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**Law Conclave (2022)**

**Regulating Artificial Intelligence: Issues and Options**

**26th August 2022**

**Amaltas Hall, India Habitat Centre, Lodhi Road. New Delhi – 110003.**

**Executive Summary**

The annual Law Conclave on the topic ‘Regulating Artificial Intelligence: Issues and Options’ was held at the India Habitat Centre on 26th August 2022. The Conclave dealt with the following three major issues.

1. **What are the barriers that exist in the adoption of Artificial Intelligence (AI) technology in India?**
2. **What are the risks and concerns associated with the utilisation of AI Technology?**
3. **How regulations are to be made regarding AI in Developing Countries?**

The Conclave divided in three panels addressed these key points and brought out various legal technological and ethical barriers associated with the adoption of AI in developing countries. It brought under scrutiny key concerns like the violation of privacy, lack of accountability, lack of transparency, biases against specific groups, etc that arise with the increased use of AI.

 The panel discussions brought lessons in AI regulation in other jurisdictions and the need for contextualization, especially in a country like India with a diverse culture where social structures intersect in different ways with technology.

Answering these questions and the varied solution provided is just a small step taken to bring about suitable regulations in the field of AI. It is the need of the hour to not just implement AI technologies across different sectors but also to understand the legal, social, and economic changes that will be brought about by AI. Therefore, this report calls for state-driven regulation of AI that addresses various challenges against developing countries' peculiar socioeconomic and cultural contexts.

**Introduction**

Application of Artificial Intelligence (AI) driven analytics and technology is growing in India across sectors, including healthcare, finance, governance, agriculture, and management. AI, machine learning and deep learning tools are being increasingly employed in diverse ways, e.g., assisting doctors in early detection and suggesting lines of treatment, enabling microcredit institutions in disbursing loans, customer outreach, efficient talent acquisition, and managing e-waste to name a few.

The potential benefits of AI technology, however, come laced with concerns of discrimination between consumers, privacy and exclusion-related risks, and concerns regarding pitching ‘efficiency’ against ‘fairness’ with regard to governmental decision-making. Growing concerns around these risks have fuelled demands for regulatory frameworks specific to AI. At present, law, ethics and regulation trail the development of technology and its innovative applications. Some jurisdictions such as the European Union (EU) have drawn up overarching regulatory frameworks aiming to address questions of algorithmic bias, data privacy, transparency, accountability, and liability.

Developing countries such as India are also witnessing debates around AI regulatory frameworks, and the adoption of existing legal frameworks of other jurisdictions is an emerging option. Contemporary scholarship on law, governance, and regulation however caution against the adoption or importation of legal frameworks of other jurisdictions given the distinct socio-economic contexts of jurisdictions. This caution is specifically relevant to India as AI-driven innovative products and services find strong support due to their potential to foster welfare through innovation. Simultaneously, the potential risks require careful thought given the nascent regulatory and legal ecosystems interacting with technology. Given the same, the tensions between the harms and benefits of AI get accentuated, presenting complex challenges for AI regulation. Against this backdrop, this conference sought to bring a diverse set of actors/stakeholders together to understand the Indian context, discuss the relevance of regulatory models across jurisdictions, and reflect upon what should be the guiding considerations in thinking about AI regulation in India.

**Panel I: Mapping the Field**

This panel, comprising AI developers and deployers, discussed specific use cases from diverse fields such as healthcare and financial markets. Panellists shared their experiences of deploying AI-based interventions to their businesses highlighting the potential of such solutions. Simultaneously, panellists discussed their requirements of data harvesting (both personal and non-personal), their expectations from regulators, and other challenges that hamper the adoption of AI in India.

**Mr. Atul Tripathi, Principal Data Scientist (Cyber Security), Tech Mahindra**

Mr. Tripathi began the discussion by focusing on the elusive ethical dilemmas which could arise due to AI. He substantiated his point with an example of driverless metro trains, wherein he posed a question that if an accident takes place, then who would be held liable for the same? He replied by saying that it would be a third-party liability. But he also questioned that even if it was a third party, who would that be? Another example discussed was the *Zhenhua* data leak wherein a Chinese company harvested all the data available on many prominent public figures. The question posed by him was whether this was an ethical act or not given that the information was available in the public domain.

Through these examples, he substantiated his point that legal, moral, and ethical questions are bound to arise at every step of the way. Mr Tripathi concluded by reminding everyone to engage with the question of ethics before focusing merely on technological advancement.

**QUESTIONS**

1. **What has been your experience in inventing innovative tools deploying AI, and has the law been an impediment or a facilitator?**

**Ans.** Mr Tripathi responded by saying that “law is never an impediment for a law-abiding citizen. It’s always an impediment for a law-breaking citizen”. According to him, everyone needed to take complete responsibility for their own privacy.

**Counter question to Mr Tripathi**- National security is important but where do you draw the line and any trade-offs?

 **Ans**. Data scientists are taught to distinguish between noise and a signal. The state is also equally scared of violating the law of the land. The state acts as a facilitator in protecting privacy.

1. **How do you think the regulators manage the two elements i.e., the speed of change and second the absence of a geographical limitation?**

**Ans.** Mr Atul Tripathi answered by stating that we cannot regulate data as it’s the society that regulates it. It became a difficult task to legislate on a field when we might not be fully aware of its scope. Similarly, earlier no one even thought of third-party liabilities. However, now there have been active deliberations on the same.

**Mr. Badal Malick, Co-founder, KarmaLifeAI**

Mr Malick focussed on the usage of AI in providing financial solutions. Their mission at *KarmaLife* is to provide sustainable finance and other financial services like savings and insurance to every gig worker in India. Furthermore, by helping the workers stabilize their cash flows, *KarmaLife* aimstoeventually unlock their aspirations. He mentioned that the key impediment for the working class was their inability to access credit as there are no adequate data points to assess their creditworthiness effectively. He further cited the TransUnion Bureau Report wherein it was projected that at the end of 2021, approximately half the Indian population remained credit unserved. Access to credit is low even among those who can earn and still deserve the same. According to his own research, 75% of workers ran out of cash even before their next payment cycle was over. Around 85 % of the Indian workforce i.e., 450 million people, were non-salaried workers. He further explained the intricacies involved in the credit industry and the role played by his organisation by employing innovative AI-based solutions. Mr Malick concluded by offering some suggestions on the potential applications of AI to address the imminent financial requirements of a massive country like India.

**QUESTIONS**

1. **What has been your experience in deploying AI in offering Fintech solutions, and do legal considerations influence your decisions?**

**Ans.** Mr Malick replied that ‘Under Writing’ was the answer to this question. Other applications of AI were credit allotment and collection. Although India doesn’t have specific laws as such, but the situation is evolving. Looking at digital lending, there have been guidelines from a regulatory standpoint. In turn, Mr Malick asked the audience to ponder upon questions like:

* What is the right trade-off between ‘innovation and customer value’ vs. ‘customer protection’?
* How does one ensure a level playing field between the small players vs. large players?
1. **How do you think the regulators manage the two elements i.e., the speed of change and second the absence of a geographical limitation?**

**Ans.** Mr Malick held a different perspective. By referring to a piece written by Vivek Wadhwa for regulating quantum computing, he said that we missed the boat on AI and let's not miss it on quantum computing. Regulators are always catching up to the latest advancements. He substantiated this by referring to the unethical practices adopted by data-based tech companies wherein the same search parameters yielded different results. Mr Malick further stated that in Fintech, data and AI can be used for regulation. Regulators themselves must innovate and use data to become better regulators in sync with the realities of today.

**Dr Nishtha Phutela, Assistant Professor, School of Engineering & Technology, BMU**

Dr Phutela started the discussion by emphasising upon the importance of ‘human-activity detection’. It has become imperative to monitor human activity in many cases, such as aged patients in a hospital. The existing solutions such as smartwatches which monitor human activity or devices measuring individual stress levels were very expensive, ranging from INR 10,000-50,000 respectively. To this end, she explained her research to develop a system for identifying human activities using device-agnostic methods. The cost-effective solution proposed by her team was the *Sniffer* device priced at merely Rs 70 per device.

*Sniffer* is device-agnostic i.e., the individual is not required to wear anything on their body. She further added that it is quite convenient to deploy using a Wi-Fi setup. While the raw data received by her team is in gigabytes, they deploy Machine Learning to identify the activity patterns. Her team was also working on a use case, whereby deploying this technology in students’ dormitories would allow the guardians to know whether the students experienced good sleep or not. For instance, if the students use phones till late at night, it would be captured by the device. Such information further helped their thesis for understanding the potential reasons why students have disturbed sleep. Lastly, she also stated their results of using the *Sniffer* device are 90% accurate in classifying these activities.

**Panel 2: RISKS & CONCERNS**

Violation of privacy, lack of transparency, bias against specific groups, lack of accountability, and job losses have been some of the key concerns associated with the increased use of AI. These risks merit intervention of the state in the form of regulation. Such risks may get amplified against the peculiar socio-economic background of a developing country such as India. Against this backdrop, this panel identified the risks that Indian policymakers and legislators must consider while deliberating AI regulation.

**Mr. Rohan K. George, Partner, Samvad Partners**

Mr George succinctly reminded the panel about the potential harms associated with AI. First, accountability issues might arise as even AI could commit errors in the use cases such as self-driven cars and medical diagnosis. Second, automation could lead to job losses and role reductions. Third, data privacy and cyber-security remained a core challenge since AI training requires massive amounts of information including our behavioural data. Fourth, biases implicit in the training of AI could further discriminate against the marginalised sections of society. Fifth, excessive policing and surveillance fuelled by AI could undermine fundamental human rights. Lastly, increasingly many problems are being solved by AI compared to traditional human intervention. This has also led to challenging intellectual property issues.

As per Mr George, the existing regulatory framework including an outdated Information Technology Act, of 2000 remained incapable of dealing with the kind of abovementioned risks. Presently, only articles 14 and 21 of the Indian Constitution potentially addressed the inherent biases in AI. Intuitively the problems might have easy answers in the domain of tort law, medical negligence legislation, etc. But the fundamental challenge remains the blame allocation and not merely the lack of an adequate regulatory framework. New legislations are required to address such intricate problems which might not be adequately addressed by creating one umbrella legislation. Furthermore, many of the abovementioned problems weren’t issues with the technology but rather issues with society. Such as job loss isn’t an AI or technology problem but an issue with the capitalist structure of our economy. Thus, a holistic approach is required while contextualising AI regulation.

**QUESTIONS**

1. **Does India have regulations to reduce subjectivity?**

**Ans.** Mr. George replied in the negative. According to him, the method of decision-making was not under consideration. Accountability remained a bigger problem since different actors were involved in training the AI whereas the same actors would not be involved in testing the models. There remains an ambiguity in framing an appropriate evaluation framework.

**Mr. Raj Shekhar, Lead, Responsible AI, NASSCOM**

As per Mr Shekhar, the human species has a peculiar tendency to shift the blame when things go south. One is expected to provide an explanation in an explainable manner. But one can’t similarly reason with AI since the people behind the development of AI are not specifically ascertained individuals but diverse actors such as product engineers, data engineers, data trainers etc. For instance, a reputed technology firm once stated that AI developers should take all the responsibility for algorithmic outputs. However, does that mean board members would be absolved of all liability whatsoever?

It is the need of the hour that private organisations address such concerns through responsible self-regulation. Unless we state our expectations from various actors in terms of practices, one cannot legislate to solve such problems. When people say we need an ‘AI Act’, what does one mean by an AI system? Because even the microphone system used in the conference can be categorized as AI. The core issue persists wherein people still didn’t know how to define AI. The new AI is more akin to human beings and thus particularly unpredictable. Therefore, even the risks associated have become increasingly complex. Since each case is different from the other, one cannot adopt ‘a one size fits all’ approach. Every firm has its own idea of Responsible AI expectations. These expectations should be set by the state and in this regard, NITI Aayog had done a commendable job. Ideally, the expectations should be set from a use-case perspective.

**Prof. Sudhir Krishnaswamy, VC, NLSIU Bangalore**

Prof. Krishnaswamy contextualised the discussion on AI regulation by first discussing Article 14 of the Indian constitution. According to him, Article 14 necessitates us to engage in the means-ends rationality test. Indian courts use such classification tests whereby they allow over-inclusive classification and discourage under-inclusive classification. Our traditional decision making has deliberative rationality i.e., rationality is humanly explainable because of human intervention. The black box algorithmic approach related to automated decision-making does not provide rationality as it deploys an unscripted and unpredictable method for arriving at a conclusion. Therefore, even though one could assess their efficacy, they provide no product rationality. However, this poses a challenge with respect to a traditional Article 14 analysis. If the decision-making is automated by employing the black box algorithms, then only the end product or final decision would be considered. If the said final decision is correct, it would be immaterial as to how one arrived at the conclusion. However, if the emphasis is to provide manifest rationality, then the black box rationality would be unsuitable, particularly for decision-making in public matters requiring increased accountability.

Furthermore, per Prof. Krishnaswamy, the real difficult problem that we will be facing soon relates to the foundations of belief. The reality is that algorithmic-based information discrimination could even shape our beliefs. This exposes a flaw in the Indian constitution as Article 19 of the constitution doesn’t use the word ‘belief’, however the same is used in the preamble. Whereas, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) does have the phrase ‘freedom of belief’. Our international obligations mandate us to let people form their own opinions. Therefore, we need to take such a possibility extremely seriously and we must start rethinking article 19.

**QUESTIONS**

1. **How can AI shape the beliefs of an individual?**

**Ans.** According to Prof. Krishnaswamy, the more one understood the nature of information flow, the clearer became the understanding that even our deepest convictions could be pushed in a specific direction.

**Prof. Pritam Baruah, Dean, SOL, BMU**

Prof. Baruah initiated the discussion with the Australian case law of *Bridges v. Chief Constable of NSW* EWCA Civ 1058 (11 August 2020)*.* In this case, biases regarding the deployment of the facial-recognition technique were challenged. While the first challenge proved unsuccessful, the Court of Appeals struck down the technology. The court reasoned that it was not wholly significant whether the results had a certain threshold of false positives. What also mattered was whether the training data itself was biased or not. Looking at the case, one can ponder upon the variety of risks involved in the deployment of AI. Risks such as replication of biases, risk of scale, risk of bias evaluation, and questions regarding principles of relevance assumed some significance. He further implored the audience to consider some of the concepts associated with AI deployment which deserved attention. For instance, a key factor while analysing AI biases is to look at the kinds of technological tools being adopted. Similarly, parameters of data usage must be clearly defined in order to appropriately assign accountability and obligations. Lastly, it must be ensured that the technology is not indiscriminate in its application.

**Panel 3- A contextual approach?**

The primary challenge for AI regulation is to balance excellence in technology that may foster welfare on one hand whilst ensuring safety and trust on the other. Excellence and trustworthiness are the leitmotifs of AI regulation in the European Union (EU). While the EU model might provide helpful guidance, it’s worth reflecting on whether the socio-economic realities of India as a developing country warrant a tailored approach to AI regulation. The panel reflected upon the lessons from other jurisdictions and the need, if any, for contextualisation which must be reflective of the interests of a variety of different stakeholders.

**Dr Sarayu Natrajan,** **Founder, Aapti Institute**

Dr Natarajan began by elaborating upon Aapti Institute's report on ‘*Artificial Intelligence and Potential Impacts on Human Rights in India*’ as commissioned by the United Nations Development Programme under the Business and Human Rights in Asia program and the EU. The report explored the impact of AI deployment by businesses in India on the human rights of consumers in sectors of healthcare and financial services, and the labour force in sectors of retail and gig economy. According to her, individuals had two kinds of relationships with the legal system and technology. Firstly, as consumerrecipients of it such as financial services and health care, and secondly as workers like platform or retail employees. The notion of contextualization became relevant across both relationships. One’s approach should not be of exceptionalism. The question of contextualization should be invoked at three levels. Firstly, what was the level of principles that could enlarge the measures? Secondly, to what extent do they need to be contextualized? Lastly, why do they need to be contextualized? The tricky part of contextualization remains the fact that India is a diverse country where social structures intersected in different ways with technology. Contextualization has become very important, but it should also synchronize with social reality and not merely with principles. Responsibility should be placed on systems to mitigate harm, to be accommodative, and to be inclusive rather than laying the onus entirely on the consumers or individuals.

**Mr. Aman Taneja,** **Partner, Ikigai Law**

As per Mr Taneja, the contextualisation of AI regulation should be inclusive, human-centred, fair, transparent, explainable, and accountable. Based on the experience of regulation in the EU, the principle of a risk-based approach should be taken into account. However, a ‘one size fits all’ approach might not be suitable. For instance, ‘facial recognition and mass surveillance’ is categorized in the high-risk category with very limited exemptions. But the problem might be exacerbated in a country like India which doesn’t have specific laws on surveillance. Furthermore, one must also ponder upon Data Protection as the application of AI requires a tremendous amount of data, and India doesn’t have a legislative framework to address the same. A fascinating solution to mitigate some of these concerns could be to use *Synthetic data* to train AI sets. There was a definite need for a lot more research on the efficacy of existing tools. For that our approach should be backed by strong R&D and institutional capacities.

**Dr Avik Sarkar, Visiting Associate Professor, Indian School of Business**

 Dr Sarkar stated that India is currently at a principal level of legislation. The technical documents which were introduced in this regard are IEEE’s Ethically Aligned designs, G20 Principles for Responsible AI, and NITI Aayog’s Roadmap for National AI Program. This work should be considered as the intention of the government to formulate a law. It will take a lot of time and deliberations. The law and technology should go hand in hand. Time should be given to technology to evolve. Regarding the regulation of AI as a whole, the landscape remained the same across the world. Increasing focus on R&D, access to computing, access to data, and ethical concerns have been some of the common focal points of the strategy developed by countries for AI. As per Dr Sarkar, Indian regulators have been proactively working on AI regulation. The Bureau of Indian Standards has a committee working on standards of AI. One needs to carefully look at aspects like bias and interpretability.

**Ms Avisha Gupta, Partner, L&L Partners**

According toMs Gupta, we subconsciously reinforce our biases in machine learning. The methods to mitigate bias should be looked upon. First, emphasis should be laid upon algorithm design. Therefore, questions such as how an algorithm should be designed assume great significance. There should be recognition of bias not just in human beings but also in machines. Secondly, inclusive coding practices such as SUPACE should be incorporated.

**Conclusion**

In the first session, the theme was the practical challenges in the deployment and development of AI. Numerous intricacies were addressed ranging from the kind of technology used to the type of data (personal or non-personal) to be gathered, and to the ethical dilemmas associated with privacy.

The second session focused on the problems of bias, accountability, and challenges in the deployment of AI. These problems get amplified in the socio-economic context of a developing country like India. In a fragmented society with different layers, ethnicity, and economic disparity, it is very important to strike a balance between competing interests.

We need to think about regulation in the context of a developing country. Regulation of AI should not have a *Brussels effect*.

To conclude if we really want to improve human well-being in the digital age, we need more than abstract principles and technical solutions. Legislators in other jurisdictions have introduced algorithmic transparency and accountability bills aimed, among other things, at combating the discriminatory consequences that AI often produces. Therefore, this report calls for state-driven regulation of AI, of which rights-based legislation is an important part.

This was the first time that the School of Law, BML Munjal University brought together different stakeholders for academic deliberation. We believe that it will take due course of time for the contextualisation of regulation pertaining to AI. The School of Law, owing to its strength as a part of an interdisciplinary university, will endeavour to work on a regulatory framework that is proportionate, light-touch and sensitive to the realities of jurisdictions.