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Indian Strategy for AI & Law, 2020

#AIforNewIndia

Preliminary Recommendations
February 2020

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**INDIAN
SOCIETY OF
ARTIFICIAL
INTELLIGENCE &
LAW™**

**Indian
Strategy
for
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2020**

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About

The Indian Strategy on AI and Law (ISA) is our policy project under the Indian Society of Artificial Intelligence and Law, where we intend to enlighten and discover various avenues of AI Ethics and Law in its multidisciplinary content, and devise solutions for the Indian Economy through policy recommendations, internship programmes and academic conferences.

The Executive Council of the Indian Society of Artificial Intelligence & Law has mandated the production of the Indian Strategy on AI and Law (ISA), 2020, which we intend to submit to various stakeholders in the AI Ethics and Law ecosystem present in India, which includes various state and non-state actors.

We hope that by **December 2020**, we would come up with a comprehensive policy draft that guides for a vibrant and intelligible New India!

Thank you.



**Abhivardhan
Chairperson &
Managing Trustee**

Areas of Research under Recommendation

- Artificial Intelligence and Constitutionalism: Legal and Administrative Challenges
Saurojit Barua, **Research Intern**
- AI & Intellectual Property Law: Suggestions in Indian Context
Aastha Mittal, **Research Intern**
- AI & Development: Entrepreneurial Ethics vis-a-vis Environmental & Social Implications
Siddharth Jain, Doma Koushik Reddy & Rezbi Kaur, **Research Interns**

Artificial Intelligence and Constitutionalism: Legal and Administrative Challenges

Saurojit Barua
Research Intern

Constitutional Adjudication is important to understand the legal and administrative challenges that the existing public and private legislations do have to tackle the redemptions in the area of technology law. This area is specific to AI Ethics, which signifies that our key focus is to propose resolutions on the issues of Constitutional Law and AI Ethics.

Recommendations

Administrative challenges faced by Artificial Intelligence

- The R&D costs of AI are bulky and intergovernmental collaboration with relevant tech diplomacy can make India's constitutional governance system robust and replenishable. Other countries like Japan, UK and China have proposed to collaborate among industries and government entities in India;
- The European Union has proposed public – private partnership incentives, particularly in affairs related to robotics and big data;
- In 2018, the Ministry of Electronics and Information Technology, Government of India set up four committees;
- The four committees that are studying data information are (a) Citizen-centric Service, (b) Data platform, (c) Skilling and reskilling and research and development & (d) Legal regulation and cyber security perspectives;

Democratized Artificial Intelligence in Technological Interactions

- **Open data:** India is a densely populated country. The startups need strong and open data to build their prototypes. Though India has a national data and accessibility policy, i.e., the NCSS, the policy considerations are not competent enough as countries like the US, the UK and member-states of the EU have much availability of open database access for AI-related research. Thus startups have to face many obstacles in innovation;

Recommendations

- To overcome the problems faced by startups, the government can provide access to relevant data required for AI Ethics research through a database support policy. The Government can also provide access to data through open data platforms which provide range of data collected by various ministries. The State of Telangana has already developed its own database policy. Other states should also take some initiative if they can do so. Further state and central government agencies need to actively pursue and achieve a **National Data and Accessibility Policy**;
- The data possessed by certain Private Sector Units (PSUs) may be accessed for rendering innovative solutions for AI research. To protect the interests of the PSUs, the data provided to researchers and developers should be encrypted using federated learning. Furthermore, the Union Government should promote data sandboxes for innovation and privacy protection;
- The NITI Aayog has proposed to create traceability in the AI infrastructure using access control based on local and international regulations to entail robust price discovery mechanisms in data research. It will bring parity but would limit the use of private sector data and should not be replaced by open government data;
- The Union Government should incentivise and promote open artificial intelligence sources toward harnessing and accelerating artificial intelligence research;

Recommendations

Re-thinking intellectual property regimes

- The NITI Aayog pointed out in its reports that that **Section 3(k), the Patents Act, 1970 (India)** exempts artificial intelligence from the definition of a patent. Furthermore, any products or bi-products derived from algorithmic activity would face controversy over patent issues. We believe that the NITI Aayog must consider the issue whether the patenting of products and bi-products of algorithms is possible and that whether the due extent of patenting of the bi-products of algorithmic activity therefore should also be answered. The question of problems faced by smaller companies for using or developing artificial intelligence regarding the issue when the products and bi-products of algorithmic data are patented is yet to be answered;

National infrastructure to support domestic development: Requires capacity for storage and processing

- There is a need to build an infrastructure of data storage for effective storage capacity, input/output operations per second and to gauge the ability to process massive amount of data;
- For improvement in the incumbent national administrative infrastructure confined to cyberspace, the Union Government must upgrade and optimise the effect of scale. Scalability must be prioritized and would require a high bandwidth, low latency and creatively manifested cyber architecture. Thus, it requires appropriate last minute data curation environment;

Conceptualization and Implementation

- Government entities and large companies should promote accessibility and encourage innovation in artificial intelligence;

Recommendations

- For example: the State Government of Karnataka in collaboration with NASSCOM is in the process of setting up a centre of excellence for data science and artificial intelligence;
- Further, the NITI Aayog in the **National Strategy for AI, 2018** had proposed a two-tier integrated approach towards accelerating research and suggested the Central Government to establish centres of excellence which should involve wide range of experts like lawyers, developers, political philosophers and other relevant stakeholders;
- To develop skills and adopting artificial intelligence, educational institutions must provide AI Ethics as a Course under the academic curriculum of schools and IT institutions should include courses on ethics, privacy and accountability of AI to estimate the developer's technology and service they are developing;
- The NITI Aayog had proposed the adoption of artificial intelligence by public entities outside workplace and by individuals. This could include catalysing shift in the mindset to lifelong learning and discussion incentives around potential implications of human-machine interaction and early childhood awareness and education;
- More focus on national minorities is required in the areas of skill development and employability via education. It would deepen the societal and global inequalities among the people and would render artificial intelligence in order to reskilling and processing of the technology infrastructure;

Recommendations

- As solutions can be converging, the data rendered from consumers can be from a variety of public and private sources - from third party sources or generated by the artificial intelligence and its interaction with its environment.;

Legal challenges faced by artificial intelligence

- Privacy and security is of foremost importance. The public and private sectors have failed to protect the interest of the citizens in cyberspace. The debate on privacy in India is based on the issue that companies are using consumer data inappropriately and they are misusing large numbers of consumer data for competitive advantages for perfecting their algorithms. Thus it may violate the Articles 14, 15, 19 & 21 of the Constitution of India, 1950 though it does not affect consumers negatively in a physical sense of understanding. Nevertheless, there are ethical implications and these implications must be adequately adjudged;
- Internal and external auditing related to AI can be a reasonable mechanism towards creating transparency in the processes and results of AI-based solutions as they are implemented;
- There are different forms and levels of transparency which include factors like criticality of function, potential direct and indirect harm, sensitivity of data involved, actor using the solution;
- It will be important for India to define standards around human-machine interactions including the level of transparency that will be required;

Recommendations

Recommendation to overcome the Legal Challenges

- **Enacting a National Data Protection Law and Privacy law based on International Standards to Police AI:** In India, data are available to both public and private sectors which in turn may infringe the privacy of the citizens and persons under Indian Law. There are no proper guidelines to regulate the privacy of the citizens. India needs to adopt an AI Privacy and Data Protection Law (or measure) which in turn may pass the following test we propose:
 1. *How algorithms are being trained ?*
 2. *How traditional data categories (PI vs. SPDI - meta data vs. content data etc.) need to be revisited in light of artificial intelligence?*
 3. *How can a privacy legislation be applied to autonomous decision making?*
- **Establishing sectoral regulatory framework:** The Central Government needs to set up a regulatory framework for public and private sector unit;
- **Stringent competition law:** The use of competition law to curb data-exclusionary or data-exploitative practices will first have to meet the threshold of establishing capacity for a firm to derive market power from its ability to sustain datasets unavailable to its competitors;

AI & Intellectual Property Law: Suggestions in Indian Context

**Aastha Mittal
Research Intern**

Intellectual Property Law is important and integral to the juxtapositioning of the legal entitlement of AI in a polity. It is therefore required to understand to provide relevant solutions in the paradigm of utmost requirement to expand the horizons of AI and IPR. Mr Abhinav Misra, Member of the Advisory Council is the lead in the area of AI & IPR in the organization.

Recommendations

Recommendation to overcome the Legal Challenges

- AI may, someday, obtain status equal to that of a human, however this remains a distant reality. To hold IP rights, an AI would require to hold other legal and human rights;
- The next question which remains a confusion is whether IP protection can be claimed for an AI based software. In different countries, this question has different answers, however, in India for patenting AI, the Computer-related inventions (CRIs) guidelines can be followed. These guidelines have provisions on computer-based, algorithm-based and software-based innovations, inventions and discoveries, but many scholars provide that it can also be used for AI based inventions;
- We could take a path similar to that of China which promises to become a world AI leader by 2030. China takes a three-tiered strategy: first, understanding and accepting the different functionalities of AI by this year of 2020. Second, make breakthroughs in the industry which would ultimately pave the way for them to become AI world-leaders by 2030, as they hope to be. Thirdly, to establish themselves at that pivotal position;
- The AI ethics are not yet formalized and far from being legislated. When computers, machinery and systems are developed then the producers have to strike a balance between accuracy and fairness. Due to the lack of proper and formulated AI ethics, the producers and their superiors tend to bend towards the more profitable side which, here, is accuracy. Thus, sacrificing its fairness and bringing the possible risks of biases and unfair treatments and decisions. They are based on 3 components: lawfulness, compliance with laws, and regulations of the land which should be technologically and socially robust;

Recommendations

Recommendation to overcome the Legal Challenges

- This would help maximize the benefits and minimizes the risks. There is a need for a social and technological- promoting safe atmosphere. This was a suggestion in the ISA 2019. What is needed in this year is its implementation and resultant outputs. Lawfulness could be ensured by checking whether the current IPR and AI laws go hand-in-hand with the laws of the land as they should not contrast the basic rules of the nation. Though these are new regulations, they will always remain inferior to the established laws;
- The lack of transparency in these algorithms may lead to further discrimination against these groups, thus making situations worse;
- A possible solution to this would be to develop an '**AI Transparency Bill**' which would call for the need to decrease algorithmic biases and making the positions of those disfavoured even worse and this bill be enacted so as to ensure the protection of the biased subjects and the subjugation of those who bias and use this technology maliciously to their advantage. This should also be open to public scrutiny. It is time to ensure that the differences which already exist to not further deepen with this drawback;

AI & Development: Entrepreneurial Ethics vis-a-vis Environmental & Social Implications

Doma Kaushik Reddy
Research Intern

Rezbi Kaur
Research Intern

Siddharth Jain
Research Intern

AI has a special relationship with the policy and politics of development and its economics. Considering the Indian scenario, we believe it is important and never too late to work and emphasize solutions in the due areas related to Developmental Economics, Entrepreneurial Ethics & AI. Abhivardhan, our Chairperson, leads the area under the Organization.

Recommendations

- The amount of data that is circulated in India within a day is more than other countries could even imagine. So, the absence of a strict privacy law allows both the public and private sector to easily access large amounts of data. To remove this gap, some upcoming start-up companies have started practising anonymising of data before they use it. For the the first time ever, the large companies, that acquire and circulate more data, are the ones that are creating a problem here. So, in order to ensure rights and address emerging challenges posed by artificial intelligence through big data, India needs to implement a comprehensive privacy legislation applicable to the private and public sector to regulate the use of data and artificial intelligence. This legislation will have to address more complicated questions as well, such as the use of publicly available data for training algorithms, how traditional data categories need to be changed in accordance with AI, and how can a privacy legislation be applied to autonomous decision making. Similarly, surveillance laws also need to be revised to provide for AI driven technologies such as facial recognition, UAS, and self driving cars as they provide new means of surveillance to the state and have potential effects on other rights such as the right to freedom of expression and the right to assembly. The Srikrishna Committee released a draft data protection bill for India in August 2018. The Bill brings under its purview companies deploying emerging technologies and subjects them to the principles of privacy by design and data impact assessments but is silent on key rights and responsibilities, such as the responsibility of the data controller to explain the logic and impact of automated decision making in defined circumstances;

Recommendations

- Globally, an expanding area of research is ascertaining the social consequences of AI with a particular focus on its tendency to replicate and magnify existing and structural inequalities. Problems such as data invisibility of certain excluded groups, the myth of data objectivity and neutrality and data monopolisation contribute to the impacts of big data and AI. So far much of the research on this subject has not moved beyond the exploratory phase as is reflected in the reports released by the White House and Federal Trade Commission in the United States. The biggest challenge in addressing discriminatory and disparate impacts of AI is ascertaining where value-added personalisation and segmentation ends and where harmful discrimination begins. Some cases where AI can have discriminatory effects are denial of loans based on attributes such as neighbourhood of residence as a factor which can be used to overcome anti-discrimination laws which prevent adverse determination on the grounds of race, religion, caste, gender, or adverse findings by predictive policing against persons who are unfavourably represented in the structurally biased datasets used by the law enforcement agencies. There is a dire need for impact regulation in sectors which see the emerging use of AI. Regulation intended specifically to avoid outcomes that the regulators feel are completely against the consumer, could be an additional tool to increase the fairness and effectiveness of the system;

Recommendations

- The talks of use of competition or antitrust laws to govern AI is still at an early stage. However, the emergence of numerous data driven mergers or acquisitions such as Yahoo-Verizon, Microsoft-LinkedIn and Facebook-WhatsApp have made it difficult to ignore the potential role of competition law in the governance of data collection and processing practices. It is important to notice that the impact of Big Data goes far beyond digital markets and the mergers of companies such as Bayer, Climate Corp and Monsanto shows that data-driven business models can also lead to the joining of companies from completely different sectors as well. Till now, courts in Europe have looked at questions such as the impact of combination of databases on competition and have held that in the context of merger control, data can be an important question if the undertaking achieves a dominant position through a merger, making it capable of gaining further market power through increased amounts of customer data. The evaluation of the market advantages of specific datasets has already been done in the past, and factors which have been deemed to be relevant have included whether the dataset could be replicated under reasonable conditions by competitors and whether the use of the dataset was likely to result in a significant competitive advantage;

Recommendations

- However, there are few circumstances in which big data meets the four traditional criteria for being a barrier to entry or a source of sustainable competitive advantage, which are inimitability, rarity, value and non-substitutability. Any use of competition law to reduce data-exclusionary or data-exploitative practices would initially have to meet the threshold of establishing capacity for a firm to derive market power from its ability to sustain datasets which cannot be accessed by its competitors. So, the distinct ways in which network effects multi-homing practices and how dynamic the digital markets are, are all relevant factors which could have both pros and cons. There is a need for greater discussion on data as a source of market power in both digital and non-digital markets, and how this legal position can be used to curb data monopolies, especially considering the government backed monopolies for identity verification and payments in India;
- The Consumer Protection Bill, 2015 has introduced an expansive definition of the term “unfair trade practices.” This definition includes the disclosure to any other person any personal information given in confidence by the consumer. But, this clause has left out unfair trade practices such as disclosures under provisions of any law in force or in public interest. This increases the need to ensure that principles such as safeguarding consumers personal information in order to make sure that the same is not used to harm them, are included within the definition of unfair trade practices. This would create a sense of trust that is highly required before the consumers or users of AI could even think to input their personal data;

Recommendations

- On a sectoral basis, there are a number of existing laws and policies that are appropriate with respect to AI. For example, in the health sector there is the Medical Council Professional Conduct, Etiquette, and Ethics Regulations 2002, the Electronic Health Records Standards 2016, the draft Medical Devices Rules 2017 and the draft Digital Information Security in Healthcare Act. In the finance sector, there is the Credit Information Companies (Regulation) Act 2005 and 2006, the Securities and Exchange Board of India (Investment Advisers) Regulations, 2013, the Payment and Settlement Systems Act, 2007, the Banking Regulations Act 1949, SEBI guidelines on robotic advisors etc. Before new regulations and guidelines are developed, comprehensive exercise needs to be undertaken at a sectoral level to understand if these sectoral policies adequately address the changes being brought about by AI and, if it does not, ascertaining whether an amendment is possible and what form of policy would fill the gap;
- It is an accepted fact that for any Artificial Intelligence or Machine Learning software/application to work, there is a need for a huge amount of data input to figure out the necessary patterns, to generate outcomes, or to point out problems, or any other function it was developed for. With the large amounts of data which goes into the program by way of human input or collection by itself, there is a possibility of an AI bias which arises out of this process. AI bias, also known as algorithm bias, is a situation where the end products or the results of the purported AI software is systemically prejudiced due to erroneous assumptions in the machine learning process.[1] These prejudices may have arisen due to the input process even though it may have been done objectively, or few scholars argue that it is a direct transfer of the bias of the human who develop the software.

• [1] <https://towardsdatascience.com/what-is-ai-bias-6606a3bcb814>

Recommendations

- In businesses, when an AI is employed by the entrepreneur there is a chance for this AI bias which would come about due to his innate biases[2]. This could prove detrimental to the entrepreneur himself because he may be missing out on potential customers if it is a sales-based business, it may give an incorrect answer if it is a consultation-based business so on and so forth. One classic case of this bias in an AI system can be seen in the pretrial assessment tool which is an AI tool employed by the New Jersey Criminal Justice System to assess the risk of prisoners absconding or escaping trial while on bail, thought his tool has changed the way bail system works in that state but it has been criticised by a few for discrimination against the black people which is argued to have come through these erroneous assumptions by itself.[3] Now that we have established that there is a problem with AI bias, both to the customers and the entrepreneurs, one plausible solution which can be taken up by them(entrepreneurs) is the employment of data scientists or experts to continually debug this issue of whatever bias that may creep in. These data scientists would involve themselves in selecting the right sources of data, manipulation of the data collected in the right way, and to integrate new data with the pre-existing data within the business. This is a continuous process.

[2] <https://www.research.ibm.com/5-in-5/ai-and-bias/>

[3] <https://www.wisconsinwatch.org/2019/02/debate-rages-over-whether-pretrial-risk-assessments-are-racially-biased/>,
<http://www.abajournal.com/news/article/can-racist-algorithms-be-fixed>

Recommendations

- This is the age of data, of various natures, we are living in. In any given AI, it is quintessential that data is inputted. The type of data differs from software to software and business to business. Large amounts of data involve a risk of potential misuse of the data either by selling of this data by the entrepreneurs, which is not a new practice in the market.[4] Or this data in the open situation would also arise out of a hacking which is also a possibility or a situation one may face.[5] This leak in the data, sometimes, will and will not affect the entrepreneur. The customer may lose faith in the provider (entrepreneur), because of the leak in the information and lose their existing and potential customers due to such leak in the information. And this should be enough incentive for the person to employ security measures to tackle this issue. The law will, of course, provide recourse for this breach to their fundamental right to privacy but the entrepreneurs also have to do something on their part to mitigate, if not stop this from ever happening. To prevent such unethical hacking, they need to invest in some robust security software which helps prevent such situation. Not only does this help prevent the data from going public but also helps in preventing the hackers from crippling the AI from within the program itself which is also a possible scenario which one could face and has been seen in the past as well. [6]
- Accountability, Responsibility, Transparency is the cornerstone of every organisation in any field to run successfully. Even more so, when employing technology like AI. Entrepreneurs should be equipped with the knowledge of how such a technology works so as to be accountable to their customers when there is a need to explain and justify one's decision in the context of AI, accountability should be ensured by the entrepreneurs;

[4] <https://indianexpress.com/article/india/up-phone-recharge-shops-sell-phone-numbers-of-women-reports-4505270/>;
<https://economictimes.indiatimes.com/tech/internet/how-data-brokers-are-selling-all-your-personal-info-for-less-than-a-rupee-to-whoever-wants-it/articleshow/57382192.cms?from=mdr>

[5] <https://healthsecurity.com/news/32m-patient-records-breached-in-first-half-of-2019-88-caused-by-hacking>

[6] <https://www.wired.co.uk/article/artificial-intelligence-hacking-machine-learning-adversarial>

Recommendations

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[4] <https://indianexpress.com/article/india/up-phone-recharge-shops-sell-phone-numbers-of-women-reports-4505270/>;
<https://economictimes.indiatimes.com/tech/internet/how-data-brokers-are-selling-all-your-personal-info-for-less-than-a-rupee-to-whoever-wants-it/articleshow/57382192.cms?from=mdr>

[5] <https://healthsecurity.com/news/32m-patient-records-breached-in-first-half-of-2019-88-caused-by-hacking>

[6] <https://www.wired.co.uk/article/artificial-intelligence-hacking-machine-learning-adversarial>

Recommendations

- The function of guiding action (by forming beliefs and making decisions), and the function of explanation (by placing decisions in a broader context and by classifying them along moral values) are both quintessential to ensuring accountability.[7] A responsible AI means a capable system which identify errors and unexpected results and rectify them in the right way. Here, in this context transparency means that the process through which an AI or he mechanisms, results which are important to the stakeholders are to be made known to them and the need for that could be collectively termed as transparency. An entrepreneur has to embody the principles of accountability and transparency, the information regarding the same are not to be kept in secrecy contravening the aforementioned principles. An entrepreneur, in his own interest, should take necessary steps towards the realisation of these principles and employ the AI so as to go towards the same. An AI which cannot do the same, will not be trusted by the customers or the potential market. [8]
- Environmental considerations in an AI programme. Environment, as a resource, is understood only as something which is utilizable and only to be used. This line of thought has led to the deterioration of the common pool resources. Technology has contributed to this rapid deterioration of the commons. AI, which is the set to cause the next big industrial revolution, is about to change the way we traditionally did things. And with this radical change, environment should no longer be seen only through the lens of the utility it holds but considerations like sustainability, pollution must be fed into the AI systems so that preservation of environment is also done or looked into;

[7] <https://medium.com/@virginiadignum/the-art-of-ai-accountability-responsibility-transparency-48666ec92ea5>

[8] Ibid.

Recommendations

- The Critical legal studies argument goes in the direction that, any instrument made for supposed welfare or with any other intent only benefits the ones who created it. Same can be argued for AI wherein entrepreneurs use AI for their benefits and environment could be on the non-benefitting end of the line. With government initiatives like carbon tax, or any other form of sin tax, this would incentivise the business personnel to take into consideration environmental factors which would be affected by the way of the type of the business and the AI process in furtherance of the same;
- When developing an AI especially for the Indian demography, is pertinent to keep in mind the 'Indianness' of the system, since the people here are still very attached to the values, traditions and cultures. India has a huge income divide which naturally means that the system requirements and inputs will vary from region to region. For e.g. – The inputs and information requirements of a big business city such as Mumbai/Delhi/Bangalore would be different from the inputs and requirements from cities in Bihar/Uttar Pradesh/Jharkhand;
- The same would apply to North India v. South India demography, which are drastically different;
- This means that an AI system customised for India cannot be copied on the lines of the USA or other Western European countries, since they have relatively similar data input and output throughout the nation. While in India, the case is different;

Recommendations

- This means that the entrepreneurs can purposely implant some AI bias to suit specific demography. AI bias can be defined as the algorithm bias where the AI system is spiked. It is systemically prejudiced due to erroneous assumptions in the building process of the of the system. A lot of times these biases are created by the developers themselves, other times, they are the result of the poor and uniform quality of data fed to the AI system. Regardless of the source, bias can be both useful or harmful for the entrepreneur. This means that the AI systems have to made with precision and keeping in sight the intricacies of the bias (if present);
- AI system has to be bankable enough so that the people/clientele is not scared of it. They shouldn't be too worried about the secrecy of their data or information. It is the responsibility of the entrepreneur and developers to look into the safety and storage of such sensitive data. For e.g. – The case of Cambridge Analytica resulted in salty public relations and did cost Facebook both financially and legally;
- Such incidents should not happen again in future and it the responsibility of the data collectors to look into the security. And even if such accidents do occur in future, such entrepreneurs along with the AI system should be held legally liable;
- **Societal implications and reactions with regards to AI acceptance:** Also, the duty of an AI system towards the citizens and the government;
- **Quality of life at Earth is deteriorating at a faster pace than ever:** Climate change is an evident reality. In such times it won't be stupid if the AI system are a bit tilted towards the nature and environment. Consumerism and capitalism can take a back seat here since they have done enough damage to the natural resources already;

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