[23] and of *Nabam Rebia v. Deputy Speaker*[24], Arunachal Pradesh., to conduct a floor test and end the state of uncertainty. The court further added "in the event that they or any of them opt to attend the session of the Legislative Assembly, arrangements for their security shall be provided by all the concerned authorities" regarding the 16 rebel MLAs of Congress. Subsequently, Mr. Chouhan won the confidence of the house on 24th March 2020.

D. KARNATAKA SCENARIO

In the year 2018, Karnataka conducted state general elections. The result of the elections was hotly debated throughout the nation as it gave a fractured verdict and none of the political parties got a clear-cut majority. The total capacity of the Karnataka state legislative assembly is of 224 seats. Out of which BJP got 104 seats which were the highest among all1 political parties in the election. But it could not make the government as it didn't achieve a majority. Later on, BJP formed the government but was unable to gather a majority in 3 days.

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[23] Supra Note 22.

[24] *Nabam Rebia v. Deputy Speaker*, Civil Appeal Nos. 6203-6204__OF 2016.

After that post-poll alliance of Congress and JD(S) took place and gathered the majority. Consequently, a coalition government was formed which was headed by H.D. Kumaraswamy. A year later, in July 2019; 14 MLAs of Congress and 3 MLAs of JD(S) quit the government as they were not satisfied by the ruling coalition government. It was said that the resignation of 17 MLAs was because of the pressure created by BJP. This led to the disqualification of the rebel MLAs and they were also barred from contesting elections during that term of assembly by the Speaker. On 23rd July 2019, a trust vote was conducted, and the rebel MLAs didn't take part in it and this led to the collapse of the coalition government. Thus, this paved the way for the BJP to form a government headed by Yediyurappa.

The disqualified MLAs moved to the Supreme Court urging to quash the orders of the speaker. At the same time, other Congress and JD(S) MLAs moved to the Supreme Court for the enforcement of the Speaker's order.

In a unique turn of events a case filed before the Supreme Court, *Shrimanth Balasaheb Patil v. Hon'ble Speaker of Karnataka Legislative Assembly and others*,[25] approved the disqualification of 17 rebel MLAs. However, a part of the speaker's order was struck down where they were barred from contesting the election for the current assembly because section 36 of the Representation of People's Act, 1951 does not contemplate such type of disqualification.

E. MANIPUR SCENARIO

The assembly election in Manipur in the year 2017 led to a hung assembly because no party was able to secure the majority. Congress secured 28 seats in the election but was unable to form the government due to the defection caused by Shyamkumar. This helped BJP with 21 seats to form the government in which Mr. Shyamkumar was made a minister. In a total of 13 applications were filed before

[25] *Shrimanth Balasaheb Patil v. Hon'ble Speaker of Karnataka Legislative Assembly and others*, 2019 SCC OnLine SC 1454.

the speaker requested to disqualify Mr. Shyamkumar from the assembly. Mr. Shyamkumar in reply to the question raised to the situation stated that the rule of defection will not be applicable to him as he switched the party before he was sworn in as a legislator. Mr. Speaker was silent on the issue and did not take any action.

The case, *Keisham Meghachandra Singh v. The Hon'ble Speaker, Manipur Legislative Assembly*[26], was thus referred to the Supreme Court wherein the court on 21st January directed the speaker to take an immediate decision on the matter of defection against Mr. Thounajam Shyamkumar, the rebel legislator. After non-compliance with the SC order by the Speaker, Supreme Court on 18th March directed for an immediate cessation of Mr. Shyamkumar's entry to the assembly. Following this, he was disqualified from the house for that term of the Manipur Assembly by Speaker Mr. Y. Kemchand on 28th March 2020 for defecting his parent party.

VII. LOOPHOLES AND SUGGESTION

Having a detailed discussion over the labyrinth of the defection law of India, the loopholes can be narrowed to the following points:-

First. Power of the Speaker: - Speaker of the house holds the absolute power to decide on matters related to defection under paragraph 6 of the 10th schedule. It must be noted that the speaker being a member of the house can be biased when deciding such matters. So, biasness could be expected. Also, the Speaker must not be the sole repository of all the judgment regarding the Anti-Defection Law as he/she may not be an expert to look upon the matter upon such matters. In support of these facts, a couple of speakers, Mr. Rabi Ray and Mr. Shiv Raj Patil raised

[26] *Keisham Meghachandra Singh v. The Hon'ble Speaker, Manipur Legislative Assembly*, CIVIL APPEAL NO. 547 OF 2020.

their concerns in 1991 and 1993. Hence, such an authority vested in the hands of the speaker must be normalized.

Second. Judicial Review: - Paragraph 7 of the 10th schedule excludes courts on any matter concerning disqualification outside the scope of Supreme Court and High Court under articles 136, 226, 227 of the Indian Constitution. Here, the legislature tried to restrict the power of the Judiciary which is not tenable. This rule has been challenged in multiple cases. But in Kihota Hollohan's case court held that the law is valid in all aspects, except the rule of judicial review, and held it as unconstitutional. However, this matter should be brought under immediate hearing because once the house dissolves the case stands meaningless. Also, the court should be allowed to take suo motto action in it to handle the situation as it is one of the pillars of democracy and must be protected ipso facto.

Third. No individual stand on part of members: - Paragraph 2 of the 10th schedule put the members into a bracket of obedience or obligation to abide by the part instruction. It restricts the freedom of the MPs to act against the policies of the party. A political party does not allow any independent action of its legislator which is against the democratic essence of a democratic setup of government. The law has thus failed to blur the distinction between defiance on part of members and defection of the members that might lead to disqualification.

Fourth. Vagueness of the term "Voluntarily giving up": - Paragraph 2(1)(a) of the 10th schedule talks about 'voluntarily giving up' one's membership.

This term is not defined in the as to what shall be the extent to which it will be applicable.

There is a case, wherein it was stated that the term "voluntarily giving up" can be interpreted differently, taking the MPs' conduct into account and not limited to resignation. Similarly, in the case of G. Vishwanathan[27], it was held that even though a member is expelled from the party he/she shall be considered a member of its parent party under the purview of schedule 10. In furtherance to the expansion of the interpretation, in the case of Rajendra Singh Rana[28], it was stated that if a member by letter invites the opposite party leader to form the government would be considered under the ambit of voluntarily giving up his membership of the party to which he/she affiliates to.

Fifth. Problem with Merger provision: - The merger of two parties is another example to get away from defection. The merger of two parties can happen only when two-thirds of the members agree to it. This merger does not constitute defection as per law thus safeguarding the members from the purview of being disqualified.

[27] *G. Viswanathan v. The Hon'Ble Speaker Tamil Nadu*, 1996 AIR 1060.
[28] *Rajendra Singh Rana And Ors v. Swami Prasad Maurya And Ors, Appeal*, (civil) 765 of 2007.

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