

# AN EXPLORATORY ANALYSIS OF LAW AND ARTIFICIAL INTELLIGENCE INTERFACE IN INDIA

*Farooq Ahmad Mir\**

## Abstract

Digital technology has shown enormous flexibility and potential. Its variants spring surprises for the policy planners as well as businesses. Its new variant in the form of Artificial Intelligence (AI) has made a profound impact on many branches of legal jurisprudence. Like other technologies, it is maintaining its lead over law and is posing unprecedented challenges to existing legal principles which have been established by the Common Law courts and then incorporated in the domestic legislations. India has been on the forefront in enacting full-fledged legislation in the form of IT Act, 2000 to deal with internet related issues but the emergence of AI has posed challenges, some of them cannot be addressed even by invoking the provisions of the IT Act. It may be too early to enumerate legal issues that may crop up by the products driven by AI because its use is still in an infancy stage and where it will carry us in future is a wild guess for legal researchers who have to identify those issues for legal resolution. It is, however, for sure that the impact of AI on legal jurisprudence will be perverse and new issues are likely to emerge sooner than the later. This paper makes an attempt to explore the possible legal issues that may spawn by the use of AI that is based on the present facts which may have some inkling about what is in store for legal researchers in the days to come.

## I Introduction

ARTIFICIAL INTELLIGENCE (AI) is the science combined with engineering of making intelligent machines, especially intelligent computer programs. It primarily refers to using computers to understand human intelligence, but AI does not have to limit itself to methods that are biologically observable.<sup>1</sup> Artificial Intelligence is the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems associated with the intellectual processes mainly associated with humans, such as the ability to discover meaning, reason, generalize, or learn from past experience.<sup>2</sup> AI mainly refers to perceiving, synthesizing and inferring information. It is a machine based learning that is why it is called artificial learning as opposed to real learning of human beings. The AI is used in diverse activities, including computer vision, speech recognition, translation between natural languages. Its applications include advanced search engines like google search, recommendation systems that are used by You -Tube or Amazon, understanding human speech such as Siri and Alexa, self driving cars like Waymo, generative or creative tools like ChatGPT and

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\* Professor, Head and Dean, School of Legal Studies, Central University of Kashmir, (JK), India

1 John McCarthy, "What is Artificial Intelligence?", Computer Science Department, Stanford University Stanford, (2007 Nov 12), available at: <http://www-formal.stanford.edu/jmc>.

2 BJ Copeland, *Encyclopaedia Britannica*, available at: [britanica.com/contributor/BJ.Copeland/4511](http://britanica.com/contributor/BJ.Copeland/4511) (last visited on May 13, 2023).

AI art, automated decision making and competing at the highest level in strategy based game systems such Chess and GO.<sup>3</sup>

Among the series of developments in digital technology in quick succession, the advent of AI has been the most profound one. In view of its pervasive potential, it is bound to raise significant legal issues in days to come for courts to debate and decide. However, opinions about AI have divided the world. While some fear that AI may take away jobs, adding to the unemployment burden, others believe that the technology can make lives easier.<sup>4</sup>

There is a concern round the globe about the non-regulation of AI but authorities around the world are now moving to frame rules for AI, including in the European Union, where draft legislation faced a pivotal moment. Almost 25 European Countries have already signed a declaration on April 10, 2018 for cooperation on issues involving artificial intelligence.<sup>5</sup> The declaration promises cooperation *inter alia* on research and development, ethical issues and loss of jobs and the solutions thereof.<sup>6</sup> This declaration was prompted by an open letter written by the main stakeholder of artificial intelligence, including experts and professors of law, ethics, robotics, artificial intelligence. They urged the European Commission to avoid limited about the vision of artificial intelligence. The impact of artificial intelligence is not confined to technological and economic considerations but its influence has to be seen on the society and its ethical and criminal liability contours be appraised and addressed. The letter showed its reservation of conferring legal personality upon artificial intelligence and opposed any move to hold human beings liable for the actions based on artificial intelligence or robots by invoking fiduciary relationship.<sup>7</sup> Now European Union Parliament is close to enacting of AI legislation AI Act.<sup>8</sup> Its chief features are :

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3 Available at: [https://en.wikipedia.org/wiki/Artificial\\_intelligence](https://en.wikipedia.org/wiki/Artificial_intelligence) (last visited on Jan. 10, 2024).

4 Aprameya Rao, "Soon, AI-powered chatbots to take customer orders at Wendy's", *WION*, available at: <https://www.wionews.com/business-economy/soon-ai-powered-chatbots-to-take-customer-orders-at-wendys-590820>, (last visited on Feb. 12 2024).

5 The Artificial Intelligence Act (AI Act) is a proposed regulation mooted on Apr. 21, 2021 by the European Commission. The object of this Act is to provide a common regulatory and legal framework for artificial intelligence. Its covers all sectors (except for military), and to all types of artificial intelligence.

6 EU Declaration of Cooperation on Artificial Intelligence, available at: <https://ec.europa.eu/jre/communities/en/community/digitranscope/document/eu-declaration-cooperation-artificial-intelligence> (last visited on Feb.12 2024).

7 Open letter to the European Commission Artificial Intelligence and Robotics, available at: <http://www.robotics-openletter.eu/>(last visited on Mar. 12, 2024).

8 European News, "AI Act: a step closer to the first rules on Artificial Intelligence", available at: <https://www.europarl.europa.eu/news/en/press-room/20230505IPR84904/ai-act-a-step-closer-to-the-first-rules-on-artificial-intelligence> (last visited on Feb. 12 2024).

- (i) once approved, they will be the world's first rules on Artificial Intelligence;
- (ii) MEPs include bans on biometric surveillance, emotion recognition, predictive policing AI systems;
- (iii) Tailor-made regimes for general-purpose AI and foundation models like GPT; and
- (iv) the right to make complaints about AI systems.

The legal issues which the AI will spawn are not foreseeable at present but one can easily expect some interesting and intriguing cases for courts to decide. The facts in the *Ashaffenburg* case (2012) unfold the story of the future. In this case a driver was driving an Audi automated car but he suffered an un-expected stroke which made him unconscious. He lost the balance over the car while driving. The car went off the road and raced to nearby adjacent bushes, and was about to crash but it was brought back on the road by AI which was programmed to deal with such situations, especially where a car is likely to meet an accident due to dis-balance of the driver. While the car was back on the road, it started moving on its own, while the driver was still unconscious. The car ran over two persons and killed them on the spot. This case has thrown open a legal puzzle of criminal liability to solve. The driver cannot be held liable because he under no circumstances could have foreseen the stroke. Manufacturer could not be made liable because of absence of, at least, required foreseeability nor could manufacturer be held liable for non application of due diligence. AI cannot be held liable as there is no technical snag involved and one cannot expect any alternative decision of AI under the given circumstance as AI works in a mechanical manner by following the known patterns. It cannot be expected of AI to take foreseeable decisions. Even the programme could be made liable for lack of foresight or due diligence. The court could not fix criminal liability but asked the company to pay compensation to the beneficiary of the deceased for discharging its civil liability.

## II Liability models for determining liability in cases involving AI

### Traditional criminal liability model

The liability for any criminal action generally hinges on two principles, *mens rea* and *actus reus*. *Actus reus* in case of actions based on AI are easy to determine. Any overt act triggered by AI will constitute *Actus reus* but it has to be supported by *mens rea*. Can AI be clothed with the required *mens rea* as and when action takes place that results into a crime? AI is not having emotions like human beings. It is not concerned with the consequences but it is also true that it at times takes decisions on its own. The moot point is: Should AI be charged for its actions the way human beings are? There are some exceptional situations wherein human beings are not held criminally liable for their actions because of being *doli incapax*, like children below the prescribed age or insane persons. Can such protection be extended to AI driven products.

There is an argument that AI is different from other digital technologies as it enables operators not only to work automatically but also autonomously. It takes decisions on its own as it is programmed in such a way but mere decision making capacity cannot hold AI criminally liable for it lacks required intention, motive, knowledge with varied forms. It has no emotions and will neither feel sad nor be happy on its actions. Also the basic objective of punishment cannot be achieved. That is to inflict pain so that the criminal is deterred or reformed.

### **Absolute liability model**

The liability issues that are likely to arise by the use of AI have been raised in India in the context of liability of corporations for environmental protection. The supreme court has laid down in a plethora of public interest cases<sup>9</sup> that a company will be liable for inherently hazardous substance even if it is proved that there were no foreseeable circumstances available to the owner to ward off of the damages caused by such substance. Even the traditional defenses like accident or act of God will not be available. Initially, only fine was imposed on such corporations on the ground that no corporeal punishment can be inflicted on it. However, this rule has been modified and it is now an accepted proposition that corporations do not act themselves but they act through their directors who lend their eyes, ears and mind to the corporation. They are now held liable for the acts of the corporation and the doctrine of corporate veil does not prevent such action against the directors. The directors are held liable under strict liability principle, no matter the damage caused was not foreseeable. This doctrine can be extended to AI actions also but it is still not clear whether manufacturer or programmer be held liable under this model.

### **Programmer liability model**

AI does not work on its own like human beings which have a well placed brain that takes its own independent decision. AI makes a machine to learn but it has to be programmed in the first instance. With the passage of time, this machine learns and learns and gains an experience on the basis of which it takes its decisions. It follows certain patterns without having any discretion and choice. A robot guard may kill its own master if the master falls in the category of intruder or trespasser as mentioned in the programme. This actually happened in Japan in 1981 when a worker in a motorcycle company was killed by the strong arm of the robot who considered the worker as a threat necessary to be eliminated. The robot then started its work as usual without any remorse as it is bereft of emotions. Should then programmer be held liable? He may be held liable where it can be proved that he knew or had reason to believe that AI has a capacity to commit any such criminal act but where machine

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9 See *MC Mehta v. Union of India*, AIR 1987 SC 1086; *MC Mehta v. Union of India*, AIR 1988 SC 1037.

malfunctioned either due to error or because of the malfunctioning of the programme not foreseeable then the programmer's liability becomes a moot issue.

### **Attribution model**

The issues likely to arise by the use of AI have already been raised in case of electronic contracts and more particularly by EDI contracts for civil action (Electronic Data Interchange). The solution has been found in adopting theory of attribution. Section 11 of the IT Act provides that an electronic record shall be attributed to the originator:-

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- (c) by an information system programmed by or on behalf of the originator to operate automatically.

The above provision could be stretched to cover AI created situations as clause (c) above deals with the information system programmed by or on behalf of the originator to operate automatically but AI works autonomously and its actions at times may not be foreseeable at all. In that event applicability of above provision is doubtful. The above model presently applies only in case of a civil liability, it can be extended to criminal liability also after proper fine tuning.

### **Product liability model**

The Consumer Protection Act, 2019 has replaced the earlier Consumer Protection Act of 1986. This new Act has introduced many novel features which include product liability. The word product has been defined in section 2 (33). "product" means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs. The claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be.<sup>10</sup> The product liability has been also defined which means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.<sup>11</sup> The harm caused to the consumer is also defined which in relation to a product liability, includes— (i) damage to any property, other than the product itself; (ii) personal injury, illness or death; (iii) mental

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<sup>10</sup> CP Act, 2019, s. 2 (6) (vii).

<sup>11</sup> *Id.*, s. 2 (34).

agony or emotional distress attendant to personal injury or illness or damage to property;<sup>12</sup> and “injury” means any harm whatever illegally caused to any person, in body, mind or property.<sup>13</sup> The consumer protection Act *inter alia* deals with the product liability for which product manufacturer or product seller may be held liable that may cover AI also but this Act operates with a scheme of things that may not address all the issues that are likely to crop up with the use of IA. The consumer protection provides civil remedy only and is not applicable to criminal liability. Even for civil remedy, the complainant must be a consumer<sup>14</sup> as defined in the Act and where AI based product is for commercial purpose or for resale, then the Consumer Protection Act is not applicable. For instance, where a robot is purchased for a personal security but it starts malfunctioning due to some defect, the complaint shall lie against the product manufacturer or product seller but where AI based product is for a restaurant for providing catering services and that malfunctions, the complaint cannot lie as the product is for commercial purpose. Thus the remedy under consumer protection may be speedy and in expensive but it does not cover all the issues that may arise by the use of AI driven products.

AI is now increasingly being used for diverse activities, it has spawned new generation of disputes. A class action suit was filed against Microsoft, GitHub and OpenAI. for having allegedly violated copy right law by allowing Copilot to launch a code generating AI system that is trained on a very large number of public codes without acknowledging them.<sup>15</sup>

Similarly, a legal case was filed against Mid journey and Stability AI alleging that they have been engaged in the infringement of the rights of millions of artists by training their tools on web-scraped images. Another case was filed against Stability AI by Getty Images for

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12 *Id.*, s.2 (33).

13 *Id.*, 2 (23).

14 *Id.*, s. 2 (7) “consumer” means any person who— (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for 6 consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose. Explanation. — For the purposes of this clause, — (a) the expression “commercial purpose” does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment; (b) the expressions “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.

15 The Verge, *available at*: <https://www.theverge.com/2022/11/8/2344> (last visited on Feb. 10 2024).

using millions of images from its site without the permission and these images have been used for training stable diffusion which is an art generating AI. The main challenge is on account of enormous flexibility of AI to replicate images, text that includes copyright content. Recently, it was found that CNET used AI tools to write some articles but later on it was found that these articles are based on the articles already written by human authors and are thus plagiarized.<sup>16</sup>

In America, some image-hosting platforms have banned AI-generated content for fear of being entangled in any legal battle for copyright infringement that leads then to negative publicity, a campaign that a company can ill afford. In *Google LLC v. Oracle America, Inc.*,<sup>17</sup> the court came up with a “transformative doctrine”. This doctrine poses a question: whether the alleged infringer used the copyrighted works in a way that significantly varies from the originals? Using collected data to create new works can be transformative. Such issues have been raised in other jurisdictions also but they have not adopted “transformative” doctrine. The UK, for instance, is proposing to modify an existing law to allow text and data mining “for any purpose,” this may dilute original authors rights and may lean towards corporate world and other businesses.<sup>18</sup>

### III Some learning out comes from trans-jurisdictional cases

In the case of *Gaughran v. the United Kingdom*,<sup>19</sup> a British national, Fergus Gaughran was stopped on October 14, 2008 at a police checkpoint. He was arrested for the recordable offence (*i.e.*, an offence punishable by imprisonment) for driving with excess alcohol in violation to the Road Traffic (Northern Ireland) Order, 1995. He was immediately taken to a police station where his samples of breath were taken which were found to contain quantity of alcohol in excess of the permitted limit. On the same day, fingerprints, a photograph; and a non-intimate DNA sample by buccal swab were collected from him. A DNA profile (a digital extraction of key data) was subsequently taken from the DNA sample. He then pleaded guilty and was sentenced to fine of 50 pounds sterling (GBP) and was disqualified from driving for 12 months but no immediate or suspended custodial sentence was imposed on him.

Fergus Gaughran alleged on October 20, 2015 that his DNA profile, fingerprints and photograph have been retained for indefinite period in accordance with the blanket policy of retention of personal data of any individual convicted of a recordable offence. This amounts to a disproportionate interference with his right to be respected for his private and family life. This could not be justified under article 8 of the

16 The Verge, *available at*: <https://www.theverge.com/2023/1/16/23557>.

17 593 U.S. - (2021).

18 Kyle Wiggers, “The Current Legal Cases Against Generative AI are just the beginning AI that can generate art, text and more is in for a reckoning”, *available at*: <https://techcrunch.com>, Jan. 27, 2023.

19 Application no. 45245/1513/06/2020, This judgment has become final under art. 44 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.



Convention for the Protection of Human Rights and Fundamental Freedoms. His council pleaded to the Police Service of Northern Ireland (the “PSNI”) that the retention of the photograph, fingerprint and DNA sample of his client was unlawful. He requested that they be either destroyed or returned to his client. His request was turned down but the DNA sample of his client was destroyed in 2015. However, the PSNI decided to retain the DNA profile, fingerprints and photograph of the client that were taken from him on October 14, 2008, indefinitely.

The case was heard by the courts below and finally on February 13, 2020, the European Court of Human Rights (ECHR) passed its judgment and ruled that the retention of the above mentioned data amounts to disproportionate interference and, therefore, a violation of right to respect for private life of Fergus and consequent violation of Article 8 of the European Convention on Human Rights since the interference in no case be regarded as necessary in a democratic society .

The court heavily relied on *S. and Marper v. The UK* (2008) case wherein it was held that the blanket and unguided nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of the applicant suspected but not convicted of offences, as laid down in the UK law, violated their right to respect of private life.

In Germany Telecommunications Act (*Telekommunikationsgesetz*) was amended in June 2004. The new amendments made it obligatory for telecommunication providers to store personal information of their subscribers, even if such information of subscribers was not necessary for billing purposes or other purposes (prepaid (“pay-as-you-go”) mobile telephone SIM cards). The telecommunication service providers were entitled to collect and store the data necessary for their contractual relationship well before these amendments came into force. However, in case of prepaid mobile telephone SIM cards, no such data had been considered necessary. These new amendments were necessitated by the adoption of five EU Directives on March 7, and July 12, 2002 that had to be introduced into German Law before July to October 2003.

These amendments were challenged in *Breyer v. Germany*<sup>20</sup> by Patrick Breyer and Jonas Breyer, two German Nationals. They were associated with a civil-liberties union that campaigned against the general retention of telecommunication data. In pursuing their goal, they organized public protests and wrote articles against State surveillance. The first applicant was also a member of the Parliament of Schleswig-Holstein. They filed an application in the court on July 27, 2012 against the Federal Republic of Germany by invoking Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Their contention was that their certain personal data had been stored by their respective service providers by taking recourse to

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20 Application no. 50001/12 final order on Sep. 7, 2020. This judgment has become final under art. 44 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.



articles 8 and 10, pursuant to the legal obligation envisaged under section 111 of the Telecommunications Act that applies to the users of prepaid mobile phone SIM cards.

These applicants were using prepaid mobile phone SIM cards. They were required to register certain personal details with their respective service providers as and when they would activate their SIM cards. This was required under section 111 of the Telecommunications Act.

The applicants challenged the constitutionality of many provisions, including sections 111, 112 and 113 of the Telecommunications Act. Section 111 of this Act imposes an obligation to collect and save the telephone numbers, the name, address and date of birth of a subscriber from the date when the contract came into existence. Sections 112 and 113 contained an automated and a manual procedure for accessing the data saved under section 111. The applicants contended that these sections breached their right to privacy relating to correspondence, post and telecommunications including their right to informational self-determination (*Recht auf informationelle Selbstbestimmung*). The Federal Constitutional Court<sup>21</sup> laid down some important principles which can prove torch bearers for courts in other jurisdictions having similar issues in hand.

- (i) The unfettered development of human personality cannot be thought of unless the protection of the individual against unrestricted collection, storage, use and transmission of the personal data is ensured. This protection is envisaged by the fundamental right enshrined in article 2(1) read with article 1(1) of the Basic Law.<sup>22</sup> The fundamental right empowers the individual to decide on the disclosure and use of his or her personal data. The fundamental right can be invoked, in particular, when the development of personality is staked by government authorities by using and combining personal information in a manner that is neither understood nor controlled by the person so affected by the use of this information.
- (ii) This constitutional protection to the right to informational self-determination is not restricted to information merely because of being very sensitive in nature. No personal information is insignificant and availability of constitutional protection cannot be decided on the basis of significance alone. There is no component of personal data which in itself is insignificant. This protection of informational self-determination also includes personal information relating to the procedure by which telecommunication services are provided.

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21 No. 1 BvR 1299/05).

22 Mean domestic law of the country.

- (iii) The powers of the government to collect personal data as a rule has a cascading effect as it creates a number of interconnected encroachments which trigger one after the other. For this reason alone, a distinction has to be drawn between the collection and storage of data and then use of data. Where data is required for carrying out government functions, then further distinction has to be made out between data transfer by the party supplying the information and data retrieval by the agency seeking the information for government functions. The transfer as well as retrieval of information constitute two separate encroachments which have to be justified separately.
- (iv) The legislature must not only open the door for the transmission of data, but also the door for its retrieval. They must be taken together for understanding their legal bases like 'a double door', that gives authority to exchange personal data. This does not exclude the possibility of both legal bases being contained in one provision, subject to the system of competencies and the requirements of clear drafting .
- (vi) The complainants' fundamental right to informational self-determination is encroached upon by the challenged provisions. *Firstly*, section 111 of the Telecommunications Act lays down encroachments upon the duty of collection and storage of data. *Secondly*, section 112(1) of the Telecommunications Act creates independent encroachments upon fundamental rights. It imposes a duty on service providers to make the data available as customer databases. This data can be then accessed by an automated procedure and by the authority of the Federal Network Agency which has a power to retrieve this data and to transmit it to authorities designated under section 112(4) of the Telecommunications Act. Section 113(1) creates an independent encroachment upon fundamental rights by imposing a duty on the telecommunications service providers to provide information on demand with regard to the data stored by them.
- (vii) A national legislation enacted to fight crime has to satisfy some substantive conditions when it authorizes the retention of traffic and location data, as a preventive measure. *Firstly*, it is to be ensured that the retention of data is limited to what is strictly necessary to obtain the objective of the enactment. *Secondly*, it is quite possible that while those conditions may vary according to the nature of the measures taken for the purposes of prevention, investigation, detection and prosecution of serious crime, the retention of that cannot be permitted if it fails to meet objective criteria. *Thirdly*, the objective criteria must have an intelligible nexus between the data to be retained and the objective sought to be achieved. *Fourthly*, data retention must be shown to be such as actually to circumscribe, in practice, the extent of that measure and the public affected.

On the issue of proportionality so often invoked by our Supreme Court, the Federal Constitutional Court stated, *inter alia*:

Section 111 of the Telecommunications Act does not breach the requirements of proportionality when taken in the narrow sense. Even if the provision orders a precautionary collection and storage of wide range of data, without the consent of the owner of the data, that passes through telecommunication channels, this is an encroachment of limited weight.

This position is not changed appreciably merely because the data so collected and stored is only a precautionary measure purpose. Even this precautionary storage of data must always remain an exception to the rule and needs to be justified.

The Court of Justice of the European Union (CJEU) in *Tele2 Sverige and Tom Watson*<sup>23</sup> acknowledged the role of technology in its use in modern investigating techniques to containing serious crimes, especially organized crimes and terrorism but the court ruled that this alone cannot justify the general and indiscriminate retention of all data by the legislation. To plead that the retention of data is necessary for the purpose of that fight could not be justified. The indiscriminate retention of traffic and location data has made it a rule, whereas the system put in place by Directive 2002/58 that requires the retention of data is an exception.

The court delve deep in the actual language of the legislation and observed that it is general in content. It envelops all subscribers, registered users in one fold and covers all means of electronic communication and all traffic data. The legislation is more generalized as it does not provide any differentiation, limitation or exception so as to include some and leave some traffic to be determined on the basis of the objective criteria. It is comprehensive in the sense that it is likely to affects all persons using electronic communication services, even though those persons are not, even indirectly, associated with a situation that is liable to give rise to criminal proceedings. This legislation will equally be applicable to persons against whom there is no evidence available indicating that they might have any link, even an indirect or remote one, with serious criminal offences. Further, it does not provide for any exception, and consequently it will apply even to such persons whose communications are subject to the obligation of professional secrecy as envisaged, in the rules of national law.

This legislation does not make it mandatory that there be some casual relationship between the data that is to be retained and a threat to public security. More particularly, it does not make retention specific to (i) data pertaining to a particular time period and/or geographical area and/or a group of persons likely to be involved, in one way or another, (ii) it does not make mention of the nature of offence that will lead to retention of the data, or (iii) persons who could, for other reasons, contribute, through their data being retained, to fighting crime.

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23 Judgment of Dec. 21, 2016, *available at*: [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJO](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJO), (last visited on Feb. 12, 2024).

The court laid down that the national legislation must, as and when it mandates retention of the data, necessarily provide precise and clear rules delineating scope and application of such a data retention measures. It should then ensure to provide safeguards to the persons whose data has been retained and these safeguards should include effective protection of the personal data against the risk of possible misuse. It should also clearly indicate the circumstances and conditions that would warrant invocation of a data retention measure, as a preventive measure. It should without any ambiguity mention that such a measure is temporary and not for all times to come and is limited to what is strictly necessary.

In the context of fighting crimes there are some basic substantive conditions that must be satisfied by any national legislation that permits the retention of traffic and location data, as a preventive measure. These are (i) to ensure that there is a symbiotic relationship between the data retention and the object sought to be achieved, *i.e.*, it is limited to what is strictly necessary. (ii) the conditions for retention may vary and be dependant on the nature of the measures to be taken for the purposes of prevention, investigation, detection and prosecution of serious crime.

In *S. and Marpers v. United Kingdom*<sup>24</sup> the court held as follows:

The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. The domestic law must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse.

In case of *Roman Zakharov v. Russia*,<sup>25</sup> Roman Andreyevich Zakharov, a Russian national filed an application No 47143/06 against the Russian Federation under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. His contention was that the mobile-network operators, without any judicial authorization, had installed an equipment that facilitated the Federal Security Service (FSB) to intercept all telephonic communications. It was held that the Russian legal provisions allowing interceptions of communications do not provide any adequate and effective guarantee against arbitrariness. It does not provide measures to ward off the risk of abuse which is inherent in any system of secret surveillance. This risk

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24 [2008] ECHR 1581.

25 Application no. 47143/06.

is particularly high in a system where the secret services and the police have direct access to all mobile-telephone communications by technical means. Further more, the circumstances in which the government authorities are empowered to resort to secret surveillance measures are not defined with the required clarity. Even the provisions on discontinuation of secret surveillance measures do not ensure sufficient guarantees against arbitrary interference.

It has been observed that the domestic law permits automatic storage data that is clearly irrelevant. The circumstances in which the intercepted material will be stored and destroyed after the end of a trial are also not clearly spelt out. The procedure for authorization is not comprehensive enough to ensure that secret surveillance measures can be invoked only when “necessary in a democratic society”. The court outlined three standard operating procedures for exercising supervision for interceptions. These are independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The court laid down that the legislation in question does not comply with these standard operating procedures. The effectiveness of the remedies is undermined because of the lack of prior notification of interception or reasonable access to the documents on the basis of which interception was carried out. The court ruled in favour of Zakharov and opined that Russia’s legal provisions dealing with the communications surveillance did not ensure adequate safeguards against arbitrariness or abuse. It violates Article 8 of the European Convention of Human Rights (right to privacy).

An American case of *Author’s Guild v. Google*<sup>26</sup> is by all standards a landmark judgment pronounced by the second circuit court in the field of artificial intelligence, and more explicitly, machine learning. The case involves the rights of *Google* to use copyrighted books for training its database in order to train its Google Book Search algorithm. The Author’s guild contended that the Google Book Search database is primarily based on the the copyrighted works of millions of books that infringe their copyright. The Authors Guild of America and the Publishers Association joined together against Google but after several years of litigation a settlement was proposed but the settlement was rejected on March 22, 2011 for various reasons. The Publishers Association made a compromise with Google, but the lawsuit with the Author’s Guild continued. It was first decided by the district court and then it went to second circuit that came in agreement with the findings of the district court. Not satisfied with these judgments, the Publishers Association went in an appeal to the Supreme Court in *certiorari* that was denied by the Supreme Court with the result the Second Circuit ruling in Google’s favor remained unchanged. It is made clear here that the denial of *certiorari* by the Supreme Court should not be construed as approval or disapproval of the decision of the second circuit. It simply means that less than four of the Supreme Court Justices voted to review the case. The opinion of the district court authored by Justice Denny Chin in November 2013, which is a more clear and easy to understand legal position in America. It is reproduced here under:

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26 No. 15-849 (Dec. 31, 2013).

In my view, Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.

The four traditional factors<sup>27</sup> that have been used to decide whether the use of a copyrighted work is categorized as a fair use under United States Copyright Law were also considered by Justice Chin in the present case and concluded that Google Books satisfies all the legal requirements of fair use doctrine and there is no violation of the copyright law as the Author's Guild had contended. He further emphasized that "Google Books enhances the sales of books to the benefit of copyright holders" which means that there is no possible economic damage to the copyright owner and there is also no negative influence on the copyright holder. In other-words, it enhances sale as well as the reputation of the copyright holder and is protected under fair use doctrine. The Second Circuit unanimously approved the judgment in Google's favor. It was laid down:

Google's unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses. The purpose of the copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals. Google's commercial nature and profit motivation do not justify denial of fair use.

Google's provision of digitized copies to the libraries that supplied the books, on the understanding that the libraries will use the copies in a manner consistent with the copyright law, also does not constitute infringement. Nor, on this record, is Google a contributory infringer.

### **ChatGPT: A new application of AI**

GPT is an acronym for "generative pre-trained transformer". ChatGPT was launched on November 30, 2022, by San Francisco-based OpenAI that is credited with DALL·E 2 and Whisper AI. ChatGPT service was initially free of charges to the public as usual in such cases and the company had plans to make it paid service later. It generated an unexpected interest among users and by December 4, 2022, it recorded over one million users. Its exponential growth trajectory went unabated and it saw a record number of users in January 2023 touching over 100 million, making it the fastest growing consumer application to date<sup>28</sup> that may be due to its flexibility to frame

27 See SS. 17U.S.C. §106 and 17U.S.C. §106A, The four factors for detemining 'fair use' made of a work to be considered shall include:

- (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (ii) the nature of the copyrighted work;
- (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (iv) the effect of the use upon the potential market for or value of the copyrighted work.

28 Much of the discussion is based on the information provided in Wikipedia

answers across many domains of knowledge.<sup>29</sup> But it has a flip side also. Its vulnerability to confidently and to provide factually incorrect responses have been identified as a significant limitation.<sup>30</sup> Any discussion on the use or misuse of ChatGPT is premature as it has not yet unfolded to its full potential. Every body is guessing whether it will do more harm than good.<sup>31</sup>

ChatGPT service functions better in English, but it is also able to work in some other languages with varying degrees of accuracy. It has attracted attention for its detailed responses and historical knowledge but its accuracy has been challenged. ChatGPT was essentially trained to use reinforcement or repetitive learning from human feedback. This is based on a method that supplements machine learning with human intervention to achieve a realistic result.

ChatGPT is a powerful tool that can be used for diverse applications, including chatbots, customer service, personal assistants, and more. The release of OpenAI's ChatGPT in November last year garnered a renewed interest in artificial intelligence among companies and its unexpected success triggered a rat race among tech giants to use the AI-powered chatbot technology in business. ChatGPT has a feature of chat history that helps it to save and store all the conversations that one may have with it. This feature is enabled by default, which means that all the messages one may exchange with the bot will be recorded and stored.

OpenAI began accepting registrations from United States customers for a premium service, known as ChatGPT Plus in February, 2023 at a monthly charges of \$ 20. The company accepted that it is still an experimental version but promised that its updated version would provide access during peak periods with no downtime. Apriority access to new features and faster response speeds would be ensured.

A significant development took place on March 14, 2023 by the release of GPT-4 that is available *via* API. It has been made available to user of premium ChatGPT also with some conditions that include a limit of 100 messages after every four hours and the cap of 25 messages every three hours, in response to increased demand for premium users that is likely to change in future.

The primary function of a chatbot is to mimic a human conversation but its flexibility enables it to undertake diverse functions. It can write a computer program and can

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29 Roose, Kevin, "The Brilliance and Weirdness of ChatGPT", *The New York Times*, Dec. 5 (last visited on Mar. 10, 2024).

30 Vincent, James, "AI-generated answers temporarily banned on coding Q&A site Stack Overflow" *The Verge*, available at: [theverge.com/2022/12/5/23493932/chatgpt-ai-generated-answers-temp-banned-stack-overflow](https://theverge.com/2022/12/5/23493932/chatgpt-ai-generated-answers-temp-banned-stack-overflow). (last visited on Mar. 10, 2024).

31 Gary Marcus and Keith Teare debate in Intelligence Squared USA: "Will Chat GPT do more harm than good" Feb. 2023, available at: [archive.org/details/instsq-debate](https://archive.org/details/instsq-debate) (last visited on Feb. 10, 2024).



debug it as well,<sup>32</sup> mimic the style of celebrities of cinema, CEOs of business enterprises, world leaders, sports personalities and can write business pitches,<sup>33</sup> student essays, answer test questions (sometimes, depending on the test, at a level above the average human test-taker),<sup>34</sup> teleplays, compose music, fairy tales and write poetry and song lyrics,<sup>35</sup> translate and summarize text,<sup>36</sup> emulate a Linux system; simulate entire chat rooms, play games like tic-tac-toe and simulate an ATM.<sup>37</sup>

Unlike Instruct GPT, ChatGPT can correct responses. It can minimize harmful and deceitful responses. One such example is here: Instruct GPT accepts the premise of the prompt “Tell me about when Christopher Columbus came to the United States in 2015” as being correct. ChatGPT admits the counterfactual nature of the question and formulates its own answer as a hypothetical consideration of what might happen if Columbus came to the United States in 2015. This was possible by using information about the voyages of Christopher Columbus and facts about the modern world – including modern perceptions of Columbus’ actions.<sup>38</sup>

### **ChatGPT dawning a new era**

There are now a number of instances that signify that ChatGPT has come to stay to make life easier, processes speedier and efficient provided it is used with bona fide intention and not misused with mala fide intention. It is substantiated by an incident that took place in March 2023, wherein a pet dog’s life was saved by ChatGPT’s newest version GPT-4, which correctly identified his medical condition when even veterinarians were unable to do so. It is considered as the best artificial intelligence chatbot ever released to the general public.<sup>39</sup> Its educational applications are quite

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32 Short, Cole E.; Short, Jeremy C. “The artificially intelligent entrepreneur: ChatGPT, prompt engineering, and entrepreneurial rhetoric creation”, *Journal of Business Venturing Insights* (June 1, 2023), available at: [researchgate.net/publication/369393158](https://researchgate.net/publication/369393158) (last visited on Mar. 10, 2024).

33 Heilweil, Rebecca (Dec. 7, 2022). “AI is finally good at stuff. Now what?”, *Vox*. available at: [vox.com/recode/2022/12/7/23498694/ai-artificial-intelligence](https://www.vox.com/recode/2022/12/7/23498694/ai-artificial-intelligence) (last visited on Mar. 10, 2024).

34 *Ibid.*

35 Reich, Aaron “ChatGPT: What is the new free AI chatbot? – explainer”. *The Jerusalem Post*, Dec. 27, 2022 (last visited on Mar. 10, 2024).

36 Rider, Elizabeth “How ChatGPT Will Dramatically Change the Influencer Space”, *Entrepreneur*, Apr. 6, 2023.

37 Edwards, Benj (Dec. 5, 2022). “No Linux? No problem. Just get AI to hallucinate it for you”, *Ars Technica* (last visited on Mar. 10, 2024).

38 Wikipedia, available at: [https://en.wikipedia.org/wiki/Voyages\\_of\\_Christopher\\_Columbus](https://en.wikipedia.org/wiki/Voyages_of_Christopher_Columbus) (last visited on Mar. 10, 2024).

39 Roose, Kevin (Dec. 5, 2022). “The Brilliance and Weirdness of ChatGPT”, *The New York Times*.

amazing. One such use is associated Dan Gillmor who used ChatGPT on a student assignment. He found its generated text was as good as one would expect from reasonably good student would deliver. This made Gillmor to predict that “academia has some very serious issues to confront.”<sup>40</sup> Similarly, Henry Kissinger, Eric Schmidt, and Daniel Huttenlocher opined that “ChatGPT Heralds an Intellectual Revolution”. They argued that “Generative artificial intelligence presents a philosophical and practical challenge on a scale not experienced since the start of the Enlightenment”, and compared the invention of ChatGPT (and LLM in general) to Gutenberg’s printing press.<sup>41</sup> Sam Altman an OpenAI CEO in a more optimistic note has forecast that the” benefits AI for humankind could be ‘so unbelievably good that it’s hard for me to even imagine.’<sup>42</sup>

### Intersection of ChatGPT and the law

ChatGPT has shown enormous flexibility that has exposed it to legal challenges. Some of these challenges are known but many more are unknown because ChatGPT is not so commonly known and used. Therefore, at present, there cannot be any exhaustive list of these challenges as this technology of machine learning is still in its infancy stage. It will throw open many more legal challenges once its use becomes common. It will raise issues that may pertain to contract law, criminal law, tort law, constitutional law, IP law, labour law, IT law and procedural law. Some of the already reported facts are discussed here under that will give an idea of host of issues that are likely to be raked up before the courts in future.

OpenAI acknowledges that ChatGPT at times writes well meaning -sounding but incorrect or absurd answers. This behavior is generally found in large language models (LLM) and is equated with the human behaviour of “hallucination”<sup>43</sup>. Its inherent limitation is that it has limited knowledge of events that mainly occurred after September 2021 but this limitation may be soon addressed with the increasing and diverse use

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40 Hern, Alex (Dec. 4, 2022). “AI bot ChatGPT stuns academics with essay-writing skills and usability”, *The Guardian*, archived from the original on Jan. 17, 2023. (last visited on Mar. 10, 2024).

41 Huttenlocher, Daniel; Kissinger, Henry et al., “Opinion | ChatGPT Heralds an Intellectual Revolution”, *The Wall Street Journal* Feb. 24, 2023 (last visited on Mar. 10, 2024).

42 Roose, Kevin, “How ChatGPT Kicked Off an A.I. Arms Race”, *The New York Times*, Feb. 3, 2023 ISSN 0362-4331. Archived from the original on February 3, 2023. (last visited on Mar. 10, 2024).

43 Lakshmanan, Lak (Dec. 16, 2022). “Why large language models like ChatGPT are bullshit artists.” becominghuman.ai. (last visited on Feb. 25, 2024). The author opined the human raters are not experts in the topic, and so they tend to choose text that looks convincing. They’d pick up on many symptoms of hallucination, but not all. Accuracy errors that creep in are difficult to catch.

of ChatGPT. This may result into compensation claims so often being debated under tort law. This is no more a surmise, it has already surfaced. Jonathan Turley, a law professor at a US university has written a blog that revealed how ChatGPT wrongly accused him of sexually harassing a female student. The professor found out that his name was involved in such an incident after receiving an email from a UCLA professor, who asked the AI chatbot to name five instances of sexual harassment by professors at American law schools.<sup>44</sup>

Like human beings, ChatGPT is also accused of bias. It has been found that Training data of ChatGPT suffers from algorithmic bias. This has been discovered when ChatGPT responds to prompts, including descriptors of people. In one instance, ChatGPT generated a rap indicating that women and scientists of color were inferior to white and male scientists. This may result into issues pertaining to gender justice and violation of guarantees envisaged in the constitution of India.

Recently, Al Jazeera claimed in a news report that ChatGPT Creators fixed a bug that exposed the chat histories of users.<sup>45</sup> Thus raising privacy concerns which in India may be now labelled as ChatGPT Tort. Millions of people have used the software since it was first introduced. This use may include streamlining the coding process and creating architectural designs to using them like search engines or composing essays, draft notes, write songs, plays, drama, novels, and even jokes. Every conversation is immediately saved, and ChatGPT assigns a tab label based on the topic of the first query. This may be dealt under IP Regime.

According to a British spy agency, artificially intelligent chatbots like ChatGPT pose a security risk because private information could be compromised or leaked. Employees at large businesses like Amazon and JPMorgan have been advised not to use ChatGPT due to worries that confidential information may be disclosed. This may be the subject matter of law of torts and constitution of India, more particularly the new born fundamental right; 'right to be forgotten' will be further debated and discussed in light of these developments.

According to the Indian National Cyber Centre, a division of the intelligence agency GCHQ, outlined the risks that may be because of using a new generation of potent chatbots powered by AI for both individuals and businesses. For example, people with wrong intentions could write more convincing phishing emails and the attackers could try techniques they weren't familiar with previously. Various queries could be made publicly accessible, which could harm user information. It may result into

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44 Danny D' Cruze, "Chatgpt gets big update, *Business Today* Sep. 28, 2023 available at: <https://www.businesstoday.in/technology/news/story/openai-chatgpt-falsely-acc...> (last visited on Mar. 20, 2024). The accusation was based on a fabricated article in the Post that was cited by the chatbot as evidence.

45 Al Jazeera, "ChatGPT owner OpenAI fixes bug that exposed users' chat histories", available at: [aljazeera.com/news/2023/3/23/chatgpt](https://www.aljazeera.com/news/2023/3/23/chatgpt) (last visited on Mar. 23, 2024).

further addition of cyber crimes. This concern has been already raised as ChatGPT is designed to generate responses on the basis of inputs it receives. This needs better regulations as many people are abusing technologies like ChatGPT.<sup>46</sup> The use of technology needs to be regulated by better policies and laws to prevent misuse.<sup>47</sup>

“Information is a power but wrong information is a threat”. The use of Chat-GPT will rise with time, leading to vulnerabilities and issues, but incorporating best practices into the use of Chat-GPT will prevent most of the major security breaches which may result from ChatGPT.<sup>48</sup>

A major security breach was reported in March 2023. It was found that a bug allowed some users to see the titles of conversations of other users. It was accepted by not less than OpenAI CEO who admitted that the users were not temporarily able to see the contents of the conversations. Once the the bug was fixed, users were unable to see their conversation history. Later on it was revealed that the bug was much more severe than initially thought to be. OpenAI accepted that it had leaked users’ “first and last name, email address, payment address, the last four digits (only) of a credit card number, and credit card expiration date”.<sup>49</sup> Such instances are bound to raise constitutional, criminal and tort law issues in India . In 2023, Australian MP Julian Hill made a very revealing statement in his national parliament by claiming that the growth of AI could cause “mass destruction”. Highlighting the negative side of AI. Therefore warned that it could result in frauds , unemployment and job losses, discrimination, misinformation, and uncontrollable military applications.<sup>50</sup> Nathan E. Sanders and Bruce Schneier opined that ChatGPT will have telling effect on governance as it has a capacity to “hijacks democracy.”<sup>51</sup> Noam Chomsky, Ian Roberts and Jeffrey Watumull criticized the technology and concluded: “Given the amorality, faux science and linguistic incompetence of these systems, we can only laugh or cry at their popularity.”<sup>52</sup> All these concerns have far reaching legal implications which

46 Major Vineet, Founder and Global President of Cyberpeace, which is a global non-profit organisation and thinktank of cyber and policy experts that work to build resilience against cyberattack and crime, cited by Vaishnavi Parasha in a story titled, Can ChatGPT really replace jobs or is it just another spyware like Pegasus? *India Today*, May 9, 2023.

47 *Ibid.*

48 Per Major Vineet, *Ibid.*

49 Sam Altman: OpenAI: Sorry, ChatGPT Bug Leaked Payment Info to Other, visited on 25-05-2023 Users”, *PC Mag*, Australia Mar. 28, 2023 available at: [au.pcmag.com](http://au.pcmag.com) (last visited on Mar. 10, 2024).

50 Karp, Paul, “MP tells Australia’s parliament AI could be used for ‘mass destruction’ in speech part-written by ChatGPT”, *The Guardian* Feb. 6, 2023 available at: [taipeitimes.com/News/world/archives/2023](http://taipeitimes.com/News/world/archives/2023) (last visited on Feb. 25, 2024).

51 Sanders, Nathan E.; Schneier, Bruce (Jan. 15, 2023). “Opinion | How ChatGPT Hijacks Democracy”, *The New York Times* Jan. 15, 2023.

52 Chomsky, Noam; Roberts, Ian; Watumull, Jeffrey, “Opinion | Noam Chomsky: The False Promise of ChatGPT”, *The New York Times* Mar. 8, 2023.

will be debated and decided by the Indian courts in future under different laws, including labour laws, Indian constitution, IT, criminal law, torts law, commercial laws, consumer laws and competition law.

It was reported in April 2023 that Brian Hood, mayor of Hepburn Shire Council in Australia, plans to take legal action against ChatGPT. The reason for this legal action was a defamatory information that ChatGPT was providing to its users. According to Hood, the OpenAI-owned program erroneously claimed that he was convicted for bribery when he was working with a subsidiary of Australia's national bank. This information was not only untrue but contrary to the actual facts. Hood was not jailed for bribery at all. He acted as a whistleblower against corruption and was not charged with any criminal offenses.<sup>53</sup> A case like this in India would invite defamation law, be it under criminal law or law of torts. Hood's claim on ChatGPT's erroneous content was verified by BBC. The news outlet asked the question regarding Hood's involvement in the bribery scandal to public-available version of ChatGPT. The AI tool replied with a case description and then added "pleaded guilty to one count of bribery in 2012 and was sentenced to four years in prison". It was quite rightly taken by Hood very seriously. Hood's legal team has already sent a concerns notice to Open AI. This is the first case of an official filing a defamation notice against ChatGPT. Under Australian law, OpenAI has 28 days to reply to Hood's concerns notice. If Hood decides to move with the lawsuit, it would be the first public defamation case that OpenAI would face over the content of ChatGPT's.<sup>54</sup>

ChatGPT will have its influence on justice delivery system also. It may not replace judges for judgments are not always mechanical, they are also some times based on technicalities, emotions, changing circumstance and even on particular schooling and mind set of the judges.<sup>55</sup> Nevertheless, Open AI will prove an important aid to the judicial system. It is substantiated by a new report from Pakistan. It is reported that a judge of a session court in Pakistan used ChatGPT in April 11, 2023 to decide the bail of a 13 year old accused in a particular matter. The court took the help of ChatGPT for formulating its decision: "The question that was posed to ChatGPT:

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53 Tom Gerken, "ChatGPT: Mayor starts legal bid over false bribery" claim. *BBC*, available at: [bbc.com/news/tech/](https://www.bbc.com/news/tech/). Apr. 7, 2023. (last visited on Feb. 25, 2024).

54 *Ibid.*

55 See, Zichun Xu, "Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities", available at: <https://doi.org/10.1080/08839514.2021.2013652> (last visited on Feb. 25, 2024).

"In recent years, artificial intelligence technology has been widely used in the field of justice. Compared with human judges, judicial artificial intelligence is more efficient, experience and objective. But artificial intelligence has its limits. Artificial intelligence is still essentially machine intelligence based on big data, algorithms and computing power, not organic intelligence."

Can a juvenile of 13 years of age suspected to have committed an offence be granted bail after arrest according to law in force in Pakistan? The reply was: “Under the Juvenile Justice System Act 2018, according to section 12, the court can grant bail on certain conditions. However, it is up to the court to decide whether or not a 13-year old suspect will be granted bail after arrest”.

Similar such questions were asked by the judge from AI Chatbot pertaining to the same case and formulated his final decision in the light of ChatGPT’s answers.<sup>56</sup>

The present Chief Justice of India Justice D.Y Chandrachud expressed cautious optimism about the use of AI. In his own words:<sup>57</sup>

Technology is relevant insofar as it fosters efficiency, transparency and objectivity in public government. AI is present to provide a facilitative tool to judges in order to recheck or evaluate the work, the process and the judgments.

In Italy there was an allegation in late March, 2023 that ChatGPT was exposing minors to an inappropriate content. ChatGPT was banned and investigation was started on the ground that OpenAI’s use of ChatGPT conversations as training data could be a violation of Europe’s General Data Protection Regulation.<sup>58</sup> A temporary restriction The temporary restriction by Garante, the Italian data protection authority were imposed due to privacy concerns surrounding the failure to verify users’ ages. But of late April 2023, ChatGPT is once again accessible in Italy. OpenAI, the owner of the Chatbot, stated that it has taken necessary steps to effectively clarify and address the issues raised that were raised by the Data protection authority. OpenAI has implemented an age verification tool to ensure users are at least 13 years old. A privacy policy document is also now available for users who can access it before their registration. Furthermore, users in the European Union will be provided a new form that allows them to exercise their right to object to the company’s use of their personal data for model training.<sup>59</sup> Cases like these will involve criminal law, IT Law and POCSO Act.

Interestingly, ChatGPT has been found involved in discriminatory behaviors like human but in its own way. It has been found telling jokes about men and people from England while refusing to do the same about women and people from India.<sup>60</sup>

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56 Sana Jamal, “Pakistani judge uses ChatGPT to make court decision”. *Gulf News* Apr. 13, 2023. “AI revolution is here’: Pakistani court takes help from ChatGPT to grant bail in rape case”. *Pakistan Observer*, Apr. 11, 2023.

57 Express News Service, “Justice Chandrachud to State Government : Leverage AI in Judiciary”, *Indian Express* Nov. 18, 2020.

58 ChatGPT banned in Italy over privacy concerns”. *BBC News* Mar. 31, 2023.

59 Shiona Mc Callen, “ChatGPT accessible again in Italy”. *BBC*. available at: [bbc.com/news/tech/](https://www.bbc.com/news/tech/). (last visited on Feb. 25, 2024).

60 Jain, Alka, “ChatGPT won’t crack jokes on women and Indians, netizens left guessing why”. *Livemint*, (Feb. 12, 2023) available at: [livemint.com](https://www.livemint.com). (last visited on Feb. 25, 2024).

Similarly, it has been found praising public figures like Joe Biden while refusing to do the same to another public figure, namely Donald Trump.<sup>61</sup> In India, such accusations may take serious turn if it makes reporting, for instance, about the members of marginal sections of our society or when it involves religious issues.

ChatGPT has been accused of showing bias, an issue that may be dealt under administrative law in India if perpetuated by the state or its instrumentality, through its executives. In America, conservative commentators allege that ChatGPT is biased and protective of left-leaning perspectives on issues like voter fraud, Donald Trump, and the use of racial slurs.<sup>62</sup> This was admitted by Open AI and it started corrective measures. It unfolded its plans to allow ChatGPT to create “outputs that other people may strongly disagree with. It also contained information on the recommendations based on the responses collected from human reviewers on how to handle controversial subjects, including that how the AI should “offer to describe some viewpoints of people and movements”.<sup>63</sup>

It has been found by Check Point Research and others that ChatGPT can be used for writing phishing emails and malware, especially when combined with OpenAI Codex.<sup>64</sup>

If news reports are to be believed, the popular US fast-food joint will begin testing artificial intelligence chatbots for drive-thrus from June, 2023. The next time you stop by at a Wendy’s drive-thru in the United States, there is a high possibility that an AI chatbot may take your order. This is being done to improve customer service amid a labour shortage. AI chatbots create a huge opportunity to deliver a truly differentiated, faster and friction-less experience for customers.<sup>65</sup> The first test location will be a Wendy’s restaurant in Columbus, which is located in the US state of Ohio. During the test phase, a restaurant employee will monitor the drive-thru to make sure the AI-powered chatbot can address customer requests.<sup>66</sup> Instances like these are bound to raise issues involving labour and consumer Justice.

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61 Guynn, Jessica. “Is ChatGPT ‘woke’? AI chatbot accused of anti-conservative bias and a grudge against Trump”. *USA Today*, available at: [ustoday.com/story/tech](https://www.ustoday.com/story/tech) (last visited on Feb. 25, 2024).

62 Bray, Hiawatha, “Is ChatGPT liberal or conservative? Depends who you ask”. *Boston Globe* Feb. 9, 2023 (last visited on Feb. 25, 2024).

63 McLean, Sophie. “The Environmental Impact of ChatGPT: A Call for Sustainable Practices In AI Development”. *Earth.Org*, available at: [earth.org.com](https://www.earth.org.com) (last visited on Mar. 15, 2024).

64 “Why ChatGPT can be dangerous for every internet user”. *The Times of India* Dec. 21, 2022. Archived from the original on Jan. 5, 2023. (last visited on Mar. 15, 2024).

65 CEO Todd Penegor cited *infra* note 66.

66 Aprameya Rao “Reality Check: AI is changing the way people work. This survey tells you how” WION, available at: <https://www.wionews.com/business-economy/reality-check-ai-is-changing-the-way-people-work-this-survey-tells-you-how-720152> (last visited on Mar. 12, 2024).



#### **IV Conclusion**

AI has come to stay and it is going to open its pervasive wings through its variants, of which ChatGPT is already making rounds not only in technological filed but other allied fields as well, which includes legal jurisprudence also. India being a global stakeholder in the filed of digital technology, it has more than two decades before enacted a legal instrument titled the Information Technology Act to deal with civil and criminal liability issues that are likely to crop up with the introduction of Internet but the issues that are likely to come on the surface due to the use of AI may not find solutions in this enactment. Further more, it will be too early to make a case for new regulatory mechanism without fully understanding the impact of artificial intelligence on different branches of legal jurisprudence. However, the present study clearly shows that issue germane to constitutional law, labour Law, Law of Torts, Law of contract, consumer protection and IPR are likely to occupy the mind and space of legal researchers including judiciary who will be time and again called to decide the legal issue involving the use of artificial intelligence. The issues that are surfacing on daily basis by the use of AI have to be understood through legal prism so that their impact on legal jurisprudence could be appraised and appropriate solutions either by stretching existing relevant legal provisions by new interpretation or amendments or enactment of new legal legislation could be proposed.