

ARTIFICIAL INTELLIGENCE IN CONTRACT LAW

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ABSTRACT

Artificial Intelligence (AI) is transforming the global economy in an unprecedented way, and Indian Contract Law, 1872, is no exception. The use of AI technologies can potentially modernize the simple philosophies of the Indian Contract Act. AI is revolutionizing not just the contract drafting and review process but also enhancing the ambit of contract lifecycle management. AI systems are becoming indispensable tools for the legal sector. This paper has set forth an overview of the AI application in the legal field, particularly contract law. The objective was to recognize the fundamental theories of contract law vis-à-vis contemporary AI systems. AI-based contracting is pioneering and the Indian Contract Act, 1872 formed around the most basic elements of the contracting process is a lacking legislation for advanced AI complications. Nonetheless, there is abundant scope for AI development considering that present-day AI systems continue to have flaws in application. AI systems will make leaps and bounds in reducing the administrative workload of lawyers yet non-compliance with legal and ethical standards, lack of human judgment, and expertise clearly indicate growth possibilities. As AI penetrates more into the Indian economy, the daunting task before the legislative is the formulation of a robust framework for AI systems. The need for a comprehensive framework could be recognized either by updating the current Contract law to include the ambit of AI application or creating new statutes for effecting the aforementioned objective.

Keywords: Artificial Intelligence, Contract law, Indian Contract Act, 1872.

INTRODUCTION

“Change is the only constant” as correctly said by Heraclitus echoes true to date. The advent of Artificial Intelligence is the latest phase of the digital revolution we are currently experiencing. Artificial Intelligence or AI for the sake of brevity has taken the world by storm.

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AI is not perfectly defined, yet in simple terms, AI means “machines made intelligent artificially”.¹

Just like every other human technology, AI has evolved continuously. At the offset, algorithmic systems were developed on a rule-based learning and operating model. A modest example of this would be Apple’s SIRI². SIRI is based on advanced machine learning which enables the AI to quickly respond to the proposed question or inquiry. SIRI operates according to the data fed to its algorithm, limited by hand-coded knowledge. Modern-day state-of-the-art AI had made astronomical progress, not only by boosting its efficiency but also by incorporating ease of use.

Modern AI is developed with the purpose of imitating the human mind and decision-making abilities. It is built on a knowledge-based intelligent behavior principle. Rather than purely relying on the coded information for producing the optimum results, future AI now learns from its own data and experience. AI considers the original input, produces an apt output, recognizes the feedback, and applies feedback to enhance user competence. Hence, replicating the human ability to identify and resolve issues without echoing the same error.

AI has been making leaps and bounds, no economic or socio-economic industry is immune to the bearing impact of this technology. The legal field is considered a very slow adaptor of technological changes, yet the deep penetration of knowledge-based AI in our juridical field is thought-provoking.

AI AND CONTRACT LAW: AN AMBIGUOUS ARENA

Contract law is based on mercantile law. Mercantile law was mainly concerned with various mercantile or business transactions. These transactions originated from human behavior and semantics. To deduce the obvious, human-based beliefs and practices are the essence of the Indian Contract Act, of 1872. The most prominent dilemma when addressing the place of AI in contract law is whether AI shall act as a human agency for contracting purposes or whether

¹ Martin Ebers, ‘Artificial Intelligence, Contracting and Contract Law: An Introduction’ in Martin Ebers, Cristina Poncio, and Mimi Zou (eds), *Contracting and Contract law in the age of Artificial Intelligence* (2022)

² Sankshp Mahendra, ‘Is Siri an AI?’ (*Artificial Intelligence+*, 14 February 2023) <
[\[www.jlrjs.com\]\(http://www.jlrjs.com\)](https://www.aiplusinfo.com/blog/is-siri-an-ai/#:~:text=Over%20the%20years%2C%20Apple%20has,known%20as%20the%20feature%20dimension.>
accessed 5 May 2023</p></div><div data-bbox=)

AI shall be considered an autonomous party capable of entering transactions by its own legal authority.³

AI as a human agency is based on the principal-agent concept. The legal relationship paradigm of an AI acting as an agent is expected to be identical to any other regular principal-agent relationship. The principal shall be held liable for all the acts of the agent. To give you an example, supposedly an AI enters into a sale agreement for business goods with the buyer, the organization on whose behalf the AI is contracting shall be the principal. AI is the agent acting on the principal's legal intentionality. At this point, the essential elements for constituting a valid contract as mentioned u/s 10 of the Indian Contract Act, 1872 shall be applicable to the organization enabling the AI's services for contracting i.e. our principal.

AI as an agency approach is to an extent very similar to e-contracting. E-contracting enables individuals to enter into a contract via an electronic medium, in the same way, the agency approach enables using AI to enter into business transactions while having strict legal parameters which restrict the AI's autonomy to avoid entering into rogue transactions.

Another approach that befuddles contract law principles, is considering AI as an autonomous entity capable of entering into legal transactions of its own free will, without any external human influence. Here, we are considering the latest wave of AI which can operate and improve independently. Surely, this AI also has to be coded by humans only, which leaves room for errors, and biased behavior for any pre-coded topic, yet this approach has potential. Such AI is designed to replicate human-capacity reasoning and decision-making abilities but lacks human judgment, beliefs, and sensibilities.

Considering how the prevalent Contract law worldwide is based on human notions, introducing advanced AI as an autonomous contracting entity, is an unexplored notion. Presenting the possibility for AI as a legal entity capable of contracting like companies, firms, etc., will be changing the tapestry of the Indian Contract Act altogether. This view opens a whole new avenue for contract law. Yet, drafting a comprehensive framework for such a focus area is impossible at the moment because AI penetration in the Indian market is still in the nascent stage.

³ Florian Martin-Bariteau and Teresa Scassa, *Artificial Intelligence and the Law in Canada* (LexisNexis 2021)

AI POTENTIALITIES FOR CONTRACT LAW

Contract law encompasses the nitty-gritty of contracting procedures at length. Any contract involves myriad conditions and practicalities which need to be successfully completed before the contract becomes enforceable. Contract management helps streamline the notoriously complex contracting requirements. AI assists in elevating the contract management experience by amplifying efficacy and shrinking the time required.

In the pre-contractual phase, AI is most useful for analyzing and processing large data sets, this includes contract pattern recognition, anomaly identification, optimization, etc. Cyril Amarchand Mangaldas (CAM), a top-tier law firm has been using an AI-based software called Kira⁴ for augmenting their legal services delivery experience. CAM predominantly employs Kira for contract and due diligence review. Considering that AI is excellent at analyzing volumes of data, it is supreme at document review and abstraction, tracking deal points from prior deals, and error-free lease abstractions, among other things. Drafting due diligence lists and assorting data according to the set parameters for multifarious legal transactions is an overwhelming benefit.

During the performance phase, AI is often used for contract drafting and redlining.⁵ Contract drafting software and chatbots have made monumental leaps. Motionize is an AI-based contract drafting software that collates required precedents, drafts clauses based on keywords, maintains a huge agreement and clause database, and works as an extension of Microsoft Word! Another widespread AI application in the legal field is algorithmic decision-making, this is often used in the financial markets to determine stock viability. Advanced AI systems have the capability to eliminate the need for human intervention in basic contracting tasks. AI can absorb and analyze data swiftly, it can identify unenforceable clauses and alert the user. AI is excellent for legal research, it can analyze vast volumes of case law, statutes, and recommendations and provide valuable legal recommendations about the requested subject matter.

AI as a decision-making software can help predict case outcomes based on the statutes and case precedents. In the legal sector, the use of automated decision-making AI for assisting in reducing the burden on the Indian judiciary is a hotly debated topic. A difference in opinion is

⁴ Cyril Amarchand Mangaldas, 'Advanced delivery' (*Cyril Amarchand Mangaldas*) <<https://www.cyrilshroff.com/advanced-delivery/>> accessed 7 May 2023

⁵ Beverly Rich, 'How AI Is Changing Contracts', (*Harvard Business Review*, 12 February 2018) <<https://hbr.org/2018/02/how-ai-is-changing-contracts>> accessed 7 May 2023

natural considering that some people are of the opinion that perfectly coded AI or Strong AI can begin substituting judges in petty case trials. Meanwhile, a majority of the legal fraternity is of the opinion that AI can never replace human judges due to their inherent flaws such as absolute control in the hands of the covers, biased opinions, lack of human sentiments, no sense of human ethics and judgment, etc.

In the post-contractual phase, AI is expected to keep track of the parties' performance and enforce remedies for any delay or deviations by tracking performance and compliance. Handling customer disputes, providing recommendations for improving the organization's effectiveness, professionally resolving customer grievances, and participating in negotiations. Dispute resolution is one of the most sought-after features of legal AI systems because disputes are often very costly and time-consuming. AI can easily identify areas of disagreement, predict their outcome based on similar previous data and provide recommendations for resolving the issue by improving the efficiency of the negotiation.

AI AND THE INDIAN CONTRACT ACT, 1872: A LEGISLATIVE CONUNDRUM

Circling back to the central issue, the Indian Contract Act, of 1872 is drafted keeping in mind the welfare, shortcomings, and expectations of a natural person. The basic principles and doctrines in the Contract Act when primarily stripped down are human nature oriented.

An intriguing question arises: How do the fundamentals of the Indian Contract Act, of 1872 reciprocate to AI-based contracts?

1. Freedom of Parties to a contract

A basic contracting principle is, parties must enjoy genuine contractual freedom, and they must be well-informed about their bargaining position in the contract⁶. Our current legislative system is not prepared enough to deal with these newer power imbalances created by the introduction of AI systems. Clearly, AI systems are more adept at drafting comprehensive clauses and documents than most humans, plus they are extremely time-efficient. Nonetheless, one cannot ignore the brewing asymmetries AI systems can cause by intensifying any party's ability to manipulate contracts to individual benefit and hence gain better bargaining power. Artistically

⁶ Martin Ebers, 'Artificial Intelligence, Contracting and Contract Law: An Introduction' in Martin Ebers, Cristina Poncio, and Mimi Zou (eds), *Contracting and Contract law in the age of Artificial Intelligence* (2022)

drafted clauses can conceal conditions, breaches, and remedies creating lopsided contracts which challenge the party's autonomy to determine the contents of the contract.

One can argue that brilliantly drafted contracts that have an underlying complexity and unpredictability were never a rarity in the legal field, yet AI systems pose an unprecedented threat of this becoming a very common occurrence where the innocent party will hugely suffer because their legal rights and remedies will be curbed.

But then again one wonders who shall be held responsible for restricting the party autonomy in the event that the AI system acts on its own. How does one identify whether the program was coded incorrectly intentionally or whether the AI software has formed the legal opinion based on a subset of data it received? Whether the principal company employing the AI system shall be held liable or the person responsible for operating the AI has made an error or the AI system itself defaulted? Since the subject of AI is extraordinary, our prevalent Indian Contract Act, of 1872 is not well-equipped to give justice to the aggrieved party and discipline the wrong-doer.

2. Offer and Acceptance

When a valid offer is absolutely accepted, an agreement is formed between the parties. When such an agreement is backed by legal intentionality, it becomes a contract. AI systems which just act on behalf of their human principal, are covered under the ambit of the Indian Contract Act, of 1872. In this case, AI software simply acts as a medium of contracting, very similar to e-contracts where agreement is made between the parties mutually and the internet is just a medium of effecting the contract.

The use of an autonomous AI system for forming a contract is concerning.⁷ Where an AI system is making an offer or accepting an offer on behalf of the organization, without the organization's express knowledge about the exact contents of such contract, can this offer or acceptance be deemed valid? Autonomous AI-based contracting has the potential to change the foundation of the Indian Contract Act, of 1872.

⁷ Martin Ebers, 'Artificial Intelligence, Contracting and Contract Law: An Introduction' in Martin Ebers, Cristina Poncio, and Mimi Zou (eds), *Contracting and Contract law in the age of Artificial Intelligence* (2022)

3. Legal Intentionality

Human beings are capable of forming an intention, intention gives rise to action. The contract law also assumes that humans enter into a contract based on an intention to share a goal. To have this goal legally enforceable is legal intentionality.⁸ Legal intentionality is recognized by our Contract Act thus giving rise to legal obligations in the form of contractual performance. Contracts drafted by AI lack the ability to form an intention. In the event that AI is treated as an agent, acting on behalf of the principal, only then can the principal's legal intention be constituted as a valid element to enter into a contract. Intentionality ensures a meeting of minds, but when two AI are individually contracting, what constitutes the meeting of minds?

4. Identifying defects in consent – Fraud and Mistake

In the event that any party's consent is obtained by fraud, the contract shall be voidable at the option of the aggrieved party. One unquestionably wonders, how this doctrine of fraud pans if AI has an implicit knowledge of the contract. Provided this latest wave of AI is self-learning, false implicit knowledge can be easily introduced to the AI system. How can any court or the judiciary possibly identify who was responsible for introducing fraudulent behavior patterns in AI systems? AI software is adept at data absorption, data can be either in a coded form or via self-learning from the available database. Hence, AI systems build upon this inherent implicitly formulated knowledge. What happens when the AI software generates its views, legal opinions, and contractual clauses based on untrue and prejudicial knowledge? Indian Contract Act, of 1872 does not contain any provision for remedial actions against an unknown wrongdoer. Hence, pinpointing who is responsible for fraud is difficult when contracts are drafted by AI systems. Liability for fraud can be attributed to the human principal when AI is an agent provided that fraud is observed in the algorithm i.e. explicit knowledge of the software. Meanwhile, even after employing AI as an agency concept, implicit fraud cannot be expressly attributed to the human principal because identifying the source of fraud or fraudulent implicit knowledge is almost impossible.

On the contrary, another possibility must also be explored. What happens in the event of a mistake? A mistake is an innocent error of judgment by one or both parties. Mistakes can be unilateral or bilateral. Unilateral mistakes are void, hence, the contract is valid and enforceable.

⁸ John Linarelli, 'A Philosophy of Contract Law for Artificial Intelligence: Shared Intentionality' in Martin Ebers, Cristina Poncio, and Mimi Zou (eds), *Contracting and Contract law in the age of Artificial Intelligence* (2022)

Bilateral mistakes are valid, hence, the contract becomes void. Our point of contention arises in identifying what impact a mistake made by any autonomous AI system or electronic agents shall have. If any party suffers due to the unilateral mistake of an AI, who shall be liable to pay the damages or remedy the situation? Should the developer or organization deploying such an erroneous AI system have to bear the brunt of an event he knew nothing about?

5. Legal Remedies and Dispute Resolution

AI can potentially draw a legally viable conclusion for existing contractual inaccuracies and inconsistencies. Automated AI can then work on resolving such issues via automated dispute resolution which comprises negotiation, mediation, or arbitration⁹. The approach has promised to be the most cost and time efficient. The only visible drawback is the presence of biased data in data samples relied upon by the AI system and the lack of subjective human understanding.

CHATGPT-4: A REVIEW OF CURRENT AI-BASED CONTRACTUAL CAPABILITIES

The most renowned and trending AI at the moment is undoubtedly ChatGpt by OpenAI. It is not a legal field-centric AI but does a remarkable job of answering most legal questions and queries. Legal documents, including complex agreements and multipart clauses, can be drafted within seconds by using this AI software. It has gained well-deserved popularity and become a go-to option for most law students and legal professionals.

ChatGpt-4 is the latest cutting-edge technology designed to generate human-like texts. It can quickly identify key clauses and provisions, it can intelligibly determine the purpose and application of law to any particular question. Rapid Contract language analysis can help flag uncertainties and potential risks, identify unlawful enforcements and improve efficiency.¹⁰

The impact of automating administrative work is visibly seen when lawyers get more time to focus on strategic tasks. Lawyers can be more attentive toward handling client negotiations,

⁹ Paola Aurucci and Piercarlo Rossi, 'Artificial Intelligence and Contracts: Reflection about Dispute Resolution' in Martin Ebers, Cristina Poncio, and Mimi Zou (eds), *Contracting and Contract law in the age of Artificial Intelligence* (2022)

¹⁰ Marcin Frąckiewicz, 'ChatGPT-4 and Contract Analysis: Streamlining Legal Document Review' (TS2, 6 April 2023) < <https://ts2.space/en/chatgpt-4-and-contract-analysis-streamlining-legal-document-review/> > accessed 15 May 2023

bargaining favorable deals for their clients, and concentrating on advising clients. Automation can be cost-effective, lead to enhanced productivity, and at the same time keep clients satisfied.

Albeit this AI model's potential is dramatic, one cannot ignore its shortcomings as well. ChatGpt-4 allows the user to feed data and after analyzing the given data, it is ready to assist the user with any question based on the data.¹¹ A couple of shortcomings noticed when this approach was followed are:

1. Unrelated new data generation

Supposedly the data fed into the AI were templates of the 'Assignment of Intellectual Property Rights Agreement'. When any legal professional would ask extremely technical questions such as 'Explain the use restrictions for the assigned IPR in the event of part-payment of royalty', the AI model generated answers which were inconsistent with the shared templates and included unrelated generic data pertaining to the payment of royalty.

2. Lapses in processing relevant information

AI Model was unable to answer questions like what shall be the governing law for Party 1 and Party 2 in the case of a dispute. Parties 1 and 2 were identified correctly but a correlation between the parties and the purpose of drafting the agreement was missing.

3. Lack of precision

ChatGpt-4 was unable to precisely identify the technicalities of the agreement. Considering an agreement where multi-party transactions are involved and each has separate rights and conditions for use and sub-assignment. Upon asking the AI model to draft a restrictions clause for the parties, it would tend to stick to the most recurrent repetition of rights and conditions, many times ignoring the individual set of rights and conditions for each party.

In conclusion, ChatGpt-4 is not the best option for the contract review process, there are a few hits and many misses. AI model's speed of contract review is unparalleled by any human but the efficiency rating surely takes a dip. The model needs a lot more work to correctly review complex contracts.

¹¹ Tammy Zhu, 'ChatGPT Can't Analyze Your Contract Yet, But There's Potential' (*Bloomberg Law*, 19 April 2023) < <https://news.bloomberglaw.com/us-law-week/chatgpt-cant-analyze-your-contract-yet-but-theres-potential> > accessed 15 May 2023

CONCLUSION

Recognition of the use of AI in Contract law is a constant battle of potential against stability. AI surely has unique potential but the foundation of our current legal system is based on the stability provided by the philosophies and principles of the Indian Contract Act.

While AI has the potential to boost the efficacy and precision of the contract creation process, its implementation in the essential elements of a valid contract must be approached with caution. ¹²AI can draft, review, analyze, and make recommendations for contracts within seconds but the problems associated with a lack of transparency, accountability, and fairness in contract lifecycle management are steadily emerging.

The rules of the Indian Contract Act are applicable to AI systems as well because currently, we do not have any comprehensive legislation for the same. The Indian Contract Act's application to AI systems has uncountable loopholes which can be easily leveraged to the detriment of an innocent party. One cannot ignore the urgent need for radical legislation which covers the scope of AI systems in contract law much better than the Indian Contract Act, of 1872.

¹² Matthew Stepka, 'Law Bots: How AI Is Reshaping the Legal Profession' (*Business Law Today*, 21 February 2022) <<https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/>> accessed 15 May 2023