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DO WE REALLY NEED TO BE INTELLIGENT ABOUT ARTIFICIAL INTELLIGENCE? TIME FOR EFFECTIVE OVERSIGHT

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I. Introduction

The integration of Artificial Intelligence (“AI”) into the legal landscape brings a paradigm shift promising efficiency and accessibility. From Online Dispute Resolution (“ODR”) mechanisms to AI-powered mediators, the legal sector is witnessing transformative applications of AI. However, the evolution of AI in law brings forth complex challenges which include, *inter alia*, privacy risks and data protection concerns. This article seeks to explore the interplay of AI with law and the need for a holistic regulatory regime. By examining the intricate interconnections between AI and law, we aim to unravel the complexities and offer insights into how a comprehensive regulatory approach is essential to navigate the transformative potential of AI.

II. AI Empowering Legal Efficiency: A Paradigm Shift

AI, with its versatile applications, has a myriad of advantages across diverse domains. From streamlining complex processes to revolutionising how information is processed, AI has become an indispensable force in shaping the contemporary technological landscape. The ability of AI to analyse intricate patterns in data enhances the decision-making processes.

In the field of dispute resolution, AI's

application can bring about numerous advantages. Small-scale disputes, often involving straightforward issues, can be resolved by AI, thereby reducing costs, easing access to justice, and alleviating court backlogs. Predictive AI can facilitate settlements even in high-value disputes, mitigating the expenses and risks associated with a full trial. Predictive AI, refers to AI systems that use advanced algorithms and machine learning techniques to analyse data and predict possible outcomes in relation to legal disputes.

A notable example is the emergence of ODR, where AI plays a pivotal role. The integration of AI into ODR brings forth a paradigm shift. Through advanced algorithms and machine learning, AI can ensure a streamlined and efficient resolution process for low-value cases. The ability of AI algorithms to analyse and resolve such cases brings about a dual advantage. Firstly, it translates into a reduction in costs associated with prolonged legal battles. Secondly, it serves as a tool for alleviating the burden on the judicial system.

With digital payments in India projected to surge, the Reserve Bank of India (“RBI”) recognised the need for a seamless dispute resolution system. The RBI introduced the ODR system in 2020, specifically tailored for handling consumer complaints and disputes related to digital payments.¹ The system

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operates through a rule-based and system-driven mechanism, aiming to minimise manual intervention. In such a situation, AI's role becomes particularly significant in handling disputes, such as chargebacks (*i.e., when a cardholder/consumer contacts their bank and asks for a particular charge to be reversed*), within the ODR mandate outlined by the RBI. The introduction of AI can ensure a seamless dispute resolution process which can replace the current manual and resource-intensive approach. By automating tasks from dispute initiation to resolution, AI can reduce operational costs, streamline processes, and align with RBI's vision of an unbiased resolution in digital payment disputes.

In the context of mediation, AI has the potential to revolutionise dispute resolution. AI-based mediators, often referred to as "virtual mediators" or "digital mediators," leverage advanced algorithms and machine learning techniques to facilitate resolutions. These AI mediation platforms adopt diverse approaches, ranging from rule-based systems, where predefined laws and regulations guide decision-making, to machine learning-based systems, trained on datasets of past mediation cases.

AI is currently also playing a pivotal role in various facets of international arbitration. Several applications demonstrate the transformative impact of AI in this specialised legal domain. In e-discovery and document review, it accelerates the analysis of vast data. AI-powered tools have also revolutionised legal research by facilitating smooth access to extensive databases. The efficiency lies in the ability of AI tools to expedite the retrieval of relevant information and providing legal professionals with a comprehensive understanding of legal

nuances. Further, AI also excels in delivering accurate transcriptions which eliminates human errors. AI in arbitrator selection fosters diversity objectively through algorithms. Predictive analytics use of AI offers data-driven insights, which help in informed decision-making.ⁱⁱ

III. Limitations associated with the use of AI in the legal field

The advancements in AI are accompanied by potential limitations. In the realm of arbitrations, which often entail extensive documentation, submitting voluminous data to AI systems can pose notable risks such as concerns around accuracy, confidentiality, privacy, data protection, bias, etc. While AI may be used to find material, it raises questions around the accuracy of the material. AI generates new text using an algorithm based on the prompts received and the data they have been trained upon. AI tools may make up fictitious cases, citations or quotes or refer to legislation, articles or legal texts that do not even exist.ⁱⁱⁱ

AI further raises concerns about the confidentiality and privacy of the information it receives. Any information that one puts into a public AI system may be considered to be published to the whole world. The sensitivity and confidentiality of the information involved in legal proceedings magnify the importance of addressing potential privacy and data protection concerns.

IV. Regulating AI under the existing data protection law in India

At present, there is no special law regulating the use of AI or the potential data protection and privacy concerns surrounding AI. The Digital Personal Data Protection Act, 2023 ("DPDP Act") passed by the Indian

Parliament marks a significant development in the area of data protection. The DPDP Act, in Section 2(h), defines 'data' as a representation of information encompassing facts, concepts, opinions, or instructions. This broad interpretation essentially includes any form of information that can be comprehended or utilised. Moving further, the DPDP Act defines 'personal data' as any information about an individual. This comprehensive definition reflects a commitment and intent to protect a broad spectrum of information.

Entities tasked with the collection, storage, and processing of digital personal data are defined as data fiduciaries. On the other hand, the term 'data principal' refers to the person to whom the personal data relates. DPDP Act has notable implications in the context of AI, including generative AI. AI may be treated no differently from the other technologies processing personal data. As AI spans across various applications, including machine learning, natural language processing, image recognition, and more. Generative AI systems, including language models like GPT, inherently involve the processing of vast amounts of digital data, including personal information. Consequently, AI, including generative AI, can arguably be treated as a data fiduciary and be said to be bound by the rigorous standards set out under the DPDP Act in India.

The DPDP Act imposes a set of obligations on entities involved in data processing. According to the DPDP Act, data fiduciaries, the entities responsible for processing personal data, are mandated to adhere to specific provisions and operate solely for lawful purposes. This includes obtaining consent from the data principals or engaging in certain legitimate uses. The term "lawful

purpose" here signifies any purpose not expressly forbidden by law. When seeking consent, data fiduciaries must furnish a comprehensive notice to the data principal. This notice outlines the personal data to be processed, the purpose behind it, and provides information on how the data principal can exercise their rights and file complaints. The consent, a pivotal aspect of this process, must meet certain criteria – it should be free, specific, informed, unconditional, and clear.

The DPDP Act prescribes substantial fines to discourage violations. Penalties for non-compliance range from INR 10,000 to INR 200 crore, with a maximum cap of INR 250 crore. Therefore, AI platforms, as data fiduciaries, ought to ensure compliance with the provisions of the DPDP Act to avoid significant financial penalties. As AI continues to advance, aligning its practices with the DPDP Act becomes imperative.

V. Creating a holistic legal framework for AI

Regulating the AI sector is crucial, and the current DPDP Act primarily addresses data protection concerns. However, the intricate nature of AI demands a dedicated and comprehensive law to prevent misuse and ensure responsible practices. The DPDP Act rightly focuses on safeguarding personal data, but AI goes beyond mere data processing. It involves complex algorithms, decision-making processes, and potential societal impacts that extend beyond individual privacy concerns. A sector-specific law for AI is necessary to address these broader aspects.

Given the substantial influence of AI systems, it is imperative to establish a dedicated legal framework that not only imparts ethical guidelines but also guarantees fairness, transparency, and accountability. A sector-

specific law becomes instrumental in mandating specific measures to identify and rectify unintentional biases in AI algorithms originating from training data, thereby fostering fairness across diverse applications of AI.

AI's operational opacity, often acting like a 'black box,' makes it challenging to understand decision-making processes. A sector-specific law can impose transparency requirements which will give users and stakeholders the ability to comprehend and challenge AI decisions. In cases of AI errors or malfunctions, a dedicated law becomes essential to establish clear liability by outlining responsibilities for developers, users, and other stakeholders.

Given AI's dynamic and ever-evolving nature, a specific law is also essential to provide flexibility to adapt to emerging technologies and ensure that regulations stay relevant and effective over time. Considering the impact of AI-driven products and services on consumers, a dedicated law should incorporate measures for consumer protection which guard against deceptive practices and ensure consumers have adequate information about AI applications.

This proposal for a holistic legal framework in India may take inspiration from the regulatory models proposed across countries.

Proposed framework for regulating AI by European Union (EU)

The EU has proposed the AI Act^{iv} to regulate AI which is based on a risk-based approach. It classifies AI uses into four categories, viz. (i) Unacceptable Risk, (ii) High Risk, (iii) Low Risk (Generative purposes AI), and (iv) Minimal Risk. In the realm of 'Unacceptable

Risk', the AI Act takes a firm stance against AI systems that pose a direct threat to individuals' safety, livelihoods, and rights (*for example, management and operation of critical infrastructure*). By imposing a prohibition on such systems, the regulation seeks to protect people from severe harm. In the High-Risk category, the AI Act identifies specific domains where AI applications could have significant implications, such as critical infrastructures, education, safety components, employment, and law enforcement. The risks here involve potential biases, lack of transparency, and adverse impacts on individuals' lives. To address these concerns, the AI Act outlines strict obligations, including thorough risk assessments, detailed documentation for transparency, clear user information, etc. These measures aim to ensure that AI systems in critical areas operate with accountability, fairness, and accuracy. Moreover, the AI Act acknowledges the low risks (Generative purposes AI) associated with certain AI systems. The category of low-risk AI systems comprises those AI systems not prohibited and not categorised as high-risk AI systems. Identifying a low-risk AI system is not reliant on a specific definition or criteria, instead, it involves a process of exclusion. Generative AI, like ChatGPT, would fall under the category of low-risk AI. Low-risk AI systems need to comply with transparency requirements under the AI Act. Minimal-risk AI is granted the flexibility for use. For minimal-risk AI systems (*for example, AI that generates or manipulates image, audio or video content*), AI Act requires the European Commission and member states to formulate and implement voluntary codes of conduct for the regulation of these AI systems.

People's Republic of China (PRC) has always been ahead in this race

The People's Republic of China (“PRC”) is taking a leading role in AI regulation through a series of implemented and proposed regulations. Notably, the Algorithm Recommendation Regulation, effective since March 1, 2022, focuses on algorithm recommendation technologies for internet information services.^v The Generative AI Regulation, effective since August 15, 2023, broadly oversees the development and use of generative AI technologies for services in the PRC. These regulations impose obligations on various stakeholders, including service providers, technical supporters, users, and online platforms.

Under Article 7 of China's Generative AI Regulations mandates that generative AI service providers must strictly adhere to legal guidelines during pre-training, optimization training, and other data processing activities. This includes sourcing data and basic models exclusively from lawful origins, respecting intellectual property rights, obtaining individual consent for handling personal information, and implementing effective measures to enhance the quality, authenticity, accuracy, objectivity, and diversity of training data. Furthermore, compliance with relevant laws such as the cybersecurity law, data security law, personal information protection law, and other administrative regulations is mandated.^{vi}

Several nations, such as Israel and Brazil, are currently in the process of creating rules and regulations to effectively regulate AI. This highlights the international acknowledgment of the necessity for legal frameworks that cater to the distinctive complexities and possibilities presented by AI technologies. The ongoing initiatives in these countries are geared towards establishing guidelines that ensure ethical AI practices, stimulate

innovation, and address potential risks linked with the implementation of AI systems.

VI. The wait for an AI specific law should end for India

India faces a confluence of challenges in the realm of AI, including the creation of deepfakes to allegations of plagiarism and the pervasive use of AI in various office settings. Deepfakes, facilitated by AI, blur the lines between reality and fiction, creating a pressing need for regulatory measures to address their potential misuse. Furthermore, instances of plagiarism raise concerns that warrant attention. Recently, the New York Times (“NYT”) filed a lawsuit on December 27, 2023, against OpenAI and Microsoft, alleging the unauthorised use of its content to train chatbots. The lawsuit contends that OpenAI's ChatGPT and Microsoft's Copilot utilised NYT's content without permission, infringing upon the newspaper's copyrights. This recognises the growing complexities and legal challenges associated with the use of AI technologies, particularly in relation to intellectual property rights and content ownership.^{vii}

Further, the integration of AI in office environments, including government offices, introduces a complex set of considerations. While AI offers efficiency and innovation, questions about data security arise, particularly when dealing with sensitive national information. The risk of data breaches underscores the urgency of developing comprehensive regulations to safeguard against such potential threats.

In India, the absence of robust regulations raises concerns around the potential misuse and security vulnerabilities. A comprehensive regulatory approach is essential to address the ethical challenges posed by deepfakes, plagiarism concerns, and extensive use of AI

in diverse business environments.

While the DPDP Act addresses crucial aspects of data protection, the need for a dedicated AI law arises from the lack of a comprehensive regulatory framework for AI. Such legislation would not only address current challenges but also guide the responsible development and deployment of AI technologies proactively, safeguarding against potential misuse and ensuring ethical and equitable practices. Creating a dedicated AI law is not merely about addressing present challenges, it's an opportunity for India to take the lead in shaping the regulatory landscape that fosters innovation while

proactively mitigating the risks associated with the evolving nature of AI technologies.

The Digital India Bill, 2023 announced by the Government of India is a notable step in regulating India's digital ecosystem. Given the nascent stage of the Digital India Bill, there still exists a golden opportunity for the government to reconsider and include a specific framework for the regulation of AI after detailed consultations. This strategic move could fortify India's digital infrastructure and contribute to a comprehensive legal framework that addresses the challenges and opportunities presented by AI technology.

ⁱRBI Notification no. RBI/2020-21/21, Online Dispute Resolution (ODR) System for Digital Payments <https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=3194>

ⁱⁱDLA Piper, IA Meets AI – Rise of the Machines, <https://www.dlapiper.com/en/insights/publications/arbitration-matters/2023/ia-meets-ai-rise-of-the-machines>].

ⁱⁱⁱForbes, Lawyer Used ChatGPT In Court—And Cited Fake Cases. A Judge Is Considering Sanctions, <https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions/?sh=5a63525c7c7f>].

^{iv}European Commission's proposal for a regulation of the European parliament and of the council laying

down harmonised rules on artificial intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206>

^vLatham and Watkins, Commentary on China's AI Laws,

[<https://www.lw.com/admin/upload/SiteAttachments/Chinas-New-AI-Regulations.pdf>

^{vi}China Internet Information Office, Interim Measures for Generative Artificial Intelligence Service Management, [http://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm].

^{vii}NY Times, The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work, <https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html>