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ARTIFICIAL INTELLIGENCE AND CYBER LAWS IN INDIA: DISCOVERING WAYS TO IMPLEMENT REGULATION

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ABSTRACT

Artificial Intelligence is a rapidly expanding concept of technology which enables the functioningof tasks by the computer-system in the most efficiently diversified and anthropoid-manner possible. However, the current social conception about AI is much associated to an anthropomorphic imagination, which is distant and in many-ways oblivious from the current system of AI technology which might not be as advanced as society currently perceive it to be. This paper approaches to explain the current dichotomy between the imaginative and pragmatic conception of AI and then sail-forth to understand the current legal frameworks needed to render the regulation of AI efficient in India considering the social perils which the regulation could curb. For the same, the research compared the American and European progress in this sphere of legislation and finally suggested the incorporation of Lamfalussy approach to bring-in AI regulation within the country.

Keywords- *Artificial Intelligence, anthropoid, anthropomorphic, dichotomy, regulation, Lamfalussy approach.*

Artificial intelligence (AI) is a branch of computer science which deals with making machine (systems) capable of executing tasks which normally require human-like intelligence to perform. But does that mean, systems that possess human intelligence? The answer to this question is crucialin order to clear a myth regarding the nature and kind of AI which exist in the contemporary worldand the possibility of its regulation. Simple answer to the aforementioned speculation is in negative, reason being the current limits to the capability of science to vest machines or software systems with the

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ability to process the information they receive like humans do. A larger answer to this question would entail us to dwell into the aspects of AI in somewhat deeper context, one which would be more approachable from the task of regulation and one which is closer to realityconsidering today's scientific progress regarding AI.

MISCONCEPTION ABOUT ARTIFICIAL INTELLIGENCE-

Since its conception, artificial intelligence has been widely misunderstood by the general population. John McCarthy was the first person to coin this term in Dartmouth Conference in MITin 1956. Although the vision was sumptuous, but his phrase: "*a system which is to evolve intelligence of human order"*[2] led people to have an anthropomorphic misconception about AI. Alan Turing too proposed Turing test[3] in 1950 to asses machine's intelligent behavior at par withhuman cognition.

However, that's a fictional depiction of AI, much motivated by the entertainment industry who depicted computers to engage in arbitrary conversations about abstract general topics along with possessing independent cognitive system without human-supervision showcasing super-human intelligence.[4] This is just a far-stretched imagination for scientists which currently stands as an aspirational phenomenon for current technology to fathom.[5]

However, AI does have a structural existence in today's world in the form of sub-fields of robotics and Machine learning (ML).[6] But these fields of system work through human-defined algorithmic codes which are directed to perform certain specific tasks in particular and not every task in general. This brings us to the two forms of AI, namely-

1. Artificial General Intelligence (AGI) is an AI which could harness capability to surpass human intelligence, knowledge, social behavior across every field of human endeavor, ranging from working ability to abstract elements of emotions.[7]

[2] DR. J. MACCARTHY, PROGRAMS WITH COMMON SENSE 79 (1959).
[3] Robert M. French, *The Turing Test: the first 50 years*, 4, Trends in Cognitive Sciences, 115 (2000).
[4] Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA.ST.U.L.REV. 1305 (2019).
[5] *Id*, at 1309.
[6] Olivia J. Erd´elyi & G´abor Erd´elyi, *The AI Liability Puzzle and a Fund-Based Work-Around*, 70, Journal ofArtificial Intelligence Research, 1309 (2021).
[7] M.C. ELISH & TIM HWANG, AN AI PATTERN LANGUAGE, 1 (Data & Society 2016).

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AGI, also labelled as 'strong AI' is generally within the mental picture of the society when they envision the concept of artificial-intelligence. But this category of Artificial-Intelligence doesn't exist today and is utterly implausible.[8] Envisioning it as a reality posits an unrealistic expectation which is dangerous for policymakers in particular for even giving a thought to regulate them. In other words, an AI can't think, behave, foresee or care in an anthropomorphic manner.[9] Hence, policymakers need not divert their time to regulate what is known to be "inconceivable" with current technology to envision.

2. Artificial Narrow Intelligence (ANI) also known as weak AI, refer to those systems which canexhibit human-like intelligence in some specific domains.[10] An AI of this sort is not general but specifically envisioned and algorithmically coded to execute a certain task in a narrow domain. However, calling it a weak AI would be dysphemistic to the current state-of-the-art technology which it sustains within itself. ANIs today are the most powerful software systems which are capable to learn through experience and are able to self-modify their code to providethe output they are programmed to perform.[11] Some ANIs are- Apple's Siri, Amazon's Alexa,IBM's Watson, Tesla's electric cars, etc. These AIs use Machine-learning (ML) or its differentsubsets (like deep-learning) as a technique to perform these specific tasks.

   Machine-learning works by detecting useful patterns (heuristics)[12] in large data to reach an intelligent result.[13] Thus, Machine-Learning can be used to program and modify AI code accordingly to perform a specific-task for which it doesn't need an explicit intervention of programmer at every stage to encode it in advance.[14]

   The aforementioned discussion establishes the fact that the AIs which exist today are ANIs which work through human-programmed codes exhibiting intelligence in its output through pattern-detection by processing more data. Most importantly, it's a technology which is built andcontrolled by humans through algorithmically coded programs. This opens up the possibility of itsregulation.

[8] John Markoff, *Software is smart enough for SAT, but still far from intelligent* NEW YORK TIMES(Sept20,2015), http://www.nytimes.com/2015/09/21/technology/personaltech/software-is-smart-enough-for-sat-but-still-far-from-intelligent.html.
[9] Olivia, *supra* note 5, at 1320.
[10] Vidushi Marda, *Artificial intelligence policy in India: a framework for engaging the limits of data-drivendecision-making*, Phil. Trans. R. Soc. A 376: 20180087, 1(2019).
[11] Harry, *supra* note 3, at 1311.
[12] *Id*, at 1314.
[13] *Id*, at 1315.
[14] *Id*, at 1314.

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This regulation may be attributed to AI inventors who, via feature engineering, are responsible for enabling AI systems to execute and train themselves in their intelligent pattern-assessing work, resulting in better outcomes.[15]

Now that the myth about the real nature of AI has been dispelled, it is time to examine the necessity, options, and methods for its regulation.

NEED FOR REGULATION OF ARTIFICIAL INTELLIGENCE-

There is no doubt in asserting that AI in its various forms today has made human life easier, efficient and better, saving valuable time and energy.[16] But every invention has potential dark- sides and AI brings no exception to it. Self-driving automobiles, for example, can be of enormousassistance to PWDs and save significant human effort, but they can also cause accidents if improperly designed.[17] Many scholars have pointed out to the liability of producers and end-usersas AI's learning and decisions are a result of human programming or instructions which make its actions a foreseeable result of its codification.[18]

But still there are two significant reasons for it to be regulated: Firstly, the absence of regulationopens up the field of AI technology for various illegal purposes such as violence,[19] terrorism,[20] offences against privacy, etc.[21] The instances of cyber fraud using AIs such as PaymentDiversion Frauds (PDF) and Ransomware attacks are tantamount to its dangerous effects which AI could engender.[22] Secondly, since this new technology is still developing in the hands of largebusinesses, there is a potential of unequal distribution of the benefits of AI in the world, furtheringthe inequality. However, it's unfortunate that there is hardly any concretized government effort taken to deal with the issues of regulation. Given the potential of AI and the scale of its progressionto date, AI can be managed for the

[15] Vidushi, *supra* note 9, at 3.
[16] Matilda Claussen-Karlsson, *Artificial Intelligence and the External Element of the Crime: An Analysis of theLiability Problem*, 7(2017).
[17] Ankit Padhy & Amit Padhy, *Criminal Liability of the Artificial Intelligence Entities*, NLUJ, 15(2019).
[18] *Id*, at 19.
[19] LOW Yan Lin, *International Regulations on Artificial Intelligence in the Military*, SAcLJ, 720(2020).
[20] *Id*, at 720.
[21] Sunitha Jain & Simran A. Jain, *Artificial Intelligence: A Threat to Privacy?* NULJ, 21(2019).
[22] Alana Maurushat et al, *Artificial Intelligence Enabled Cyber Fraud: A Detailed Look into Payment DiversionFraud and Ransomware*, IJLT, 261(2019).

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time being; yet, if steps are not taken now, its effects might soon infiltrate the darker edges of progress, as seen by different contemporary circumstances.

CURRENT INDIAN PROGRESS-

For introduction and promotion of artificial intelligence in India, the Indian government initiated "#AIFOR ALL" wherein, NITI Aayog, a government-run think-tank has been tasked to direct its national AI policy.[23] Some of its collaborations are as follows-

1. NITI Aayog teamed up with google to develop and integrate AI based models to provide business solutions for modern India.[24]
2. In May 2018, it also signed a letter of intent with ABB India to "get critical sectors of the Indian economy ready for a digitalized future and leverage the promise of AI, big data, and connectivity."[25]
3. It published a discussion paper in 2018,[26] wherein it recognized the potential of AI for India'sgrowth and technological advancement in key areas along with promoting it for greater good instead of commercially driving it.

It's conspicuous that Indian government is pouring intense effort to promote AI in India. However, the current AI growth in India is being done on fragmented ad-hoc policies by the government.[27] It is true that there is now no regulatory structure for AI in India, with the exceptionof certain theoretical concerns for dealing with privacy issues,[28] which are separately addressed bythe Data Protection Bill, which is currently not in force. Thus, there exists no single authority, regulatory body or ministry to understand the implications arising out of AI.[29]

Hence, the existing initiatives are primarily geared to harness the opportunities rather than to regulate those opportunities. Even in matters of national security, AI Task force lacks the efforts to be taken to regulate the responsibility of government.[30] But as the saying by Denzel Washingtongoes: "*If you*

[23] Vidushi, *supra* note 9, at 6.
[24] *Id.*
[25] *Id.*
[26] *NITI Aayog*, National Strategy for Artificial Intelligence, INDIAAI, 5 (June 2018) https://indiaai.gov.in/documents/pdf/NationalStrategy-for-AI-Discussion-Paper.pdf.
[27] Vidushi, *supra* note 9, at 7.
[28] NITI Aayog, *supra* note 25, at 87-89.
[29] *Id.*
[30] *Id.*

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pray for rain, you gotta deal with the mud too. That's a part of it,"[31] we can't properlyand safely benefit from AI technology without having a shield of regulation backing it. Also, as already discussed about the potential damage AIs could have on the lives of people and businesses,it becomes crucial for having a regulation simultaneously as the AI technology is developing. Hence, it's clearly a point of concern to be contemporaneously vigilant against.

Since India lacks a regulatory framework of its own, it's crucial to understand the efforts of foreign governments so as to study and suggest the ideal method to regulate AI in India or introduce a manner of regulation in India which as per the grand vision of the government wouldrevolutionize growth in multiple sectors such as education, smart-cities, agriculture amongothers[32].

In this regard, a brief understanding of the American and European experience would bring intolight the systemic considerations to suggest the direction of AI regulation in India.

AMERICAN AND EUROPEAN EXPERIENCE-

American experience is unique with respect to approaching the regulation of digital innovations. American practice avoids taking a precautionary-approach because of the inherent risks this type of approach sustain within it. For-instance, traditional administrative regulatory-systems are notorious for being extremely rigid, bureaucratic, inflexible, and sluggish to adjust to changing circumstances.[33] It seems problematic to foster fast-moving technologies with prior-hypothesizedregulation as trying to plan for every possible worst-case situation and then resolve it through a regulatory procedure/law implies that many best-case outcomes will never be realized.[34]

Thus, America embraced the culture of permissionless-innovation which enabled it to open the contours to development avoiding unnecessary restraints. A major instance could be seen from the Telecommunications Act, 1996,[35] which restricted agencies to regulate internet unlike other physical technologies as its growth is itself undetectable and moreover unpredictable, much like AI. Hence, this policy is based on three stanchions: Avoiding prior restraints; basing policy on evidence not fear

[31] BRAINYQUOTE, https://www.brainyquote.com/quotes/denzel_washington_337069 (last visited Jan 3,2023).
[32] NITI Aayog, *supra* note 25.
[33] Adam Thierer et al, *Artificial Intelligence and Public Policy*, Mercatus Research Paper, 38(2017).
[34] *Id*, at 38.
[35] Pub. LA. No. 104-104, 110 Stat. 56 (1996).

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to avoid hypothesized legislations as in here, problems are best dealt in ex-post fashion[36] and adopting a flexible bottom-top approach rather than rigid top-down approach as we often uncover logical answers to legitimately challenging difficulties that new technology might bring only via. continual trial and error: "By making errors and dealing with adversity, both individuals and organizations learn how to do things better, more effectively and safely."[37]

Hence, it could be inferred that American experience is against previously legislating upon unpredictable aspects of technology such as internet. However, what could be predicted and fairly hypothesized could be regulated in a manner which embraces its permissionless innovation policy. Hence, the current AI (ANIs) could be considered under subject-matter of liberal regulation. This unhindered AI regulation in US is termed: "allowing a thousand flowers to bloom."[38] Here, government accepted to regulate AI in light-handed fashion and introduce regulation only when applicable, for-instance, aviation-sectors,[39] thus, forming predictable, minimalist, consistent, and straightforward legal environment for business.[40] Accordingly, US is pouring efforts for introducing the regulation on AI supervision through National Artificial Intelligence Initiative Act,2020[41] which has imbibed its unhindered AI growth policy. Hence, US approach to regulate AI isdynamic and not bureaucratically-inflexible.

These three stanchions of permissionless-innovation also seem to guide the European Union's efforts in AI regulation. Accordingly, EU, in 2016 published a draft-report on Civil Law Rules onRobotics[42] to recommend the principles for AI regulation. However, as compared to US, this regulation seems narrower as it focused on Robotics (a branch of AI) instead of overall AI structurein ANIs. It also identified specific areas where immediate attention is required such as drones, autonomous vehicles, medical-robots.[43] The report proposes establishment of a "European Agencyfor Robotics and AI," comprised of regulators and ethical experts to monitor AI and robotics- related trends, identify best-practices, recommend regulatory measures, define new principles, andaddress potential consumer

[36] Adam, *supra* note, at 43.
[37] *Id*, at 38.
[38] Corinne Cath et al, *Artificial Intelligence and the 'Good Society': the US, EU, and UK approach*, Science and engineering ethics, 505 (2018).
[39] *Id*, at 5.
[40] Corinne, *supra* note 36, at 41.
[41] *Id*, at 6.
[42] European Parliament Committee on Legal Affairs (JURI), *Civil Law Rules on Robotics*, (2016).
[43] *Id*, at 22.

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protection issues.[44]

Subsequently, EU unveiled its white-paper on AI on 19th February, 2020 wherein it took a giantleap forward to propose a clear plan to regulate AI and characterized a clear dichotomy between promotion (fostering ecosystem of excellence) and regulation (fostering ecosystem of trust).[45] Herein, it accepted the fact that EU already has laws dealing with certain crucial aspects of AI. One such law is the General Data-Protection Regulation (GDPR) which had explicitly provided for Data-protection in the EU.[46] Others are in the areas of unfair commercial practices and productliability laws.[47] So, any future strategy for AI law would entail an examination of existing laws insimilar areas so that unnecessary clash could be avoided and future AI law becomes coherent withlesser burdensome legislation.[48] Accordingly, EU is considering drafting its Artificial IntelligenceAct,[49] focusing on multiple sectoral development of AI in its promotion and regulation with assisted frameworks already under its perusal.

A SUGGESTIVE INDIAN-MODEL FOR REGULATION-

It can be understood that European efforts are guided by the principles upon which the directionof American regulatory practice in digital technology is carried on. Although the abstract principles are similar on ground level, one crucial aspect needs to be perused upon which both approaches differ. It's the level of legislation which is available in both the regions with respect todata-protection. As already understood from the mechanism of machine-learning, data is the mostimportant aspect of AI because it's the main ingredient for AI technologies to process the desiredintelligent output.[50]

Hence, AI is data hungry. At this juncture, it becomes crucial for a country/region to have lawsto regulate data-protection, especially considering the vast array of sensitive information which AI utilizes to take decisions for us. Hence, data-protection framework becomes much crucial for basing future AI related policies upon. In fact, it could become the first step towards regulating the AI

[44] European Parliament Committee on Legal Affairs, *supra* note 40, at 7ff.
[45] Dr. Philipp Hacker, *AI Regulation in Europe*, SSRN, 1 (2020) https://ssrn.com/abstract=3556532 (Last visited onJan 3, 2023)
[46] Anirudh Burman, *Will a GDPR-style data protection law work for India*, Carnegie India, (2019) 4-17-19_Burman_India_GDPR.pdf (carnegieendowment.org), (Last visited o Jan3, 2023).
[47] Dr. Philipp, *supra* note 43, at 4.
[48] Veljanovski, *Economic Approaches to Regulation*, The Oxford Handbook of Regulation, 18 (2010).
[49] THE AI ACT, https://artificialintelligenceact.eu, (Last visited on Jan2, 2023).
[50] Harry Surden, *Machine Learning and Law*, WASH. L. REV., 87 (2014).

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framework. However, only European Union has an enacted regional data-protection law named General Data-Protection Regulation which entails to harmonize privacy and data-protection within European Union.[51] Fortunately, there exists some state regulations in the US rather than federal. Although talks are undergoing to have American Data Privacy and Protection Act,[52] but it's not yet in force. Considering the current circumstances and American policy of required-intervention, a federal legislation was a much-needed requirement for safety of its citizens which is still a dreamfor many American states and it may hinder its drafted law on AI.

Coming to the question of India, it's clear that it doesn't have any regulatory mechanism to govern AI actions. However, what it does have is a draft of Data-protection Bill which has gone through multiple revisions and is still under consideration.[53] One unique aspect to note is that Indiaaspires to model its data-protection law along the lines of GDPR. The drafted bill has envisaged many provisions similar to GDPR such as prior-consent requirement,[54] limitations on processing of personal-data,[55] compliance-requirement for data-processors[56] along with provisions for providing cross-sectoral privacy and penalties for non-compliances.[57] Hence, I propose to base theIndian AI regulatory framework upon the model suggested by the scholars for implementing the AI law in Europe for a crucial reason of basing the Indian data-protection regulation on GDPR, itseems much more coherent to adapt to the path of EU or at least have its manner of implementationinto preferential consideration while enacting the Indian law on Artificial Intelligence. Secondly, the European efforts would focus on a dynamic approach wherein existing laws would also be examined while making its Artificial Intelligence Act (AIA). However, Americans are yet to haveexisting laws regarding the fields similar to AI, such as the Data-Protection law. Thus, in absenceof such regulations in US and provided the scenario where India is already drafting its data- protection law on the GDPR model, India could already have an existing Data-Protection law by the time it starts working on its own law upon Artificial Intelligence. These two scenarios entail the European approach much closer for Indians to embrace in its AI policy for regulation.

[51] Anirudh, *supra* note 44, at 1.
[52] American Data Privacy and Protection Act, H.R.8152 [117th Congress (2021-2022)].
[53] Anirudh, *supra* note 44, at 2.
[54] Draft Personal Data Protection Bill, cl. 8, 12. https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%20 2022.pdf.
[55] *Id*, clauses 4–5, 10.
[56] Draft Personal Data Protection Bill, *supra* note 52, cl. 15–23 and 35–36.
[57] Draft Personal Data Protection Bill, *supra* note cl. 65, 69–73.

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Now, in terms of the mode of implementation of AI regulation in Europe, Dr. Philipp Hacker[58] proposed an effective method consisting of a mix of horizontal and vertical regulation, which is commonly used in capital-markets law, to implement a future liberal AI/ML regulation, namely the *Lamfalussy-process*.

Herein, regulation should be brought in four stages/levels to implement complex regulatory mechanisms. In Level-1(General-principles), he proposes to introduce horizontal-regulation in which general/abstract principles are laid down. These would act as guide for future rules to be framed in specific sub-areas. The article 5 of GDPR[59] could become part of it which have abstractprinciples such as lawful, fairness and transparency. However, those matters which have higher risk-potential could also be addressed under level-1 specifically with certain refinements at furtherlevels. This would entail protection against certain high-risk AI techs at initial stage itself.

Under Level-2(sector specificity), specific vertical-regulations could be introduced on a sector-specific basis in accordance with the general-principles in areas which require precise-regulation tailored to different kinds of risk. Specific areas could include medicine, autonomous driving and personalized-ads. Level-3 should cover safe-harbor provisions on strict-conditions to ensure compliance of rules by big-players who are in position to mutilate fair-competition and annihilate general-principles. Level-4(Guidelines and self-regulation) could cover further refined requirements for certain areas along with introducing non-binding guidelines to foster economic-growth, such as article 40(3) of GDPR[60] which allows people to enter into contracts with third- country organizations as well to set out their own liabilities (which of course can't go against the general-rules but can be flexible enough to foster a liberal development).

CONCLUSION-

Indian experience with AI is still in its promotional stage and as seen from the approach of NITI-Aayog, India is looking for a multi-sectoral implementation of AI.[61] Concomitantly, it requires a multi-sectoral regulatory approach as well, for which the Lamfalussy-process can be of crucial guidance.

[58] Dr. Philipp, *supra* note 43, at 1.
[59] General Data Protection Regulation, art. 5, 2018.
[60] General Data Protection Regulation. art. 40, cl.3, 2018
[61] NITI Aayog, *supra* note 25, at 91.

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However, since no country has a full-fledged AI law in operation to learn the consequences of its implementation, it would be prudent for Indian regulatory-approach to imbibe the liberal US-stanchions while adopting the Lamfalussy-process to ensure a fair implementationwhile avoiding compromises with citizen-welfare and unnecessary state-intervention via. precautionary-approach impeding future Indian potential in the sector of artificial-intelligence.