THE ETHICAL QUESTION OF USING AI IN THE COURT ROOMS FROM THE VANTAGE POINT OF CRIMINAL JUSTICE SYSTEM

"There is a debate about ethics in AI. But for the justice system, there is no debate."[1] – Prof. Michael Legg, UNSW Law, Australia.

Introduction

The widespread perception of artificial intelligence (AI) often conjures images of automated robots making critical decisions in realms such as security, industry, and colonies- a narrative popularized by science fiction, write-ups, and social media. However, when delving into the application of AI in the legal field, the complexities and nuances present in the realm of justice diverge from the simplistic expectations shaped by mainstream portrayals. Unlike other domains, the legal landscape is marked by a multitude of intricate issues, with each case presenting a unique factual matrix.

In the legal arena, decision-making extends beyond the application of black- and white legal principles. Judge must navigate a complex interplay of legal doctrines, moral considerations, and ethical nuances adjudicating cases. A hypothetical scenario, such as a son murdering his father to gain inheritance, underscores the intricate ethical dilemmas that the legal system grapples with.

While AI holds the potential to alleviate the burden on courts, it cannot replace the discerning legal acumen required for nuanced decision-making. The introduction of AI in legal proceedings raises ethical concerns that transcend mere legal equations. Striking a balance between leveraging AI advancements, the evolving nature of legal principles, and the ethical considerations inherent in dispensing justice is crucial. This discussion explores the ethical nuances surrounding the integration of AI in the legal field, acknowledging both its potential benefits and the imperative for cautious implementation.

Intersection of Ethics and AI- Transparency, Bias, and Due Process

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[1] Krishna Ravishankar & Parul Anand, AI Judges: The Question of AI's Role in Indian Judicial Decision-Making, CALJ (Oct. 10, 2024, 09:05 PM), https://www.calj.in/post/ai-judges-the-question-of-ai-s-role-in-indian-judicial-decision-making.

On August 12, 2019, Resolution 112 was approved by the American Bar Association (ABA) House of Delegates, hereinafter referred to as "ABA", says that-

"*RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence in the practice of law including: (1) bias, explain-ability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.*"[2]

Model Rule 8.4 (g)[3] of the Model Rules of Professional Conduct and Rule 2.3[4] of Model Code of Judicial Conduct marks that the lawyer and judge both should not perform biasness, prejudice, or harassment based upon sex, race, religion, national origin, gender, age, disability, ethnicity, marital status or socio-economic status related to the practice of law.

However despite these rules, biasness continues to plague the criminal justice system.

When we delve into the realm of using AI with the process of adjudication, then various issues come to light, but they can be mainly divided into two limbs; one, is the adjudication of core legal and direct issues, for instance, dealing with ideas of liability and ownership, which require direct application of codified laws and rules; while on the other hand, second, is the adjudication of issues which require an ethical vantage point to look into the issues, which require more thoughtful enquiry into the issues in hand, for instance, when auto- driving vehicles are programmed to prioritize passengers safety, while trying to avoid hitting pedestrians who were illegally crossing street, hits a child who was riding the bicycle legally; then question of liability arises, that who is to be held liable and to what extent. So, when deciding ethical questions, a number of factors and stakeholders come into play; the decision- maker has to choose among various actions on different paradigms before pronouncing the final judgement.[5]

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[2]The ABA Tackles Artificial Intelligence and Ethics, SENSEIENT (Oct. 10, 2024, 09:25 PM) https://senseient.com/articles/the-aba-tackles-artificial-intelligence-and-ethics/.

[3]AMERICAN BAR ASSOCIATION (Oct. 10, 2024, 09:34 PM) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

[4]AMERICAN BAR ASSOCIATION (Oct. 10, 2024, 09:41 PM) https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/.

Law is always living, developing and growing with the changes in times and societies. Law always evolves with the society and there is a complex relationship that both follow, for instance, before 2005, daughters did not get the inheritance rights in the father's property at par with the sons. It was only after a wave of feminism, equality, and empowerment came, that daughters were given inheritance rights at par with the sons with the amendment in the Hindu Succession Act, 1956 in the year 2005.[6] This amendment because, we understood the need of reforms and could just lay on archaic provisions of law, as the society was changing and demanding equality between men and women on every front. But, AI can't itself understand these complex social understandings as it is just working on basic set of algorithms, it can just help us to give new directions and perspectives because of the plethora of information that it has stored. Also, it will give us results based on its algorithm, which can also give unexpected results and wrong observations.[7]

COMPAS and SyRI- legal but problematic ethically?

Like in the USA, the "*Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)*" system serves to assess the risk of recidivism and aids judges in sentencing decisions. Its function as a "pretrial risk assessment" tool, impacting bail determinations, prison sentences, and even determinations of guilt or innocence.[8]Developed by Northpointe Inc., COMPAS factors in diverse aspects of an individual's background, including age, sex, socio-economic status, and criminal history, to construct a behavioural profile.[9]However, the mathematical weighting of these factors remains obscured by technical complexity, presenting challenges for both defendants and judges to comprehend the rationale behind the systems recommendations.

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[5] Khalil, Omar E. M. "Artificial Decision-Making and Artificial Ethics: A Management Concern." *Journal of Business Ethics*, vol. 12, no. 4, 1993, pp. 313–21. *JSTOR*, http://www.jstor.org/stable/25072403. Accessed 13 Oct. 2024.

[6] The Hindu Succession Act, 1956, § 6.

[7] Melissa Heikkilä, Nobody knows how AI works, MIT TECHNOLOGY REVIEW (Oct. 11, 2024, 08:59 PM), https://www.technologyreview.com/2024/03/05/1089449/nobody-knows-how-ai-works/.

[8]Stanley Greenstein, Preserving the rule of law in the era of artificial intelligence (AI), 30 ARTIFF. INTELL. LAW 291, 291-323 (2022), https://doi.org/10.1007/s10506-021-09294-4.

[9]AI in the Criminal Justice System, EPIC - ELECTRONIC PRIVACY INFORMATION CENTER (Oct. 11, 2024, 09:19 PM) https://epic.org/algorithmic-transparency/crim-justice/.

The opacity surrounding COMPAS is exemplified by Northpointe Inc.'s refusal to disclose details, citing proprietary and business secrecy.[10]This lack of transparency raises fundamental questions about accountability and challenges the principles of a fair and open legal system. .In the case of *State v. Loomis*, the defendant's six year prison sentence was influenced by the algorithmic risk assessment provided by COMPAS.[11] Despite concerns about transparency and fairness, the Wisconsin Supreme Court upheld the use of COMPAS, stating it didn't violate theright to due process of the defendant.[12]

Similarly, in the Netherlands, the SyRI system, scrutinized for identifying benefit fraud in socio-economically disadvantaged communities[13], operated under the SyRI Act of 2013.This system amassed and correlated data from diverse public databases to assign risk scores, designating individuals as 'worthy of investigation'.[14] A District Court in the Hague ruled that the indiscriminate collection of personal data, lacking prior suspicion of wrongdoing, violated human rights, resulting in privacy infringement, discrimination, and stigmatization. This underscores the significance of transparent legislation, allowing legal scrutiny and public examination, a contrast to other algorithmic systems lacking legislative transparency, potentially jeopardizing individual rights without public awareness.

Algorithmic decision-making underpinned by intricate technology involving complex mathematical models and data processing techniques, claims objectivity and impartiality. However, outcomes are influenced by the design choices made by their creators, raising concerns about perpetuating societal biases, particularly in the criminal justice system. Rigorous oversight, transparency, and accountability are imperative to address the challenges.

As the prevalence of algorithmic decision-making systems like COMPAS and SyRI increases, there is a looming risk of entering a 'digital welfare dystopia'. The unchecked expansion of executive power, coupled with the lack of clear legal boundaries, threatens individual rights and

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[10]Greenstein, *supra* note 4, at 306.
[11]State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
[12]Greenstein, *supra* note 4, at 306.
[13]Landmark ruling by Dutch court stops government attempts to spy on the poor – UN expert, OHCHR (Oct. 12, 2024, 07:10 PM) https://www.ohchr.org/en/press-releases/2020/02/landmark-ruling-dutch-court-stops-government-attempts-spy-poor-un-expert?LangID=E&NewsID=25522.
[14]Greenstein, *supra* note 4, at 306.

erodes the trust between citizens and the state. Balancing the benefits of AI in decision-making with safeguarding fundamental rights and ethical principles requires meticulous consideration.

AI- biased or not?

The issue of bias in AI decision-making has garnered heightened attention, especially in the US justice system. Media scrutiny intensified after ProPublica analyzed cases involving algorithmic risk assessments, revealing racial bias. White individuals received more favourable treatment compared to African Americans, with the algorithm inaccurately identifying African Americans at a double rate than White individuals. The Venice Commission emphasizes the factors contributing to discrimination including race, colour, sex, religion, language, national or social origin, political opinions, association with a national minority, birth, property, or other status.[15] The lack of transparency and the potential for bias in AI pose significant challenges to the principles of equality before law and non-discrimination integral to the rule of law.

By seeing all these biasness and lack of transparency, the US Attorney General Eric Holder in 2014 cautioned about the potential introduction of bias into the court decisions due to the utilization of risk scores in predicting recidivism. He urged the US Sentencing Commission to conduct a comprehensive study on the application of these programs.[16] Regrettably, the suggested study was never conducted. And in the case of *Malenchick v. State*[17], the Supreme Court of Indiana deliberated on the appropriate utilization of the assessment scores and related information. The court determined that for the judges it was not discriminatory to employ risk assessment tools considering offenders' inherent characteristics, asserting that sentencing law requires comprehensive pre-sentence reports encompassing various aspects of an individual's background. However, the court emphasized that these scores should augment, not entirely, a judge's assessment.

The Punjab and Haryana High Court recently harnessed AI to swiftly process over 1,00,000 bail applications, a task that would have taken months for a manual review by a legal team. While contemplating the integration of AI in judicial proceedings, it is imperative to consider its impact

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[15]Greenstein, *supra* note 4, at 312.
[16]Sari Horwitz, Eric Holder Warns of the Risk of Using Risk Assessment Data to Determine Sentencing, SAFE AND JUST MICHIGAN (Oct. 13, 2024, 06:55 PM) https://www.safeandjustmi.org/2014/08/07/eric-holder-warns-of-the-risk-of-using-risk-assessment-data-to-determine-sentencing/.
[17]Malenchik v. State, 928 N.E.2d 564 (Ind. 2010).

on the fundamental rights of the involved parties. Cesare Beccaria's principles of due process, equal treatment, fairness, and transparency, enshrined in Articles 14 and Article 21 of the Indian Constitution, must be upheld.[18] Rajasthan High Court, in *Shyam Singh v. State of Rajasthan*[19], emphasized that judicial bias in criminal cases violates Article 14, contradicting the constitutional principles of fairness and equal treatment. This is particularly concerning in India, where societal prejudices are deeply rooted.

Need of a Balanced Approach

With the progress of technology, no field of study has remained immune to its impact, including legal field. With the progress of technology, new methods and software have come which have helped the lawyers and judges in finding case laws and other legal works. Also, in Japan, AI technology is being used to draft judgements related to procedural matters, and it is working quite impressively.[20] In the same way, since Indian judiciary is overburdened by cases, similar approaches can be used in India to work these out, and AI can act as a boon in this regard. But, these things need a cautious implementation.

But, there are also equal problems with the personal prejudices and biases of the judges and lawyers as well, their bias is not always eliminated.[21] They are to an extent influenced by their personal opinions and biases, which can be corroborated from the fact that there are split judgements, judgements with majority and minority judgements, the judgements that are challenged and overruled. Because of this, a uniformity is very difficult to achieve, which the AI software can help to achieve. But, this approach of using AI should not be one sided only, that is blindly following AI results, rather there needs to be synergy between AI and judges, that will bring the optimal output.

One of the recent uses of Artificial Intelligence in court room and in criminal matters can be seen in Punjab and Haryana High Court, where the judge took some inputs from an AI platform,

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[18]*supra* at 1.
[19]Shyam Singh v. The State Of Rajasthan And Anr., 1972 SCC OnLine Raj 116.
[20] Neha Joshi, AI's next challenge: Indian courts saddled with millions of pending cases, MINT (Oct. 13, 2024, 8:18 PM) https://www.livemint.com/ai/judiciary-ai-artificial-intelligence-judicial-system-legal-decisions-court-cases-litigation-law-firms-11728274378497.html.
[21] Alarie, Benjamin, et al. "HOW ARTIFICIAL INTELLIGENCE WILL AFFECT THE PRACTICE OF LAW." *The University of Toronto Law Journal*, vol. 68, 2018, pp. 106–24. *JSTOR*, https://www.jstor.org/stable/90019655. Accessed 13 Oct. 2024.

ChatGPT, to decide on a matter of a bail. The judge did not directly take away the recommendation of the platform, rather he took insights from it on bail jurisprudence and decided the matter considering the situation and issue in hand.[22] This instance of High Court of Punjab and Haryana High Court shows us that how a balanced approach can be used between AI and Judicial system. That, the AI is not there to replace human contribution but to corroborate and assist the Judges and lawyers while performing their duties with due diligence.

Conclusion

As Justice DY Chandrachud rightly emphasizes, while technology, including AI, is undeniably a part of our present and future, caution must be exercised in entrusting AI with the sole responsibility of governing the justice system.[23]The integration of AI into the legal landscape poses ethical concerns, particularly regarding transparency, bias, and accountability.The potential for opaque algorithms, as seen in systems like COMPAS, raises questions about fairness and due process, essential components of any just legal system.

In the Indian context, where societal prejudices are deeply ingrained, the implications of AI-driven decisions on fundamental rights as outlined in the constitution, must be carefully considered. The synergy between human judgment and AI assistance, as witnessed in the Punjab and Haryana HC's use of ChatGPT, presents a more balanced approach[24]. Developing robust AI systems that assist judicial officers without compromising transparency and ethical standards could significantly enhance the efficiency of the justice system. However, stringent checks and balances, along with ongoing education for legal professionals, are imperative to ensure that AI serves justice while upholding constitutional values in India's diverse and complex legal landscape.

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[22] Sparsh Upadhyay, In A First, Punjab And Haryana High Court Seeks ChatGPT's Response On Bail Jurisprudence Across The World, LIVELAW (Oct. 13, 2024, 10:25 PM) https://www.livelaw.in/news-updates/punjab-and-haryana-high-court-chatgpt-reply-bail-jurisprudence-world-224929.

[23]'Technology is here to stay, forever', CJI Chandrachud tells High Court Chief Justices, THE INDIAN EXPRESS (Oct. 13, 2024, 10:37 PM) https://indianexpress.com/article/india/cji-chandrachud-technology-high-courts-8443340/.

[24]In a first Punjab and Haryana high court uses chat GPT to decide bail plea, TIMES OF INDIA, (Oct. 13, 2024, 10:45 PM) https://timesofindia.indiatimes.com/india/in-a-first-punjab-and-haryana-high-court-uses-chat-gpt-for-deciding-upon-bail-plea/articleshow/99070238.cms.