IN-DEPTH

Artificial Intelligence Law

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Artificial Intelligence Law

EDITION 1

Contributing Editors

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The Cantellus Group

In Depth: Artificial Intelligence Law is a perceptive global overview of the fast-evolving state of law and practice surrounding artificial intelligence (AI) systems and applications. Focusing on recent developments and their practical implications, it examines key issues including legislative initiatives, government policy, AI risk management principles and standards, enforcement actions and much more.

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India

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Summary

Introduction

Cognisant of the importance of developing, deploying and utilising safe AI systems, India has published various guidelines over the years, starting with the National Strategy for AI in 2018, to the Complex Adaptive Framework to Regulate Artificial Intelligence in 2024, to encapsulate myriad perspectives to regulate AI systems in accordance with changing needs. While India has yet not conceived of a specific regulatory framework that directly governs the development, deployment and utilisation of AI systems (akin to the EU Artificial Intelligence Act), current laws pertaining to intellectual property (such as the patents[2] and copyright laws[3]), personal data protection,[4] information technology[5] and consumer protection[6] assist in regulating certain aspects of AI technology at this time. The central government has also previously stated in the Indian Parliament[7] that insofar as copyright is concerned, existing law is well equipped to protect AI-generated works. With respect to future legal frameworks governing AI in India, the Digital India Act is stated to be one of the pieces of expected legislation that will attempt to deal with the ill effects of AI technology and will support the AI ecosystem in the country.[8] The Indian competition authority is also conducting a market study on AI,[9] which may provide further understanding of how AI regulation may be developed.

In courts, the protection of personality rights against misuse by users of generative AI tools has taken centre stage over the past year. The judiciary has also observed that generative AI tools such as ChatGPT cannot be the basis of adjudication of legal or factual issues in a court of law.[10]

This chapter elucidates India's legislative, judicial and policy AI landscape. Specifically, 'Year in review' highlights the key legislative, executive, judicial and policy developments of the past 12 months. The section also provides a perspective of the important and relevant AI use cases in India. 'Legislative and regulatory framework' outlines the current laws and guidelines that govern AI in India but does not cover any laws or guidelines already covered in 'Year in review'. The following sections outline risks and impacts, enforcement, legal practice implications, and outlook and conclusions.

Year in review

i Technology

Individual adoption and use of AI models has been robust in India. Statistics for 2023 predict that 20 per cent of deep tech AI and machine learning applications were in the customer analysis field.[11] In the legal sector, AI tools are on the rise, with a focus on increasing productivity – document analysis, document summarisation, contract drafting and legal research.

The Supreme Court of India and some high courts have started to implement various AI tools as part of a massive and commendable digital drive to enhance productivity, accessibility and transparency. Some of these initiatives include SUVAS[12] (Supreme Court VidhikAnuvaad Software), which translates documents from the English language

into nine vernacular languages, and vice versa, and ANUVANDINI,[13] which translates court decisions for the Kerala High Court from English into Malayalam. SUPACE[14-] (Supreme Court Portal for Court Efficiency Assistance) is another example of augmented intelligence, as it assists judges by analysing case files and extracting information from them. TERES[15] (Technology Enabled Resolution) helps translate court arguments into text during live proceedings.

Both the government and the private sector are utilising AI in the healthcare industry. Both diagnosis and treatment have improved through AI capabilities. These include ATMAN (developed by the Defence Research and Development Organisation), a tool that helps detect covid-triggered lung abnormalities;[16] ePaarwai (developed by the state government of Tamil Nadu), an app that does preliminary screening for cataract by analysing eye images;[17] and Tricog, a start-up endeavour that diagnoses cardiovascular conditions.[18]

Agriculture is a big beneficiary of AI too. The platform SmartFarm powers data analytics with AI throughout the crop life cycle by using geotagging.[19] With accurate measurements and insights provided by AI, this platform allows farmers to make quicker and more informed decisions. In the private sector, Microsoft has developed an AI-powered sowing app for farmers that helps farmers identify the optimal time for sowing seeds and improving crop yields and agricultural practices.[20]

ii Developments in legislation, policy and case law

Developments in legislation

Digital Personal Data Protection Act, 2023

India enacted its personal data protection law in August 2023. The core principle of the newly enacted Digital Personal Data Protection Act, 2023 (DPDPA) is to acknowledge the rights of data principals and safeguard their digital personal data by mandating that digital personal data be processed for lawful purposes only.

Data, which may include personal data, is essential for any AI system. Thus, it is possible that a data principal's digital personal data may be used to train an AI system, and, for this use, various provisions of the DPDPA would have to be complied with. Because of the overlap between AI and personal data, the DPDPA is the relevant legal framework that must be complied with by all stakeholders developing and deploying AI systems in India. The DPDPA is also relevant to understand how personal data may be utilised in various stages of AI development.

In terms of scope, the DPDPA applies only to personal data that is in digital form or to personal data in non-digital form that has been digitised subsequently.[21] Personal data made or caused to be made publicly available by the data principal or by any other person who is under an obligation under any law to make such personal data publicly available is beyond the scope of the Act.[22] The DPDPA permits the processing of the data principal's personal data either on the basis of valid consent or for certain legitimate uses.[23] Moreover, the data fiduciary has to identify the purpose of processing the personal data, and the data principal's consent has to be limited to that purpose.[24] The territory in which the personal data is going to be processed is also relevant, as the Act restricts the transfer

of personal data to certain territories that have been specifically prohibited by the central government.[25] In this context, transfer of personal data is permitted unless specifically restricted by the government.

The Act lays down obligations for data fiduciaries (i.e., entities that either alone or in conjunction with a data processor lay down the purpose and means to process personal data). Therefore, if personal data is being used for AI systems, the DPDPA lays out the legal obligations for these data fiduciaries seeking to use the data principal's personal data. For instance, the data fiduciary has to provide a notice to the data principal informing them about the personal data and the purpose for which the personal data is proposed to be processed, along with the manner in which the data principal may exercise their rights. The DPDPA thus also provides corresponding rights to data principals, such as the right to obtain a summary of data utilised[26] and to correct, complete, update and erase[27] such data, etc. Data fiduciaries are required to adopt appropriate technical and organisational measures to ensure that the data is utilised with care,[28] and the law imposes heavy penalties in cases of data breach.[29] The DPDPA has established a governance structure that has to be complied with to use personal data for AI development.

Developments in policy

Telecommunication Engineering Centre: Fairness Assessment and Rating of Artificial Intelligence Systems-[30]

The Department of Telecommunications, Ministry of Communications and Information Technology, through its nodal agency Telecommunication Engineering Centre, published a framework in July 2023 for evaluating the fairness of AI systems, in furtherance of the Responsible AI Principles of Equality, Inclusivity and Non-Discrimination. The framework lays out three steps to assess bias. The first step, 'bias risk classification', involves a self-assessment to determine the risk level associated with the identified system. The self-assessment involves questions around data, the model, how autonomous the system's operations are and the level of human involvement, etc. The second step involves determining the metrics or benchmarks for the risks identified in step 1, including whether they are based on the specific use case of the AI system and whether any sectoral requirements have been placed by any appropriate authority. The final step, 'bias testing', involves testing bias using one of the three methods proposed by the framework. This is a voluntary framework that is open for adoption by governments, corporations and non-profit organisations. The framework is also instructive because it provides an articulation of high risk, medium risk and low risk in the Indian context, as the same is needed for the bias risk classification in step 1.

Indian Council of Medical Research: Ethical Guidelines for Application of Artificial Intelligence in Biomedical Research and Healthcare[31]

These voluntary guidelines have been published to ensure ethical conduct and to address AI-related ethical concerns in biomedical research and healthcare. Stakeholders involved in biomedical research and healthcare, such as creators, developers, researchers, doctors, ethics committees, organisations, sponsors and funding bodies, are the target audience

for these guidelines. The guidelines lay out 10 principles of ethical AI and are intended to apply throughout the life cycle of the AI system. These are as follows:

1. Autonomy: Humans ought to have complete control over the AI-powered system and medical decisions.

2. Safety and risk minimisation: Whenever an AI technology-based system is widely used, it must be proven that it will run safely and reliably.

3. Trustworthiness: The principle of trustworthiness is among the most desirable characteristics of any AI system.

4. Data privacy: AI technology should ensure the privacy and security of personal data, preventing illegal access, modification and displacement of personal data at all phases of the AI life cycle.

5. Accountability and liability: Defined as an individual or organisation's obligation to account for their actions, take responsibility for their acts and publish the outcomes in a transparent manner.

6. Optimisation and data quality: Due diligence is required to verify that the 'training data' is devoid of known biases and represents broad parts of the target population.

7. Accessibility, equity and inclusiveness: AI systems ought to prevent biases and mistakes in the algorithms and maintain quality.

8. Collaboration: It is critical to collaborate with AI professionals during research and development to ensure that appropriate methods and algorithms are employed to address any challenge.

9. Non-discrimination and fairness: Avoid biases and inaccuracies in algorithms to maintain quality

10. Validity: Before being applied to patients or participants, AI technology must go through rigorous clinical and field validation.

Telecom Regulatory Authority of India: Recommendations on Leveraging Artificial Intelligence and Big Data in Telecommunication Sector[32]

In a study examining the opportunities and challenges in the adoption of AI and the enablers for adoption of AI in India, the Telecom Regulatory Authority of India (TRAI) in July 2023 provided its voluntary recommendations regarding the AI regulatory landscape. TRAI recommended that to ensure the development of responsible AI in India, there is an urgent need to adopt a regulatory framework that is applicable across sectors. Further, in the proposed regulatory framework, specific AI use cases ought to be regulated on a risk-based framework where high-risk use cases that directly impact humans are regulated through legally binding obligations. Furthermore, the suggestions propose the establishment of an autonomous statutory entity known as the Artificial Intelligence and Data Entity of India (AIDAI). This authority would be responsible for ensuring the development of responsible AI and the regulation of use cases in India. Additionally, the recommendations propose certain functions that the AIDAI would be accountable for. As these recommendations are voluntary in nature, it cannot be assumed that an autonomous entity would be created to regulate AI.

Economic Advisory Council to the PM: A Complex Adaptive System Framework to Regulate Artificial Intelligence[33]

In January 2024, the Economic Advisory Council to the PM published a voluntary framework for AI regulation in India through a complex adaptive system approach. The framework suggests the implementation of five key principles, namely (1) the establishment of guardrails and partitions; (2) the mandate of manual 'overrides' and 'authorisation chokepoints'; (3) the guarantee of transparency and explainability; (4) the definition of clear lines of accountability for AI; and (5) the establishment of a specialised regulator for regulating the AI ecosystem in India. The purpose of this framework is to ensure that the development and deployment of AI are carried out in a manner that is safe, ethical and transparent. The framework is guided by the insights gained from the regulation of financial markets.

Guidelines for Prevention and Regulation of Dark Patterns, 2023

The Guidelines for Prevention and Regulation of Dark Patterns, 2023 (the Dark Pattern Guidelines), which are voluntary in nature, specifically prohibit certain practices, such as false urgency, basket sneaking, confirm shaming, forced action and subscription trap, etc.-[34] These regulations need to be considered by AI developers to avoid the AI system leading to any prohibited outputs.

nasscom: Responsible AI: Guidelines for Generative AI (June 2023)[35]

The National Association of Software and Service Companies (nasscom) in June 2023 published Responsible AI: Guidelines for Generative AI. These were one of the first guidelines to contextualise responsible AI principles for generative AI. The guidelines establish joint obligations for researchers, developers and users of generative AI systems. The guidelines characterised generative AI as a form of AI that is capable of creating artefacts such as images, text, audio and video, as well as different kinds of multimodal material, based on a range of inputs. The categorisation of researchers, developers and users by the guidelines is not mutually exclusive. This implies that a stakeholder (which may include, but is not limited to, tech businesses, start-ups, open-source developers and researchers) may be able to fit into all three categories of research on generative AI, development of generative AI and application of generative AI. The illustrative obligations imposed upon the researchers, developers and users include the following: (1) the implementation of universal AI literacy and various awareness programmes; (2) the conduct of technical AI safety research; and (3) the implementation of regulatory reform projects for the trustworthy adoption of generative AI for the benefit of all stakeholders, through partnerships with both government and non-government organisations.

Developments in case law

Judicial intervention in the AI space is in nascency in India. The debate in the courtroom currently is dominated by intellectual property issues. A few decisions by courts are worthy of mention.

Personality rights cases

Anil Kapoor v. Simply Life India & Ors [36]

The plaintiff, a well-known Bollywood actor, brought a suit against defendants who were misusing his image and likeness, etc., to produce deepfakes, some of which were pornographic. One of the defendants was using a generative AI tool to create deepfake AI outputs and portray the plaintiff in a cartoonish setting, while other defendants misused the plaintiff's image and persona to sell merchandise and earn revenues. All these instances of use of the plaintiff's image, likeness and persona were unauthorised. The court held that the creation of deepfakes in this manner was clearly unauthorised and in violation of the plaintiff's personality rights. Cognisant of the balance between the freedom of speech and expression and the violation of the plaintiff's personality rights through the use of the generative AI tool Midjourney, the court noted that the law exempted caricatures, satire and the like. However, the court also observed that the exercise of free speech, if not done correctly, may transcend into damaging various rights of a person, including the right to livelihood, the right to privacy and the right to live with dignity in a social structure, etc. When such a line was crossed, and the same resulted in tarnishment or jeopardising the individual's personality or attributes associated with an individual, the court held that the same would be illegal. In the facts of this case, the defendant's use of Midjourney was seen as pushing these boundaries and gaining traffic and revenue by showing personalities in scandalous settings. For example, the defendant had prompted the creation of images showing Mahatma Gandhi brandishing guns – a shocking scenario. The Delhi High Court also held that the other instances of violation caused reputational loss as well as the loss of the right to endorsement of the plaintiff. Accordingly, the defendants selling merchandise were also restrained.

Jaikishan Kakubhai Saraf v. Peppy Store [37]

This case saw the court restrain some defendants who were using AI tools to develop chatbots that mimicked the plaintiff, a reputed Bollywood actor. The chatbot was created to respond in a manner that evoked the traits and unique styles of the plaintiff, which became iconic over many movies. The Delhi High Court granted an interim injunction, recognising the chatbot to be unlawful.

Amitabh Bachchan v. Rajat Nagi [38]

The plaintiff filed a suit against the Kaun Banega Crorepati lottery scam and other fraudsters for using his name, image, voice and personality attributes to dupe the public into parting with money and other personal details. Acknowledging the importance of protecting personality rights, the Delhi High Court passed an omnibus order in the plaintiff's favour restricting any kind of use of the plaintiff's personality traits, which, in effect, blocked any use of such personality traits in relation to the creation of deepfakes or their utilisation in any other AI systems without the plaintiff's appropriate permissions.

Intermediary liability and child safety

Aaradhya Bachchan v. Bollywood Time[39]

In this matter, the Delhi High Court considered significant questions concerning privacy and misinformation. The Court directed Google LLC to take down certain videos that misrepresented Aaradhya Bachchan, the daughter of well-known Indian celebrities, by portraying her as critically ill or deceased using morphed images. The Court emphasised the protection of a child's right to privacy and the need to prevent the spread of misleading information about a minor's health and well-being. Making it clear that it will show zero tolerance in cases concerning harm to children, the Court proceeded to grant an ad interim injunction in favour of the plaintiff on the first day. On merits, the case highlights the responsibilities of intermediaries to be proactive in protecting the safety of children online. The plaintiff had invoked Rules 3 and 4 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and argued that intermediaries should use AI or other automated technology to detect and block further instances of fake news or misinformation. In response, the intermediary has claimed that it is difficult to detect and delist new videos and has insisted upon the traditional notice-and-take-down mechanism, whereby it should be notified of each infringing video by the plaintiff. It has been further argued that this stance of the intermediary is a very onerous requirement for a young child, and one should not ignore the heavy impact on mental health of a child on confronting each new instance and reporting it to the intermediary. The Court is poised to decide this issue on merits at a later stage.

Use of generative AI in cases, as an assistive tool, to aid the judiciary

There were some instances in which courts have also used generative AI tools for research purposes in their matters. The Punjab and Haryana High Court used ChatGPT for research purposes to decide on a bail application.[40] However, the Court also clarified that such use was merely for the purpose of providing a more comprehensive understanding of bail law and was not to decide the bail application on merits. The Manipur High Court also used ChatGPT to obtain explanations of certain terms.[41] Further clarifying the value of generative AI as assistive tools, the Delhi High Court has stated that the accuracy and reliability of AI-generated data is still uncertain, and that AI cannot replace human intelligence or humane elements in the adjudicatory process. Nevertheless, they may be used for preliminary understanding or research.[42]

Legislative and regulatory framework

The current Indian legislative and regulatory framework is dealing with questions on AI in parts. No framework is established to consider the system in its entirety, but it is dealing with some of its constituent elements.

i The Patents Act, 1970

The patent eligibility debate

For AI inventions to be patent eligible, they will have to at least pass the threshold of Section 3(k), which categorises, inter alia, mathematical or business methods, algorithms or computer programs per se as being excluded from patent protection.

The Ferid Allani cases, specifically the decisions by the Delhi High Court in December 2019 and the Intellectual Property Appellate Board (IPAB) in July 2020, have provided much-needed clarity on the interpretation of Section 3(k). This interpretation enhances protection for AI patents as on date. In Ferid Allani, the Delhi High Court and IPAB held that if an invention demonstrated 'technical effect', the same would be patent eligible.[43] The IPAB further held that while the structuring of the query was in the realm of computer programming, the claimed invention was not limited to the structuring of the query. Relying on the Delhi High Court decision, the IPAB held that the mere fact that a computer program was used for effectuating a part of the invention did not make the invention ineligible for patent protection,[44] and that the invention must be examined as a whole.[45] Moreover, relying on the Guidelines for Examination of Computer Related Inventions (CRIs) issued by the Indian Patent Office, the IPAB held that indicators such as 'higher speed, more economical use of memory, more efficient data compression techniques', among others, would qualify as technical effect.[46] As the invention in Ferid Allani met each of these indicators, it was held to have technical effect.

Recently, the High Court of Delhi has also observed that 'even if the innovation is a mathematical or even computer-based approach, it can still comply with the patentability requirements, such as the technological effect or even contribution requirement, and thus become eligible for patent protection.'[47] In another matter, the Court has also observed that given the manner in which technology is advancing and the nature of stakeholders involved, it is time to re-examine the criteria that may prohibit software and algorithms from being patented.[48] As a matter of fact, in the context of algorithms, in the 161st Report published by the Department Related Parliamentary Standing Committee on Commerce in July 2021, it has been recommended that for India an 'approach in linking . . . algorithms to a tangible technical device or a practical application should be adopted . . . for facilitating their patents as being done in the EU and US'.[49]

Thus, currently, for patents on AI-related inventions, overcoming standard patent eligibility criteria under Section 3 of the Patents Act, 1970 pertaining to computer programs per se, and algorithms etc., along with satisfying the trinity test of novelty, inventive step and industrial application, remains the norm.

The inventorship debate

India has not yet considered the question of patentability of inventions created by or through the assistance of AI systems. Application relating to the invention created by DABUS, an AI system, which has gained popularity around the world owing to the questions of non-human inventorship, is currently under examination by the Indian patent office.[50] The Patents Act of 1970 requires an inventor to be a 'person' per Section 28 of the Patents Act, 1970. Indian law has interpreted the concept of a juristic person in a very broad sense and has included non-human actors within its ambit on several occasions.[51] It remains to be seen how the inventorship issue will pan out in India.

ii The Copyright Act, 1957

The authorship or ownership debate

Original 'literary', 'dramatic', 'artistic' and 'musical' works are covered within the domain of copyright law. In view of the same, the issue of copyright authorship or ownership of any text, artwork, video, music or any creative work created by an AI system continues to be covered under the Copyright Act of 1957. The author in relation to any 'literary, dramatic, musical or artistic' work that is computer generated has been identified as 'the person who causes the work to be created'.[52] Therefore, the Copyright Act is clear that as far as copyright authorship of any creative work is concerned, the same must necessarily involve a human being who causes the work to be created. India had initially granted copyright registration to a work – RAGHAV – claimed to be co-authored by AI.[53] However, the decision to grant copyright registration was later withdrawn by the Copyright Office.

Moreover, with respect to ownership, the courts have held that ownership in a work will be granted only in situations when a human creates such work,[54] and a juristic person is incapable of being an author of a work.[55] Currently, as AI has not even been vested with legal personality, it does not qualify as a juristic person as well.

Copyright infringement

The use of copyright-protected material as part of the training data set of an AI system, which has led to multiple copyright infringement lawsuits having been initiated in the United States,[56] appears to be justified based on the US 'fair use' provision. The Copyright Act does not follow the broad approach to fair use that is prevalent in the United States. Instead, India has a 'fair dealing' test, and this provision is limited to Section 52(1)(a) of the Copyright Act. Section 52 of the Copyright Act includes an exhaustive list of about another 32 situations where the use of copyright-protected material does not constitute infringement. Therefore, in India, for an act to not qualify as a copyright infringement, the same must fall within the 33 exceptions stated in Section 52 of the Act. Currently, the use of copyrighted protected material as training data for AI systems or tools does not find explicit mention in any of the 33 situations mentioned in Section 52 of the Copyright Act.

To interpret fair dealing, under Section 52(1)(a) of the Copyright Act, Indian courts have looked to decisions from US courts on fair use and have considered the four-factor test for fair use.[57] For a work to qualify as fair dealing under the Copyright Act, the purpose of the work should be for (1) private and personal use, including research; (2) criticism or review; or (3) for the reporting of current events and current affairs. Commercial use of the copyright-protected work is not covered within fair dealing. If any copyright-protected work is to be used for training AI models, the Government of India, in a response to a question in Parliament, has clarified that appropriate permissions need to be obtained from the intellectual property rights (IPR) holder.[58] An exception where this permission might not be needed is where the activity is covered by the fair dealing provision of the law.[59] It is pertinent to note that India also does not recognise a text and data mining exception to copyright infringement; therefore, AI developers do not have a text and data mining exception copyright infringement defence under the current regime.

iii Information Technology Act, 2000 and Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

The Information Technology Act, 2000 (the IT Act) read with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the IT Rules) is the legal framework that governs AI currently. The IT Act provides for technological measures that may assist in the traceability of the decisions taken at different stages of AI development and deployment. These technological measures include authentication,[60] attribution[61] and digital signature (to ensure that the record is secure).[62] The IT Rules provide for certain additional obligations that are necessary for entities that qualify as an intermediary under the Act.

The law prohibits circulation of explicit content.[63] For instance, the act of publishing, transmitting or causing to be published or transmitted any sexually explicit act in electronic form is considered an offence. Moreover, this prohibition also includes transmission of sexually explicit acts that depict children.[64]

The IT Act provides a safe harbour protection to intermediaries on certain conditions, exempting them from liability for the act of users or third parties that utilise the intermediaries' services.[65] Among the various conditions to be met by the intermediary in Section 79 with respect to third-party content, the intermediary must not initiate, select the receiver of, and select or modify the information contained in the transmission of the third party. The intermediary must also observe due diligence while discharging their duties as per the guidelines prescribed by the government. The IT Rules are guidelines that have been prescribed by the government in that regard.

Thus, the IT Rules provide further guidance to intermediaries with respect to the reasonable efforts they must take undertake to inform their users in order to retain the safe harbour provisions. Specific and relevant to AI, these reasonable efforts include maintaining certain due diligence requirements. As per Rule 3(1)(b) of the IT Rules, the rules and regulations, privacy policy or user agreement of the intermediary must inform the user not to host, display, upload, modify, publish, transmit, store, update or share any information that infringes any IPR, violates any law, is harmful to children or impersonates any other person, etc. Thus, intermediaries are expected to comply with Rule 3(1)(b) and, in this compliance, AI-generated content ought to be monitored by intermediaries. Moreover, if the intermediary qualifies as a significant social media intermediary,[66] and if such an intermediary uses technology-based measures, including automated tools, to comply with its due diligence obligations, Rule 4(4) of the IT Rules mandates that appropriate 'human oversight measures' must be deployed. Additionally, if any such automated tool is used by a significant social media intermediary, these tools will need to be evaluated for (1) accuracy, (2) fairness, (3) propensity of bias and discrimination and (4) the impact on privacy and security of such tools.

It is reiterated that the IT Rules and the obligations for AI-generated content and technology-based measures (that include automated tools) therein are applicable only to an entity that qualifies as an intermediary under the IT Act read with the IT Rules. The obligations under the IT Act and the IT Rules ought not to be conflated with obligations for entities that do not qualify as intermediaries as per this law.

iv DPDPA

The DPDPA qualifies as one of the relevant legal frameworks for AI systems, and reference may be made to 'Year in review' of this chapter for the same.

v Consumer Protection Act, 2019

If an AI system, or a system that has AI as its component, may be considered as a product-[67] or service[68] from the perspective of the consumer[69] in the market, the Consumer Protection Act, 2019 (CPA) is the relevant legal framework to govern such systems.

The CPA covers the concept of product liability. Under the CPA, a consumer may make a claim for compensation for any harm caused by a defective product (1) manufactured by a product manufacturer,[70] (2) serviced by a product service provider[71] or (3) sold by a product seller.[72],[73]

Harm in relation to product liability is defined broadly to include any personal injury or mental agony or emotional distress attendant to personal injury, illness or death.[74] It does not include any harm caused to the product itself or any damage to the property itself on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto.[75]

'Defect'[76] means 'any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly'.[77]

As per the CPA, a product manufacturer is liable for product liability if the product contains a manufacturing defect, if the product is defective in design, if there is a deviation from manufacturing specifications, if the product does not conform to the express warranty and if the product fails to contain adequate instructions of correct usage to prevent any harm.-[78] The liability may be imposed upon the product manufacturer even if it is proved that the product manufacturer was not negligent or fraudulent in making the express warranty of a product.[79]

A product service provider will be liable in a product liability action if the quality, nature and manner of performance is not in accordance with requirement of law or a contract. The liability may also arise for omission or commission of negligence or for not having any warning regarding any harm.[80]

Similarly, a product seller, who is not a product manufacturer, may also be liable for a product liability action. Illustratively, a product seller's liability may arise if there is substantial control over designing, testing, manufacturing, packaging or labelling of a product that caused harm,[81] or if the product seller altered or modified the product and such alteration or modification was the substantial factor in causing the harm.[82]

However, such liability will not arise if the product was misused, altered or modified before causing the harm.[83] Moreover, the CPA lays out certain exceptions where a product manufacturer may not be liable for its failure to provide adequate warnings or instructions.[84]

The enforcement for any claims by consumers under the CPA takes place through the Central Consumer Protection Authority, whose powers are prescribed in Chapter III of the CPA, or through the Consumer Disputes Redressal Commission, whose details are in Chapter IV of the CPA.

Currently, while this regime exists for product liability actions, its use for AI systems has yet not been invoked.

vi Soft-law AI frameworks in India

India has published a fair number of soft-law AI frameworks, and while none of these frameworks creates any binding legal obligations, these frameworks are instructive and relevant to better appreciate governance of AI from the Indian context.

National Strategy for Artificial Intelligence[85]

India published its National Strategy for Artificial Intelligence in 2018, which identified India's sectoral focus areas for AI. Five sectors were identified to benefit from AI in addressing societal needs: (1) healthcare, for improved accessibility and affordability of high-quality healthcare; (2) agriculture, for increasing farm productivity, decreasing wastage and enhancing farmers' income; (3) education, for enhanced quality and accessibility of education; (4) smart cities and infrastructure, connectivity and efficiency in view of the expanding urban population; and (5) smart mobility and transportation, for safer and more intelligent modes of transportation with improved traffic and congestion management.

Responsible AI: #AIFORALL: Approach Document for India: Part 1 - Principles for Responsible AI[86]

This is the seminal document emphasising inclusivity and broad adoption of AI in sectors such as health, education, agriculture, smart cities and mobility. The document underscores the necessity of adopting responsible AI practices for balancing societal protection with innovation. While economic and social potential of AI is vast, rapid adoption of AI brings ethical and societal challenges, such as bias in decision-making, privacy risks and security concerns.

The document categorises ethical considerations of AI into two:

1. Systems considerations:[87] These address issues such as understanding AI functioning, accountability, bias, exclusion, privacy and security.

2. Societal considerations: These considerations focus on broader ethical challenges, including the impact on jobs and malicious use of AI for psychological profiling.[88]

Based on the above considerations, the document outlines seven principles of responsible AI[89] for India, which are as follows:

1. Safety and reliability: AI systems must be deployed reliably with appropriate safeguards to minimise risks and ensure stakeholder safety. Grievance redressal mechanisms and continuous AI life cycle monitoring ought to be incorporated to meet the desired objectives.

2. Equality: AI systems must ensure that individuals in similar situations are treated equally.

3. Inclusivity and non-discrimination: AI systems should ensure equal opportunities and access to services, avoid reinforcing discriminatory biases based on identity, and provide affordable and accessible grievance redressal mechanisms for all.

4. Privacy and security: AI systems should ensure the privacy and security of data used for training, granting access only to authorised individuals with adequate safeguards.

5. Transparency: The AI system's design and operation should be documented and open to external review and audit in order to promote fairness, honesty, impartiality and accountability in its deployment.

6. Accountability: All AI stakeholders must conduct risk assessments, establish auditing processes and create grievance mechanisms for responsible design, development and deployment of AI systems.

7. Protection and reinforcement of positive human values: AI should uphold positive human values and maintain social harmony within communities.

Responsible AI: #AIForAll: Approach Document for India: Part 2 - Operationalizing Principles for Responsible AI[90]

In this document, a comprehensive framework is laid out for implementation of principles identified in Part 1 above. The document provides that for operationalising the principles, the government should develop regulatory and policy interventions, raise awareness and build capacity, and facilitate precise procurement strategies. Further, private sector and research institutions should consider incentivising ethical AI design, create compliance frameworks for AI standards and promote responsible AI practices in research.

NITI Aayog: Responsible AI: #AIForAll: Adopting the Framework: A Use Case Approach on Facial Recognition Technology[91]

This discussion paper examines the Digi Yatra programme run by India's Ministry of Civil Aviation and offers suggestions for future uses of facial recognition technology (FRT) in the country. The discussion is contextualised with the principles of responsible AI, such as safety and reliability, equality and inclusivity, and non-discrimination. The risk associated with AI systems has been divided into two broad categories:

1. Design-based risks: The risks explored include:

   • inaccuracy due to technical factors;

   • bias caused by under-representation;

   • lack of training of human operators;

   • glitches or perturbations;

   • security risk due to data breach and unauthorised access; and

   • accountability and legal liability issues that may arise on account of the inaccuracies in FRT systems.

2.

Right-based challenges to use of FRT: These risks relate to the impact on an individual's rights through the use of FRT systems – in this context issues such as:

- judicial interpretation of privacy;
- informational autonomy;
- anonymity as a facet of privacy; and
- threat to non-participants in deployment of FRT systems has been explored.

Specific to FRT, the document recommends (1) creation of standardised, annotated, high-quality images to train and evaluate FRT in the Indian context; (2) identification of a body to create standards and maintain the standard; (3) development of standards to avoid bias in FRT; and (4) identifying the extent and level of necessary transparency for FRT systems along with the explainability of the same.

Managing AI risks and impacts

The following risks associated with AI have been identified in either hard-law or soft-law frameworks outlined in 'Year in review' and 'Legislative and regulatory framework'. As certain frameworks are voluntary in nature, the legal obligation to mitigate each risk has to be seen in the facts of each case.

i Fairness, bias and discrimination

A bias risk in an AI system may arise from, among other factors, the lack of diversity in the team involved in developing the AI system or from the inadequacies in the data used.[92] Bias mitigation in team design or inadequate data may require ensuring the representation of groups such as ethnic minorities, marginalised groups and remotely located populations.[93] Further, organisations may also need to consider involving participants belonging to different groups in society to reduce the risk of bias associated with the people working on the AI project.[94] These bias mitigation measures are provided in the ICMR Guidelines (which are discussed in 'Year in revew') and are purely voluntary in nature.

ii Quality and performance

The Bureau of Indian Standards (BIS), the national standards body of India, has adopted and released Indian versions of various standards created by the International Organization for Standardization (ISO) in relation to AI.[95] Further, BIS is also in the process of adopting an ISO standard for responsible development and use of AI systems, which is expected to be adopted by January 2025.[96] It is clarified that some of these standards are currently in discussion and do not create any legally binding obligations for quality and performance.

iii Transparency and accountability

There are no legally binding obligations in India currently for transparency and accountability of AI systems. Currently, there are articulations of these concepts in voluntary frameworks.

The ICMR Guidelines suggest mitigating the risk of accountability by identifying the role of stakeholders from the manufacturer to the user connected with legal liability of such stakeholder on account of such damage.[97] ICMR also suggests that internal ethics committees may be constituted to oversee designing and development of AI.[98] A feedback redressal mechanism may also be adopted in various stages of the AI life cycle for proper reporting of issues and making necessary changes in the AI system to control the identified risk.[99]

The Complex Adaptive Framework to Regulate Artificial Intelligence (see 'Introduction') further suggests laying down clear responsibilities among developers, operators and end users of AI systems along with embedded tracking mechanism to associate liabilities with various parties.[100]

iv Intellectual property

Reference may be made to 'Year in review' and 'Legislative and regulatory framework', above.

v Liability

Reference may be made to 'Legislative and regulatory framework', above.

vi Fraud and consumer protection

With respect to fraud and AI, India's Central Bank (i.e., Reserve Bank of India) has opined that AI may enable financial institutions to take proactive measures against potential frauds, improving the accuracy and efficiency of their fraud detection systems and strengthening their overall risk management framework.[101] At the same time, there is a need for effective governance frameworks, data integrity and the ethical use of AI to build trust and transparency in financial systems.[102] It is clarified that these are only statements and that no legally binding frameworks have been conceptualised to address the issue of fraud detection and AI.

With respect to the risk of consumer protection, reference may be made to 'Consumer Protection Act, 2019' in 'Legislative and regulatory framework', above.

vii Disclosure and notice-of-use requirements

Due to the absence of a bespoke law on AI systems in India, there is no law that governs, or disclosure and notice of use requirements, or mandates it for that matter. The following rules and statutes address this aspect at a broad level:

1. Government advisories for online intermediaries: Intermediaries whose products can create synthetic content (generative AI and deepfakes, etc.) are advised to mark their content with appropriate labels or unique identifiers that the content was

created synthetically.[103] It is pertinent to note that these are simply directory in nature and are not legally binding.

2. Notice obligation under the DPDPA: The DPDPA lays out the overall scheme for giving notice to a data principal of a data fiduciary's intention to process their digital personal data, securing consent of such data principal and the duties and obligation of the data fiduciary while processing the digital personal data. Data processing companies may leverage AI for data analytics and may thus have to adhere to the notice obligations under the DPDPA.

viii Jurisdiction

Please refer to 'Enforcement', below.

Enforcement

i Public enforcement

No public enforcement has so far taken place in India with respect to AI. As stated above, the Indian competition authority (the competition law regulator) is currently conducting a market study on AI.[104] No central regulator for AI has currently been set up, and there is no information currently regarding the contours of public enforcement in the context of AI, if it may come up at all.

ii Private litigation

Private litigation has been initiated with respect to AI, and more so in the context of personality rights, intermediary liability and child safety issues. Reference may be made to 'Year in review'.

India has a very robust private litigation enforcement mechanism. The Indian court structure comprises one apex court (i.e., the Supreme Court). The Supreme Court monitors 24 high courts, and the high courts consequently supervise approximately 600 district courts. There are five high courts that exercise ordinary original civil jurisdiction, which implies that a private litigation can be directly instituted before the high court itself. These are the High Courts of Delhi, Madras, Bombay, Calcutta and Himachal Pradesh (Shimla).

The private litigation that has been initiated currently with respect to AI has been before the High Court of Delhi. The Delhi High Court is also considered to be one of the premier courts in India for the enforcement of IPR issues and its interrelated technology law issues.

To further bolster India's enforcement regime, in October 2015, the Commercial Courts Act came into effect, which empowered the establishment of specialised courts in India for adjudicating commercial disputes, which included intellectual property law disputes. As per the Commercial Courts Act, a commercial division was set up at the high courts, which exercised ordinary original civil jurisdiction through the appointment of one or more single judges. In such territories, a commercial appellate division was set up at the level

of the division bench of such high court (which included the High Courts of Delhi, Bombay, Calcutta, Madras and Himachal Pradesh (Shimla)). On the other hand, in territories where the high courts did not exercise ordinary original civil jurisdiction, the Commercial Courts Act empowered the state government to set up commercial courts at the level of the district court, with a commercial appellate court in the relevant high court corresponding to the said district. The jurisdiction to approach either a commercial division or a commercial court was identified in pecuniary terms. For example, currently, to invoke the jurisdiction of the commercial division of the High Court of Delhi (which exercises ordinary original civil jurisdiction), the lawsuit has to be valued above US$250,000.

Apart from jurisdiction, in terms of procedural changes, the Commercial Courts Act enabled adoption of best practices to reduce the lifespan of a commercial dispute action and simultaneously increase the general pace of adjudication at various stages of a lawsuit. For instance, if the defendant fails to file their written statement within 120 days, their right to file their written response is forfeited. Similarly, if the plaintiff fails to file their replication within 45 days of the defendant's written statement coming on record, the same may bar the plaintiff's replication from being considered by the court. Additionally, the Delhi High Court further amended its procedural rules in 2018 to permit service by WhatsApp and the recordal of court evidence by way of videoconferencing. All of these changes have streamlined the procedural aspects of litigation.

Moreover, in 2021, the Intellectual Property Appellate Board (the tribunal that acted as the first appellate board from various IPR registries such as the Patent Office) was abolished. The erstwhile IPAB was present in five locations, and this has led to the creation of intellectual property divisions at the relevant high court of those territories. Illustratively, the Delhi High Court created an intellectual property division in 2022 and enacted the Delhi High Court Intellectual Property Rights Division Rules, 2022 to further regulate the procedure of this division. These specific benches of the Delhi High Court now hear only IPR disputes. The time period of the litigation has come down to around one to one-and-a-half years.

The AI disputes that have been litigated so far and outlined in 'Year in review' have been adjudicated upon by the intellectual property division. These disputes have benefited from the changes brought about by the Commercial Courts Act, the Delhi High Court Rules and the intellectual property division. This demonstrates that India's enforcement regime is robust for enforcement of private rights, even for AI disputes.

Legal practice implications

As noted above in 'Year in review' and 'Legislative and regulatory framework', courts in India have started using AI systems to aid in their tasks in the justice delivery system. Continued responsible and effective use of AI by the judiciary has the potential to significantly enable justice delivery in a fast and effective manner. As AI is also used for translation services, its use also assists in bridging linguistic barriers, increasing access to justice.

AI is also a component of the larger digital initiative adopted by the Indian judiciary. The Government of India recently approved Phase III of the eCourts Project,[105] which will span over four years. Decentralised through the respective high courts, this initiative intends to facilitate the administration of justice by rendering it more accessible, affordable,

dependable, predictable and transparent for all parties involved.[106] The potential outcome of the scheme also includes the use of AI and its subsets for a smoother user experience and smart scheduling.[107] Further, it is also intended for emerging technologies to be used to make court processes more efficient and effective, reducing pendency cases.[108]

Outlook and conclusions

With AI playing a pivotal role in the growth story of the Indian economy, the legislature and the judiciary have played an important role in regulating and curbing the misuse of AI technology. India has enacted the DPDPA and clarified how the IT Act and the IT Rules may enable in the regulation of AI. On IPR, the parliamentary standing committees have recognised AI as a discipline of computer science, clarifying that laws and cases relating to computer-related inventions may continue to be applicable for AI systems. Moreover, the necessary impetus for AI inventions has been provided, as it has been recommended that to facilitate AI patents, India may look at patenting algorithms by linking the same to a tangible technical device or a practical application as adopted in the European Union and the United States. Consistent with the current global position, it has been observed that AI is not a juristic person, which may entitle it to patent inventorship or copyright authorship. Finally, myriad soft-law frameworks to articulate an AI governance framework from an Indian lens have been framed since 2018, showing that India has been ahead or at par globally while thinking of risks emanating from AI systems.

The Indian judiciary has also taken the lead in AI. Not only is AI being used as an assistive tool by the judiciary, which initiative is led by the apex court, but reliefs are also being granted on account of the harms caused by AI tools. The Anil Kapoor, Jackie Shroff, Amitabh Bachchan and Aradhya Bachchan cases demonstrate this. These harms that have been curbed by the courts extend from harms caused by generative AI tools, AI chatbots to misuse on online platforms in the context of children.

The ascent and resounding impact of AI in India has been an extraordinary voyage, propelled by a thriving network of start-ups, educational establishments, government initiatives and global enterprises. AI is significantly influencing multiple industries, offering the potential for development, enhanced productivity and groundbreaking advancements. As AI's omnipresence, especially generative AI, in India continuously evolves, the following will remain pivotal for any enterprise: (1) mechanisms to protect and compensate creators; (2) developing policies with regard to the use of generative AI tools; (3) envisaging AI governance structures for responsible AI development; and (4) monitoring and complying with the evolving legal landscape.

Moreover, in order to fully harness the promise of AI within India's socio-economic growth, it is imperative to strike a balance among innovation as well as responsible deployment of AI. The work commenced by BIS on AI standards is one example of how such a balance may be struck, and this may very well be the next frontier for India's continuously evolving AI landscape.

Endnotes

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3   The Copyright Act, 1957.   ^ Back to section

4   Digital Personal data protection Act, 2023.   ^ Back to section

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6   The Consumer Protection Act, 2019 read with the Consumer Protection (E-Commerce) Rules, 2020.   ^ Back to section

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23 Section 4 of the DPDPA read with Sections 6 and 7. ⌃ Back to section

24 Section 5 read with Section 6 of the DPDPA. ⌃ Back to section

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66 A significant social media intermediary is an intermediary that has a number of registered users, which threshold of users is notified by the central government, see Rule 2(v). ⌃ Back to section

67 Section 2(33) of the CPA defines product as – ''product' means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs'. ⌃ Back to section

68 Section 2(42) of the CPA defines service as – ''service' means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service'. ⌃ Back to section

69 Section 2(7) of the CPA defines a consumer. It includes a person who '(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose'. It also includes a person who 'hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose'. The term 'commercial purpose' does not include 'use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment'. The goods and services include both online and offline transactions. ⌃ Back to section

70 Section 2(36) of the CPA defines a product manufacturer. A product manufacturer is defined broadly and includes a person who makes a product, assembles a product, puts his own mark to a product made by others and is involved in placing the product for commercial purposes, and includes a product seller if the said seller also manufactures the product. ⌃ Back to section

71 Section 2(38) of the CPA defines a product service provider as a person who provides any service in respect of such product. ⌃ Back to section

72 Section 2(37) of the CPA defines a product seller very broadly and includes a person who is involved in placing the product for commercial purposes. A product seller can thus include a product manufacturer as well as a service provider. ⌃ Back to section

73 Section 82 of the CPA. ⌃ Back to section

74 For greater detail for the definition of harm, reference may be made to Section 2(22.) ⌃ Back to section

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76 Reference may be made to Section 2(10) of the Consumer Protection Act, 2019. ⌃ Back to section

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