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DARK PATTERNS AND CONSENT FATIGUE UNDER DPDP: IS 'CONSENT' EVEN MEANINGFUL ANYMORE?

Megha Vasudeva

Abstract

In this paper, it is evaluated how consent under the Digital Personal Data Protection Act, 2023 (DPDP Act) of India continues to be significant in light of dark patterns and consent fatigue. While it is true that the Act aims to secure voluntary, informed and clear consent of the users, manipulations in design and constant request for consent may result in an invalidation of such consent. The paper suggests that the DPDP approach is highly procedural as far as it pertains to consent, whereas important structural and behavioural aspects of consent remain unaddressed. The paper demonstrates the necessity of regulating consent interface more extensively, increasing accountability of Data Fiduciaries and moving beyond procedural to substantive consent.

Introduction: The Performance of Choice

Choice has had an esteemed place in the design of data protection laws. It is the ultimate form of autonomy and a process that allows individuals to have control over the flow and use of their data. The Digital Personal Data Protection Act 2023 ("DPDP Act") is consistent with this established practice in its design as well. This framework, at least on paper, seems to empower individuals; individuals are no longer mere subjects of surveillance; they become active participants whose consent becomes legitimate for the processing of their data.

However, such a promise is inherently fragile. In the very same contexts where consent is most commonly requested apps, social media, and websites consent seldom amounts to any kind of true deliberation. Instead, it assumes the guise of an obligatory gesture made in the face of asymmetry, time pressure, and coercion. What the law terms as autonomy ends up being merely

a form of compliance. The rhetoric of consent remains, but it is being emptied of any real meaning.

The paper will investigate this process of emptying out consent. In doing so, it will show how the interaction between dark patterns and consent fatigue poses a fundamental challenge to the meaningfulness of consent in the context of the DPDP framework.

The Legal Ideal: Consent Under the DPDP Act

The DPDP Act provides for a well-articulated definition of consent. Section 6 provides that consent should be voluntary, explicit, informed, unconditional, and unequivocal, shown by a clear affirmative act. This is indicative of an attempt to align with international standards such as the EU's General Data Protection Regulation. The intent here is to ensure that individuals are not just informed about the handling of their data, but that they can make real choices.

This ideal is supported by duties placed on Data Fiduciaries as well. They have a duty to inform on the purpose of the data processing, the categories of personal data, and the rights of Data Principals. The consent must be easily revocable, and the process of revocation must be equally accessible to the process of granting consent. Moreover, the use of Consent Managers seems to be another step towards institutionalization of user's control, since it means the possibility of centralized control over permissions.

However, in order to realize these principles, there is one basic assumption which must be valid, and without which these principles cannot function properly. The basic assumption is that users will use these possibilities to protect themselves from the harm in a rational and conscious way. Thus, the law supposes that the user will read information about risks and make a conscious decision on them. However, this assumption, though being normative, seems to be empirically weak. In real life, users do not use the mechanisms of consent as an instrument of deliberation, but rather as a hindrance to their path.

Dark Patterns: The Designing of Illusions of Consent

The illusion of consent becomes more apparent when viewed through the prism of dark patterns. These represent designing patterns aimed at influencing user behaviour on the basis of cognitive biases and asymmetric information. In the sphere of data privacy, dark patterns

proved to be very effective tools for designing consent while remaining within the framework of legal compliance.

The power of their influence is not associated with any form of coercion but relies on subtleties of design. Interfaces are often designed so that actions of accepting become more obvious than those of rejecting. The button of “Accept all” is usually highlighted by brighter colours and positioned more prominently, whereas other options like “Reject” or “Customize” are buried under several additional clicks.

Moreover, language serves as an additional factor here. Privacy policies and notices are often very complicated and technical in nature and, thus, hard to understand. At times, the amount of information provided by companies might serve as an obstacle on the way to comprehension. In such cases, giving consent means nothing more than not being willing to pay the price for information in terms of effort.

Another feature which should be mentioned is the asymmetry of consent mechanisms. Consent to use personal information is usually provided easily, while revoking such consent involves navigating complicated menus, multiple confirmations, and sometimes unclear instructions. As a result, the process of giving consent becomes a one-sided one, which makes it very difficult to change once given.

Finally, empirical studies have revealed the fact that manipulative consent mechanisms are widely used. It has been found that a considerable number of websites and mobile applications contain such mechanisms in their consent flow. Such facts contradict the idea of free consent. In other words, consent is rather created than given, which raises questions regarding its legitimacy.

Consent Fatigue: The Decline of Deliberation

Whereas dark patterns influence the quality of consent, consent fatigue denies its existence altogether. Within today’s digital environment, individuals experience an unending influx of consent requests: cookie consent bars, app permissions, privacy changes, and terms and conditions, all requiring immediate action. Each individual request may be justified in its own right, but cumulatively, their effect becomes burdensome.

Eventually, this burden on the capacity to focus attention will result in cognitive exhaustion. Individuals become insensitive to consent requests, reacting automatically rather than critically to them. The action of consenting is done out of habit and not deliberation. This process is

thoroughly explored in behavioural psychology, where repeated decision making in situations where cognitive capacity is low results in heuristic decision making.

This, in effect, leads to unthinking agreement. People agree to the terms not after any analysis, but in order to reduce conflict and get on with what they want to do. Thus, consent here no longer serves as an exercise of autonomy, but rather as a process of convenience.

And that is the irony. The very system that was supposed to give users greater control ends up overwhelming users to the point that there is no control anymore. And this is not just the weakness of consent, but its total loss of meaning.

The Regulatory Vacuum in the DPDP Model

Though the DPDP legislation has done justice in defining the element of consent, it fails to talk about the underlying structures that hinder consent. By concentrating on the validity of the procedure of consent, the model ensures that the consent has been sought in a way that adheres to the procedure but fails to address the conditions of such a consent.

This can be seen more prominently in case of dark patterns, where unlike other jurisdictions that have started regulating manipulative designs through specific prohibitions, the DPDP framework lacks guidelines regarding the design of consent mechanism. Consequently, Data Fiduciaries may adhere to the procedures of law, while defeating the spirit of the same.

In like manner, the provision of the Act regarding the ability to withdraw consent fails to consider the obstacles faced by the users. Withdrawal of consent without the resolution of issues related to the friction and lack of ease is meaningless. The law presupposes equal opportunities to grant and withdraw consent, but equality between them is hardly ever present.

The emergence of Consent Managers may be seen as a major breakthrough. These institutions can make it easier for the users to manage their consent. Nevertheless, their success will largely depend on how well they are regulated. Without proper standards, it is likely that they will simply duplicate inefficiency.

Political Economy of Data

A more nuanced understanding of consent involves taking into account the economic conditions that govern digital platforms. Modern digital ecosystems operate on the basis of an economic paradigm in which personal data becomes a very important source of value.

Platforms use personal data for targeted advertisement, personalization, and data analysis in order to generate profit.

In this context, consent operates at both the legal and the economic level it legitimizes the process of collecting and analysing data and makes it possible. Here lies the contradiction between the two approaches to consent while the former uses it to protect, the latter sees it as a necessary step.

There are thus some fundamental misalignments between the incentives. The platform providers have incentives for designing consents that will encourage maximum acceptances but minimum user objections. The dark patterns and consent fatigue should be seen in this light as rational reactions to these incentives. In such a system, it is enough that there seems to be an option; its reality does not matter much.

From this angle, the discussion shifts from the individual's behaviour to design of the system. What matters here is not so much that the users do not use their rights but that the system is designed in such a way that makes it extremely hard for them to do so.

Emerging Issues and Constitutional Implications

The inadequacies of consent-based regimes have become evident in legal scholarship. In India, the DPDP Act has already been challenged at the Supreme Court, raising fundamental constitutional issues related to the interplay between privacy, autonomy, and regulatory interests. These developments suggest that the issue of consent cannot merely be understood through a technical lens but requires a constitutional approach as well.

Privacy law in India, as enshrined in Justice K.S. Puttaswamy v. Union of India, hinges on issues of dignity, autonomy, and informational self-determination. The practice of digital consent, however, puts such a vision to test. If digital consent is regularly subjected to manipulation and exhaustion, it cannot be a manifestation of autonomous decision-making.

Conversely, industry fears about the practical difficulties of requiring consent raise further questions regarding the viability of such a regulatory regime.

Re-Imagining Consent in the Framework of Data Protection Law

This criticism of consent is no reason to do away with consent but, rather, to reformulate its role and re-imagine its nature as well. The emphasis should be placed on a substantive approach to privacy and data protection, rather than procedural one.

One way to move in this direction would be to regulate the design. Legal standards should take into account the influence that interfaces have on behaviour of individuals and ban manipulation and presentation of choices in a skewed way. In this way, the integrity of consent would be restored as its form would match its purpose.

Another step to be made would be a move towards the principles of accountability. Rather than imposing the entire responsibility on individuals, the law should impose independent duties on Data Fiduciaries to make sure that they act fairly, necessarily and proportionately. This will make less use of the consent mechanism as the only legitimizing tool.

The use of knowledge about human behaviour will further contribute to this.

Conclusion: Consenting to Consent

The passing of the DPDP Act marks a landmark in India's quest for establishing its data protection regime. In fact, it demonstrates the country's dedication to adjusting legal regulation to the new reality of our society, which makes individual rights very important. However, this very act proves that there is something fundamentally wrong with the current approach to consent as the main mechanism of protection.

The era of consent fatigue and dark patterns creates serious obstacles to implementing this mechanism properly. What we have here is a situation when the appearance of consent is preserved, but its content becomes more and more problematic. The task now is not to improve the concept of consent but to reconsider it completely.

This can be done only through changing the paradigm from the ideal of autonomy based on freedom of choice to autonomy as protection.

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