

# REGULATING THE ETHICS OF THE UNKNOWN: ANALYSING REGULATORY REGIMES FOR AI-BASED LEGAL TECHNOLOGY AND RECOMMENDATIONS FOR ITS REGULATION IN INDIA

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*The emergence of artificial intelligence has disrupted almost every industry in the modern world. Experts have no doubt that AI is set to take the legal services industry by storm as well, a field that is otherwise notorious for its reluctance towards embracing technology. AI-based legal technologies are being increasingly used in technology assisted review and other applications. The use of AI also poses questions relating to the ethical duties of lawyers. Are regulators around the world equipped to adequately monitor AI-based legal technologies? Do lawyers even have an ethical duty to use such AI-based legal technologies? Are the rules and the regulatory framework set-up by the United States of America and England that deal with AI in law, adequate? While the paper attempts to investigate into these questions, it also acknowledges that India, despite having a burgeoning legal services market has no such regulatory framework in place. This paper attempts to explore the reasons for the absence of such a framework and the challenges to faster adoption of these technologies in the country. This paper argues that the Indian regulator, i.e. the Bar Council of India would be well advised to adopt versions of the American Bar Association Model Rules which require lawyers to be aware of the risks and advantages of technology for the provision of legal services, and supervise non-lawyers' assistance. Lastly, this paper also suggests that the light-touch approach adopted by the Solicitors Regulation Authority of England can serve as the model regulatory approach to be adopted by the Bar Council of India.*

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## I. INTRODUCTION

Artificial intelligence ('AI') has taken almost every industry in the world by storm. However, the legal services industry has traditionally been reluctant to embrace new tech, even more so in India, where the legal field is plagued with inefficiencies and redundancies.<sup>1</sup> Although digitisation is being accelerated due to the pandemic, it has been a challenge for the Indian courts – paper is still the king.<sup>2</sup> On the other hand, in the West, AI has been adopted in the provision of legal services to augment the work of lawyers. In fact, the adoption of AI has seen an uptick in recent years, driven by demand from clients.<sup>3</sup> Clients are no longer willing to pay high hourly rates for routine work by junior lawyers. Investments in this area have risen and the application of AI in law is becoming more efficient, with underlying data sets getting bigger by the day.<sup>4</sup> AI has demonstrated its ability to create huge value in the legal services industry and is set to transform it by becoming ubiquitous.

<sup>1</sup> Maulik Vyas, *Cloak Work Smartens Up: How Start-ups are Transforming India's Archaic Legal Sector with AI, Big Data*, ECONOMIC TIMES PRIME, July 1, 2019, available at <https://economictimes.indiatimes.com/prime/technology-and-startups/cloak-work-smartens-up-how-startups-are-transforming-indias-archaic-legal-sector-with-ai-big-data/primearticleshow/70016690.cms?from=mdr> (Last visited on November 17, 2021).

<sup>2</sup> Jyoti Rattan & Vijay Rattan, *The COVID-19 Crisis – the New Challenges Before the Indian Justice and Court Administration System*, Vol. 12(2), INTERNATIONAL JOURNAL OF COURT ADMINISTRATION, 11 (2021).

<sup>3</sup> See Daniel Flagella, *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, EMERJ: BUSINESS INTELLIGENCE AND ANALYTICS, March 14, 2020, available at <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> (Last visited on November 17, 2021).

<sup>4</sup> David Silverberg, *Inside the Legal Tech Investment Boom*, BLUEJ, available at <https://www.bluej.com/ca/blog/inside-the-legal-tech-investment-boom> (Last visited on November 17, 2021).

However, with great power of AI comes great ethical responsibility. The use of AI has thrown up ethical challenges for lawyers in jurisdictions where such technologies are in use. The American Bar Association ('ABA') amended a model rule in 2012 which asked lawyers to stay updated with the advantages and risks of technology in the provision of legal services.<sup>5</sup> A change was also made in the same year to the rule on using non-lawyer assistance by lawyers.<sup>6</sup> Both changes were seen as directly targeted to indicate the legal-ethical rules for lawyers using technology (even those applications which utilise AI). The Solicitors Regulation Authority ('SRA') in England has outlined the scope of regulation and liability for lawyers while using AI in the provision of legal services.<sup>7</sup> The Bar Council of India ('BCI'), on the other hand, does not have any bespoke rules governing the conduct of lawyers while using AI or any other technology to provide legal services.

Do lawyers in India have an ethical duty to use AI while providing legal services? If so, what sort of rules govern use of such technology by lawyers? These are some of the important conundrums which this paper will attempt to answer. Part II of this paper will look at the current applications of AI in the legal field, and the need and implications of wider adoption going ahead. Subsequently, Part III will explore whether lawyers have an ethical duty to use AI in the provision of legal services and the rules in place governing its use in the United States of America ('USA'), England, and India. Under Part IV, the paper discusses whether there is a case for the use of AI in the provision of legal services in India, the challenges to the wider adoption of such technologies, and the corresponding regulations.

## II. THE ADVENT OF AI IN LAW

AI has loosely been defined as a computer's ability to perform tasks which would otherwise require human intelligence and sometimes even the ability to go beyond it. Advancements in AI have led to it penetrating nearly all service fields spawning billion dollar software that professionals rely on daily. Law is arguably one of the service fields most conducive to the application of AI. Surprisingly, it is yet to witness the widespread adoption of AI. Each of these concepts are subsequently explored in this part.

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<sup>5</sup> American Bar Association, Model Rules of Professional Conduct, 1983 (USA), Rule 1.1.

<sup>6</sup> American Bar Association, 2012 Amendments to Model Rules of Professional Conduct, 1983 (USA).

<sup>7</sup> SOLICITORS REGULATION AUTHORITY, *Technology and Legal Services*, December 11, 2018, available at <https://www.sra.org.uk/risk/risk-resources/technology-legal-services> (Last visited on November 17, 2021).

## A. BRIEFLY – WHAT IS AI?

Most definitions of AI relate to the ability to perform tasks that would otherwise require human intelligence.<sup>8</sup> AI has been defined as the science of teaching computers how to learn, reason, perceive, infer, communicate, and make decisions like humans do.<sup>9</sup> However, some commentators also view AI as computer systems that are capable of performing tasks whose completion is beyond human intelligence and capabilities.<sup>10</sup> Microsoft loosely defines AI as machine learning (‘ML’) that can improve its own capabilities without needing humans to reprogram it.<sup>11</sup>

The field of AI has many branches. Broadly, these include ML, natural language processing (‘NLP’), expert systems, vision, speech, planning and robotics. However, AI based legal technologies mostly leverage ML and NLP.<sup>12</sup> ML is an application of AI that provides systems the ability to automatically learn and improve from experience without being explicitly programmed.<sup>13</sup> ML focuses on developing computer programs that can access data and use it to learn for themselves.<sup>14</sup> Instead of manually writing rules for how the computer should interpret a data set, ML algorithms allow the computer to determine the rules itself. ML is a precursor to a more pervasive ‘deep learning’ which uses advanced algorithms to perform more abstract tasks such as recognising images.<sup>15</sup>

In technical terms, NLP is a technological process that enables computer applications to derive meaning from a user’s input. The application attempts to identify valuable information contained in conversations by interpreting the user’s needs (intents) and extract valuable information (entities) from a sentence and respond back in a language the user will understand.<sup>16</sup> The goal of an efficient

<sup>8</sup> See JACOB TURNER, *ROBOT RULES: REGULATING ARTIFICIAL INTELLIGENCE*, 16 (Palgrave Macmillan, 2019).

<sup>9</sup> John Simons, *Tomorrow’s Business Leaders Learn How to Work with A.I.*, WALL STREET JOURNAL, November 30, 2016, available at <https://www.wsj.com/articles/tomorrows-business-leaders-learn-how-to-work-with-a-i-1480517287> (Last visited on November 17, 2021).

<sup>10</sup> Lord Hodge, Justice of the Supreme Court of the United Kingdom, British Irish Commercial Bar Association, Lecture at the Signet Library, Edinburgh: Law and Technological Change (April 4, 2019); John McCarthy, *What is Artificial Intelligence?*, STANFORD UNIVERSITY, available at <http://jmc.stanford.edu/articles/whatisai/whatisai.pdf> (Last visited on November 17, 2021).

<sup>11</sup> GREG SHAW, *THE FUTURE COMPUTED, AI & MANUFACTURING*, 12 (Microsoft Corporation, 2019).

<sup>12</sup> Michael Mills, *Artificial Intelligence in Law: The State of Play 2016*, THOMAS REUTERS, February 23, 2016, available at <https://www.legalexecutiveinstitute.com/artificial-intelligence-in-law-the-state-of-play-2016-part-1/> (Last visited on November 17, 2021).

<sup>13</sup> M.I. Jordan & T.M. Mitchell, *ML: Trends, Perspectives, and Prospects*, Vol. 349(6245), SCIENCE (2015).

<sup>14</sup> Expert AI, *What is ML? A Definition*, May 6, 2020, available at <https://www.expert.ai/blog/machine-learning-definition/> (Last visited on November 17, 2021).

<sup>15</sup> Khalid Al-Kofahi, *Cognitive Computing: Transforming Knowledge Work*, THOMSON REUTERS, January 24, 2017, available at <https://blogs.thomsonreuters.com/answeron/cognitive-computing-transforming-knowledge-work/> (Last visited on November 17, 2021).

<sup>16</sup> Jonathan Fingold & Zxyan Liu, *Natural Language Processing in Composer*, MICROSOFT RESEARCH, October 13, 2021, available at <https://docs.microsoft.com/en-us/composer/concept-natural>

NLP application is to be able to analyse, understand, and generate languages that humans use naturally so that eventually, people can address computers as though they were addressing another person.<sup>17</sup>

AI is becoming more ubiquitous by the day, and for good reasons. Moore's law, coined by Intel's Gordon Moore, states that the number of transistors that can fit on a chip will double every year.<sup>18</sup> Moore's law held good for a number of years and led to the world's computing revolution and the advent of AI. However, this 'law' is reaching its physical limits. Transistors are not doubling on chips every couple of years and efficiency and processing power is not accelerating at the same rate.<sup>19</sup> Having said that, ML which requires vast amounts of processing power seems at odds with the declining trend of Moore's law, as traditional Central Processing Units ('CPUs') are not designed to deal with ML. Graphical processing units ('GPU'), and next-gen AI dedicated processing cores in chips like Apple's M1<sup>20</sup> are making ML more accessible to the masses.<sup>21</sup> Secondly, data is more readily available than ever given consumers and enterprises are readily adopting cheaper and accessible cloud storage solutions. This is birthing vast datasets for ML and AI to play with and become more efficient.<sup>22</sup> A perfect storm of ready datasets and dedicated AI chip architecture is leading to a virtuous cycle of more advanced AI processes, data availability and analytics, and research. This is birthing advanced software applications for all sorts of service fields, including law.

AI is what economists call general purpose technology – technology that changes not only how society works and lives through its direct innovations, but whose spill-over effects also enable a vast range of complimentary innovations.<sup>23</sup> AI can enable such spill-over effects much like how electricity enabled factory electrification, mass production, cold storage and everything that followed.<sup>24</sup> AI, therefore, is bound to drive innovation in the field of law as well.

language-processing (Last visited on November 17, 2021).

<sup>17</sup> See Microsoft Research, *Natural Language Processing Group*, available at <https://www.microsoft.com/en-us/research/group/natural-language-processing/> (Last visited on July 9, 2021).

<sup>18</sup> David Rotman, *We're not Prepared for the End of Moore's Law*, MIT TECHNOLOGY REVIEW, February 24, 2020, available at <https://www.technologyreview.com/2020/02/24/905789/were-not-prepared-for-the-end-of-moores-law/> (Last visited on November 17, 2021).

<sup>19</sup> Chien-Ping Lu, *AI, Native Supercomputing and the Revival of Moore's Law*, Vol. 6, APSIPA TRANSACTIONS ON SIGNAL AND INFORMATION PROCESSING, 9 (2017).

<sup>20</sup> Daniel Bourke, *Apple's New M1 Chip is a Machine Learning Beast*, TOWARDS DATA SCIENCE, December 24, 2020, available at <https://towardsdatascience.com/apples-new-m1-chip-is-a-machine-learning-beast-70ca8bfa6203?gi=cc1a7230c97e> (Last visited on November 17, 2021).

<sup>21</sup> Janakiram MSV, *Here Are Three Factors That Accelerate The Rise of Artificial Intelligence*, FORBES, May 17, 2018, available at <https://www.forbes.com/sites/janakirammsv/2018/05/27/here-are-three-factors-that-accelerate-the-rise-of-artificial-intelligence/?sh=7db92118add9> (Last visited on November 17, 2021).

<sup>22</sup> *Id.*

<sup>23</sup> Ray Eitel-Porter, *A Technology Revolution Like no Other*, ACCENTURE, September 21, 2018, available at <https://www.accenture.com/in-en/insights/artificial-intelligence/technology-revolution-like-no-other> (Last visited on November 17, 2021).

<sup>24</sup> *What We Can Learn from AI of the 1800s*, ACCENTURE June 19, 2019, available at <https://www.accenture.com/in-en/insights/digital/what-we-can-learn-from-ai> (Last visited on November 17,

## B. THE CURRENT STATE OF AI-BASED LEGAL TECHNOLOGIES

AI based legal technologies are being used increasingly today to supplement the work of lawyers. However, the technology is not at a stage where lawyers could be replaced.<sup>25</sup> As stated in the preceding section, AI-based legal technologies principally implement ML and NLP. AI based legal technologies use algorithms to *first*, identify and process patterns in data to increase the accuracy and quality of identification as an increasing number of queries are processed (via ML); *second*, comprehend and respond to human language patterns (via NLP); and/or *third*, make predictions based on patterns found in sample data (predictive analytics).<sup>26</sup>

AI based legal technologies can assist lawyers in a wide range of document-intensive tasks that are critical to negotiating a transaction, such as due diligence, conducting investigations, or ascertaining evidence relevant to a claim. Lawyers are also prone to mistakes and inaccuracy when doing spot checks<sup>27</sup> and reviewing troves of voluminous documents. The use of such technologies helps reduce these errors as well.<sup>28</sup>

Among the many applications of AI in the provision of legal services is technology-assisted review ('TAR'). It provides a means of sorting documents into categories to achieve more efficient document review. As with a manual document review, lawyers initially identify the relevant documents and upload them to a review database to create the master set which serves as the source for future searches. TAR relies on a lawyer to guide the review process through interactive testing. The lawyer may use search terms or establish criteria for judgmental sampling to create a seed set. The entire collection of stored information is compared to the seed set. The AI generates a heat map and points out deviations from the norm.<sup>29</sup>

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2021).

<sup>25</sup> Steve Lohr, *A.I. is Doing Legal Work. But it Won't Replace Lawyers, Yet*, NEW YORK TIMES, March 19, 2017, available at <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html> (Last visited on November 17, 2021).

<sup>26</sup> James Q. Walker, *What's Artificial About Intelligence? The Ethical and Practical Considerations When Lawyers Use AI Technology*, BLOOMBERG LAW, April 13, 2018, available at <https://news.bloomberglaw.com/e-discovery-and-legal-tech/whats-artificial-about-intelligence-the-ethical-and-practical-considerations-when-lawyers-use-ai-technology> (Last visited on November 17, 2021).

<sup>27</sup> Rattan & Rattan, *supra* note 2.

<sup>28</sup> Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, HARVARD JOURNAL OF LAW AND TECHNOLOGY DIGEST, January 3, 2018, available at <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> (Last visited on November 17, 2021).

<sup>29</sup> *Id.*; Brian Almquist, *Electronic Evidence and Technology-Assisted Review*, MWAIS 2019 PROCEEDINGS, 25 (2019) at 4.

There also are applications that monitor compliance and identify red flags. Some existing legal research tools and new applications are deploying AI to help with natural language legal research. Document automation tools are becoming better by the day using AI to help draft something as basic as notices to something as advanced as commercial contracts.<sup>30</sup> Certain tools deploy NLP to dig into court dockets to predict decision outcomes, identify favourable jurisdictions in which to bring a suit, and propose likely successful motions and arguments before particular judges.<sup>31</sup> Electronic billing has also been augmented with the coming of AI. These applications have helped reduce disputes on line items, more accurate client adjustments, accurate reporting and tracking, and reduced paper costs.<sup>32</sup> Certain applications specialise in intellectual property search and claims.<sup>33</sup>

### C. WHY AI IS CONDUCTIVE FOR LAW AND LEGAL SERVICES

AI is not new to the legal profession. Technologies in use by lawyers, even though slowly, have been adopting AI in their algorithms to give better outputs. Take for example NLP in search engines.<sup>34</sup> The notion that lawyers would suddenly be replaced by an army of robots is flawed because the advent of AI so far has only been gradual. However, the legal services industry is soon reaching a turning point (it can be argued that it already has). As investment in AI technology

<sup>30</sup> Certain applications like IBM's Watson Debater can scan databases for relevant content. It then identifies strongest arguments and arguments for both sides in natural language, see IBM, *AI Research: Project Debater*, available at <https://www.research.ibm.com/artificial-intelligence/project-debater/> (Last visited on October 22, 2020); Neota Logic's Perfect NDA shortens the non-disclosure agreement process by offering templates deemed most relevant to the user's situation using its AI, see Neota Logic, *NDA Automation: Perfect NDA*, available at <https://www.neotalogic.com/product/perfectnda/> (Last visited on October 22, 2020).

<sup>31</sup> LexisNexis' Lex Machina apply NLP and dig into court dockets to predict decision outcomes, identifies favourable jurisdictions in which to bring a suit, and proposed likely successful motions and arguments before particular judges, see Lex Machina, *Legal Analytics Platform*, available at <https://lexmachina.com/legal-analytics/> (Last visited on October 22, 2020).

<sup>32</sup> Brightflag has a legal pricing software that automatically adjusts line-by-line items. Users can centralize the invoice review so that all documents submitted are routed directly to the correct approver. The company claims that the average client can reduce administrative costs related to payment management, see Brightflag, *About Brightflag*, available at <https://brightflag.com/about/> (Last visited on October 6, 2021).

<sup>33</sup> Trademark Now uses an algorithm that can shorten weeklong searches for patents, registered products and trademarks using its Trade Mark Clearance platform, which according to the company, can return searches in less than fifteen seconds, see Trademark Now, *Products*, available at <https://www.trademarknow.com/products> (Last visited on October 22, 2020); ANAQUA Studio is designed for drafting patents and prosecution. Its system is said to be able to detect errors, circular claim references and formatting defects aside from automatically generating literal claims support, see ANAQUA, *Products: AQX Law Firm*, available at <https://anaqua.com/aqx-law-firm/> (Last visited on October 22, 2021).

<sup>34</sup> David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW, available at <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/?rf=1> (Last visited on November 17, 2021).

skyrockets, the use and adoption of AI applications in the field of law will also accelerate.<sup>35</sup>

It has been argued that the law is in many ways conducive to the application of AI and ML. In the social sciences, the law is the closest to a system of formal logic. Albeit oversimplified, legal rulings involve setting axioms derived from precedent, applying those axioms to relevant facts, and reaching a conclusion. The logic-based methodology is the type of activity to which ML can be appropriately applied to.<sup>36</sup> Statutes and codified law generate rules which can be applied to a situation by relatively simple rule-based programming.<sup>37</sup> A combination of these approaches can be gainfully applied to legal problems.

With ML, computers become better with more iterations of the same task. Such cognitive computing works with the help of three core processes – gathering information, analysing and understanding the information, and consequently making decisions based on the derived understanding.<sup>38</sup> Human lawyers tend to become better with more practice on a particular task, especially if they are guided by someone more experienced. Applications based on ML work in a similar fashion.<sup>39</sup> Therefore, with the wider adoption of AI in the legal services industry, the dataset for these technologies to ‘learn’ from will become larger. Consequently, the technology will become arguably better.

The adoption of AI in the provision of legal services is not a one-way street. It is not only lawyers and law firms that are pushing for AI in the legal field. In fact, client demand is driving AI adoption by bigger law firms. Corporate clients are no longer willing to pay high hourly rates to law firms for junior lawyers to do routine work.<sup>40</sup> These tasks are already being automated and out sourced, both by the firms themselves and by outside suppliers such as accountants. In the near

<sup>35</sup> In 2018, investment in legal tech, mostly driven by AI firms hit 1 billion USD, *see Legal Tech Hits \$1 Billion Investment as Lawyers Embrace Automation*, LawGeex Blog, December 3, 2018, available at <https://blog.lawgeex.com/legaltech-hits-1-billion-investment-as-lawyers-embrace-automation/> (Last visited on November 17, 2021).

<sup>36</sup> Rob Toews, *AI will Transform the Field of Law*, FORBES, December 19, 2019, available at <https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/#7477106a7f01> (Last visited on November 17, 2021).

<sup>37</sup> Jason Morris, *Rules as Code: How Technology May Change the Language in which Legislation is Written, and What it Might Mean for Lawyers of Tomorrow*, ABA TECHSHOW 2021, February 5, 2021, available at <https://s3.amazonaws.com/us.inevent.files.general/6773/68248/1ac865f1698619047027fd22eddbba6e057e990e.pdf> (Last visited on November 17, 2021).

<sup>38</sup> Bob Arens, *Cognitive Computing: Under the Hood*, THOMSON REUTERS, January 27, 2017, available at <https://blogs.thomsonreuters.com/answeron/cognitive-computing-hood/> (Last visited on November 17, 2021).

<sup>39</sup> Sterling Miller, *Artificial Intelligence and its Impact on Legal Technology: To Boldly go Where no Legal Department has Gone Before*, THOMSON REUTERS, available at <https://legal.thomsonreuters.com/en/insights/articles/ai-and-its-impact-on-legal-technology> (Last visited on November 17, 2021).

<sup>40</sup> Alex Moltzau, *Artificial Intelligence and Adoption of Legal Technology*, TOWARDS DATA SCIENCE, September 21, 2019, available at <https://towardsdatascience.com/lawtech-and-artificial-intelligence-fc5d7899c37b> (Last visited on November 17, 2021).



future, a law firm partner will be the leader of a team and more than one of the players in the team will be the AI machine.<sup>41</sup> While Indian law firms have been slow to adopt AI based legal technologies, Magic Circle firms in the UK such as Clifford Chance have actively adopted AI.

Billion-dollars plus software businesses have been built in nearly all service fields in the past two decades to boost productivity and work flows. For example, Sales force in sales<sup>42</sup> and LinkedIn in talent management. The field of law remains a glaring exception. Microsoft Word and e-mail continue to be the dominant digital tools being used by lawyers.<sup>43</sup> However, this may not remain the case for too long as the legal services industry is at an inflection point for technology adoption in law led by AI. Considering the size of the legal services market, AI demonstrates an area for huge value creation, especially with improvements in AI technologies such as NLP and ML. Much like e-mail changed the way everyday business is conducted, AI will soon become ubiquitous and transform the legal services industry. Those lawyers who adapt and embrace the change will thrive and others may be left behind.<sup>44</sup> A thriving lot of lawyers will be able to focus their time and efforts on issues requiring their professional judgment – the areas of practice that remain squarely in a lawyer’s domain.<sup>45</sup>

### III. REGULATION AND GUIDANCE ESTABLISHED IN USA, ENGLAND, AND INDIA

How are lawyers who are using AI in the provision of legal services regulated in the largest legal services markets? To answer the question, this Part will explore such regulation in place in the US and in England. Why does India lack a framework in place to regulate the use of AI or any kind of technology in the provision of legal services? This question will be answered by explaining how the BCI has kept away from regulating transactional lawyers and the use of technology by lawyers and law firms in the country, and how the outdated ethics regulations have a saving grace in an all-encompassing ‘Preamble’.

#### A. UNITED STATES OF AMERICA

In the USA,<sup>46</sup> in 2012, the ABA formally approved a change to the Model Rules of Professional Conduct (‘Model Rules’), amending Comment 8 to

<sup>41</sup> Exper.AI, *supra* note 14.

<sup>42</sup> Hiten Shah, *How Salesforce Built a \$13 Billion Empire from a CRM*, NIRA BLOG, available at <https://nira.com/salesforce-history/> (Last visited on November 17, 2021).

<sup>43</sup> MSV, *supra* note 21.

<sup>44</sup> Eitel-Porter, *supra* note 23.

<sup>45</sup> Rattan & Rattan, *supra* note 2.

<sup>46</sup> American Bar Association, Model Rules of Professional Conduct, 1983 (USA), Rule 1.1; Jim Calloway, *The Risks of Technology Incompetence*, ABA, December 1, 2019, available at [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2019/november-december/risks-technology-incompetence/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/november-december/risks-technology-incompetence/) (Last visited on November 17, 2021); Robert J. Ambrogi, *Tech*

Model Rule 1.1 making it explicit that lawyers have a duty to be competent and stay abreast with the changes in the law and its practice but also with the benefits and risks of the use of relevant technologies ('Technological Competence Rule').<sup>47</sup> The model rules do not automatically become applicable to all lawyers in the USA. The Model Rules are guidelines which States can adopt into their rules of professional conduct with suitable modifications or rejections. In 2019, South Carolina became the 38<sup>th</sup> State in the USA to adopt the Technological Competence Rule.<sup>48</sup> Under the Technological Competence Rule, it can be argued that lawyers must have a basic understanding of how AI tools operate, which is to say lawyers must understand how AI tools operate and what the capabilities, risks and limitations of the AI tool are.<sup>49</sup>

Authors are of the opinion that apart from the Technological Competence Rule, the use of AI can possibly trigger the following Model Rules – Duty to Communicate (Model Rule 1.4), Duty to Charge Reasonable Fees (Model Rule 1.5), Duty of Confidentiality (Model Rule 1.6), and Duty to Supervise (Model Rules 5.1 and 5.3).<sup>50</sup>

ABA Model Rule 1.4 substantiates a lawyer's duty to communicate with clients and requires lawyers to reasonably consult with the client through means by which the client's objectives are to be accomplished. Some authors are of the opinion that the use or non-use of AI should be communicated to the client and that the client should acquiesce to the use of AI.<sup>51</sup> However, this reasoning seems to be flawed. For example, while there could be a reasonable expectation that a lawyer should discuss trial strategy with the client, the lawyer would not discuss whether he will use Lexis or West law or the court library to conduct legal research. As long as a lawyer understands the capabilities, risks and limitations of AI based legal tools, and applies their understanding to deliver value to the client, the duty to communicate should be sparingly implicated in such situations, if at all.

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*Competence*, LAW SITES, available at <https://www.lawsitesblog.com/tech-competence> (Last visited on November 17, 2021).

<sup>47</sup> Lauren Kellerhouse, *Comment 8 of Rule 1.1: The Implications of Technological Competence on Investigation, Discovery, and Client Security*, Vol. 40, J. LEGAL PROF., 291 (2016).

<sup>48</sup> U.C. Davis School of Law, *Attorneys Now have Duty of Tech Competence in 38 States*, December 5, 2019, available at <https://law.ucdavis.edu/library/news/posts/2019-12-05-attorneys-now-have-duty-of-tech-competence-in-38-states.html> (Last visited on November 17, 2021).

<sup>49</sup> Lu, *supra* note 19; Kellerhouse, *supra* note 47, at 299.

<sup>50</sup> Janine Cerny et al., *Legal Ethics in the Use of Artificial Intelligence*, SQUIRE PATTON BOGGS, February 22, 2019, available at [https://download.pli.edu/WebContent/pm/249218/pdf/02-22-19\\_1600\\_115843\\_LegalEthics.pdf](https://download.pli.edu/WebContent/pm/249218/pdf/02-22-19_1600_115843_LegalEthics.pdf) (Last visited on November 17, 2021); David L. Gordon & Rebecca L. Ambrose, *The Ethics of Artificial Intelligence*, JACKSON LEWIS CORPORATE COUNSEL CONFERENCE, 2017, available at [https://www.jacksonlewis.com/sites/default/files/docs/Final\\_The%20Ethics%20of%20Artificial%20Intelligence\\_Gordon%20and%20Ambrose.pdf](https://www.jacksonlewis.com/sites/default/files/docs/Final_The%20Ethics%20of%20Artificial%20Intelligence_Gordon%20and%20Ambrose.pdf) (Last visited on November 17, 2021).

<sup>51</sup> Cerny et al., *supra* note 50; Michael Hatfield, *Professionally Responsible Artificial Intelligence*, vol. 51, ARIZ. ST. L. J., 1057 (2019).

Model Rule 1.5 requires fees to be reasonable. It is argued that failing to use AI technology that materially reduces the costs of providing legal services could result in a lawyer charging an unreasonable fee to a client.<sup>52</sup> For example, it is possible that in due diligence or discovery involving thousands of documents, an AI based legal tool would be able to materially reduce the number of lawyers and the time required by them to scrutinise documents.<sup>53</sup> If such technology is available and would result in the availability of reliable, efficient and cost-effective legal services to clients in the judgment of the lawyer, it will indeed be the lawyer's or the firm's duty to use such AI based legal tools to deliver value and improved services to the client.

Under ABA Model Rule 1.6, lawyers also owe their clients a general duty of confidentiality. This specifically requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorised disclosure of, or unauthorised access to, information relating to the representation of a client".<sup>54</sup>

The use of AI could involve sharing of data with third parties.<sup>55</sup> This will trigger data privacy and confidentiality issues. A lawyer should be reasonably certain that the data would be secure. This should be no different from use of virtual data rooms, cloud storage or e-mail services which are in widespread use already. A lawyer would need to scrutinise the data privacy policy of the AI based legal tool to assess the safety of clients' data on their servers and in some cases, even confer with the provider in case the data privacy features seem suspect. As long as an AI based legal technology provider has adequate data privacy features, which are fairly standard across the tech industry, there should not be major concerns.

ABA Model Rules 5.1 and 5.3 state that lawyers have an ethical obligation to supervise lawyers and non-lawyers who are assisting them.<sup>56</sup> In 2012, the title of Model Rule 5.3 was changed from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."<sup>57</sup> The change

<sup>52</sup> Ericka Johnson, *Ethical Use of Artificial Intelligence in the Legal Industry: The Rules of Professional Conduct*, AMERICAN BANKRUPTCY INSTITUTE, March 22, 2018, available at <https://insolvencyintel.abi.org/bankruptcyarticles/ethical-use-of-artificial-intelligence-in-the-legal-industry-therules-of-professional-conduct> (Last visited on November 17, 2021).

<sup>53</sup> Dan Mangan, *Lawyers Could be the Next Profession to be Replaced by Computers*, FUTURE OF WORK, available at <https://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html> (Last visited on November 17, 2021).

<sup>54</sup> American Bar Association, Model Rules of Professional Conduct, 1983 (USA), Rule 1.6.

<sup>55</sup> Use of AI will almost always involve sharing of data third parties, especially if the data is processed in servers of the entity providing the AI application, see Frank Pasquale, *Data-Informed Duties in AI Development*, Vol. 119, COLUM. L. REV., 1917 (2019).

<sup>56</sup> American Bar Association, Model Rules of Professional Conduct, 1983 (U.S.A.), Rules 5.1 & 5.3.

<sup>57</sup> American Bar Association, Variations of the ABA Model Rules of Professional Conduct, ABA CPR POLICY IMPLEMENTATION COMMITTEE, September 29, 2017, available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_3.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf) (Last visited on November 17, 2021).

clarified that the scope of Rule 5.3 encompasses non-lawyers, whether human or not.<sup>58</sup>

Lawyers are obligated to supervise the work of AI used in the provision of legal services. Therefore, as repeatedly stated by legal practitioners, the lawyer must understand the limitations and capabilities of the AI based legal tool and modify the output of the AI tool as per his professional judgment.<sup>59</sup> This is akin to a senior lawyer reviewing the work of a junior colleague. AI tools have an upper hand over human lawyers in some tasks whereas some tasks are better off being performed by AI tools. The lawyer must use his professional judgment to know where to draw the line.<sup>60</sup>

It does not seem to be the case that AI currently represents the standard of care in an area of legal practice such that its use is necessary.<sup>61</sup> As discussed above, AI-based legal tools directly implicate the Technological Competence Rule,<sup>62</sup> the duty to charge reasonable fees,<sup>63</sup> and the duty to supervise.<sup>64</sup> There is no special reason to implicate the duty to communicate<sup>65</sup> and the duty of confidentiality<sup>66</sup> in the use of AI tools. Those duties remain an over arching concern regardless, whether AI tools are used or not. The decision to use AI based legal technologies in the provision of legal services will be a balancing act for lawyers. It can safely be said that a lawyer will have an ethical obligation to use AI in the provision of legal services when the technology becomes reliable, efficient, and cost effective. In the longer run the greater danger might very well be under utilisation of rather than overreliance upon artificial intelligence.<sup>67</sup>

## B. ENGLAND

The SRA the regulatory body for solicitors in England and Wales in 2018 released a report on technology and the law under its risk publications ('the Report').<sup>68</sup> The Report discusses the advantage, disadvantages, risks, and best practices in relation to the use of technology in the provision of legal services. The Report points out that AI is already being used to enhance legal services and supplement human lawyers rather than replacing them.<sup>69</sup>

<sup>58</sup> Cerny et al., *supra* note 50, at 4.

<sup>59</sup> *Id.*; Pasquale, *supra* note 55, at 1939.

<sup>60</sup> Gordon & Ambrose, *supra* note 50.

<sup>61</sup> Al-Kofahi, *supra* note 15.

<sup>62</sup> American Bar Association, Model Rules of Professional Conduct, 1983 (USA), Rule 1.1

<sup>63</sup> *Id.*, Rule 1.5.

<sup>64</sup> *Id.*, Rules 5.1, 5.3.

<sup>65</sup> *Id.*, Rule 1.4.

<sup>66</sup> *Id.*, Rule 1.6.

<sup>67</sup> Cerny et al., *supra* note 50.

<sup>68</sup> Silverberg, *supra* note 4.

<sup>69</sup> SOLICITORS REGULATION AUTHORITY, *Technology and Legal Services*, December 11, 2018, 3, available at <https://www.sra.org.uk/globalassets/documents/sra/research/technology-legal-services.pdf?version=4a1abc> (Last visited on November 17, 2021).

It is notable that the SRA explicitly states that its regulation is based on the outcomes that solicitors and firms receive rather than the tools used to meet them.<sup>70</sup> The SRA does not intend to impose specific rules on how solicitors and firms should use AI or say which AI systems they should use, however, the Principles and Code of Conduct still apply.<sup>71</sup> For example, the duty of confidentiality applies to an e-mail just as it applies to a letter or a conversation or an AI tool. For example, the SRA expects firms to give competent and timely services to its clients, but does not want to impose or regulate the case management system the firm would use. It is within the SRA's regulatory ambit to regulate all activities of its regulated bodies, such as law firms.<sup>72</sup> However, if a body it regulates uses more advanced technologies in its activities, then the activity will be regulated on the same basis as any other, including situations where AI is used.

The SRA further states that it is the responsibility of the lawyers involved to maintain ethical and professional standards by regularly checking the output of any system's delivery.<sup>73</sup> AI technologies can learn and develop. Just as firms train, supervise and review the output of their trainees and other staff, the same should be done with the output of AI systems. Individual solicitors and firms will remain responsible for the provision of legal services, including whether they use AI technologies to advise clients or use them to work on client matters. This responsibility, however, cannot be out sourced to a third party.

The SRA, in fact, goes an extra step and outlines the scope of liability of lawyers using AI systems. If there is a flaw in an AI system which is operated by a separate tech company then the SRA is unlikely to take action against the solicitor or the firm if it can be shown that the solicitor or the firm did everything it reasonably could to assure itself that the system was appropriate.<sup>74</sup> Affected clients or stakeholders will be able to seek redress in the usual way if they have suffered a loss or detriment, such as taking their complaint forward to the Legal Ombudsman<sup>75</sup> or making a negligence claim.<sup>76</sup>

The SRA's regulatory approach may be considered a thought leader regulation. Its approach seems to be balanced and contemporaneous, adopting a pragmatic approach to regulation. AI can throw up multifarious challenges to every stakeholder interested in the output of the AI technology. These challenges are underscored when dealing with sensitive information pertaining to legal cases

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<sup>70</sup> *Id.*

<sup>71</sup> The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold, *see* SRA Code of Conduct for Firms, 2018 (England).

<sup>72</sup> SOLICITORS REGULATION AUTHORITY, *supra* note 69.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, 16.

<sup>75</sup> The Legal Ombudsman was set up by the Office for Legal Complaints and established under the Legal Services Act, *see* the Legal Services Act, 2007 (England).

<sup>76</sup> Solicitors Regulation Authority, REPORTING AN INDIVIDUAL OR FIRM, June 29, 2021, available at <https://www.sra.org.uk/consumers/problems/report-solicitor> (Last visited on July 9, 2021).

and case management systems of lawyers and law firms because such information is likely to be highly confidential. The leakage of such information, even if inadvertently, may lead to serious legal and monetary consequences. Moreover, with development and sophistication of AI technologies, potential challenges remain unknown. At this stage, lawyers themselves are the most appropriate judges of the ethicality of the AI-based legal technologies they employ. Therefore drafting bespoke rules to regulate the use of AI-based legal technologies may be counter-productive at this point in time.

As an example, imagine if there were a regulation which stated that data generated by such AI-based legal technologies in the country shall be siloed in servers inside the country – much like how the Reserve Bank of India mandates payment processor data for Indian transactions be siloed in servers in India. In such instance, data from outside the country would not be accessible to the application in India and local data would not be available for it outside India. This may hamper the growth at which the underlying AI develops as it relies on using the biggest possible datasets to improve outputs. This is something which may not be desirable especially because these AI based legal technologies are in nascent stages of development.

By outlining its approach and scope of liabilities for lawyers and law firms, the SRA has adopted what may be called a thought leader approach for the regulation of AI-based legal technologies.

### *C. INDIA*

The rules for ethics of the practice in India is set by the BCI. The BCI derives its powers to set these rules from the Advocates Act, 1961.<sup>77</sup> The rules for professional conduct of lawyers in India is set out in under Chapter II of Part VI of the Bar Council of India Rules ('BCI Rules').<sup>78</sup> Unlike in the USA and England, the rules on standards of practice in India do not prescribe lawyers to have a duty to use or be aware of the advantages and risks of technology. As discussed above, arguments can and have been made with regards to the standards of practice in the USA and England – that if and when AI based legal technologies become reliable, efficient, and cost-effective, lawyers will have an ethical obligation to use such AI-based legal technologies.

This sub-part explores how the BCI is not regulating the ethics of transactional lawyering or the ethics involved in use of technology for the provision of legal services. This leads to a discussion on how this has led to self-regulation by lawyers aided by the widely worded 'Preamble' in the BCI Rules.

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<sup>77</sup> The Advocates Act, 1961, §45.

<sup>78</sup> The Bar Council of India Rules, 1975, Part VI, Chapter II; The Advocates Act, 1961, §49(1)(c).

## 1. The Bar Council of India is not Regulating Transactional Lawyers

The standards of practice in India are almost silent on the duty of transactional lawyers towards their clients in contrast to more sophisticated jurisdictions. This is perhaps a vestige of the colonial times. These rules were forged much before the Indian economy was liberalised and foreign investment was allowed in the country in 1991, at a time when most, if not all, work that lawyers undertook and were compensated for was litigation based and not transactional. Since 1991, the Indian economy has boomed to become the world's 5<sup>th</sup> largest economy overtaking the UK and France in 2020, as per the International Monetary Fund.<sup>79</sup> Naturally, a heavy amount of foreign investment has come into the country, topping \$50 billion in FY2019-20.<sup>80</sup> The increased foreign investment and rise of the Indian economy has sown the seeds for the birth of a sophisticated transactional legal services set-up in the country.

A study of the BCI Rules and its silence on the use of technology can be explained by looking into how the BCI Rules have neglected transactional lawyering. While there is not an absolute link between use of technology and kind of practice a lawyer is involved in, transactional lawyers tend to use technology in their day-to-day work more frequently than litigating lawyers in India.

## 2. How Technology is Used by Indian Lawyers and Law Firms

Almost all the work carried out by a transactional lawyer in India is desk-based and technology reliant, whether it is diligence-data review and analysis, document storage, file sharing, report preparation, transaction documentation, time and billing systems, communications and collaboration over the internet, or research, among other things.

Courts in India, on the other hand, are still averse to the use of much technology, let alone AI based legal technologies. Filings and evidence are made in paper. It has been the author's observation that judges are also more comfortable sifting through voluminous paper filings rather than e-filings. During the pandemic, the Supreme Court of India dispensed with the need to make filings in paper when e-filing. However, the e-filing portal still charges a printing fee based on then number of pages in an uploaded document, ostensibly for judges to have

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<sup>79</sup> Joe Myers, *India is now the World's 5th Largest Economy*, WORLD ECONOMIC FORUM, February 19, 2020, available at <https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/> (Last visited on November 17, 2021); International Monetary Fund, *India*, available at <https://www.imf.org/en/Countries/IND> (Last visited on November 17, 2021).

<sup>80</sup> The World Bank, *Foreign Direct Investment, Net Inflows (BoP, Current US\$) – India*, available at <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=IN> (Last visited on July 9, 2021); Department for Promotion of Industry and Internal Trade, *FDI Statistics*, available at <https://dipp.gov.in/publications/fdi-statistics> (Last visited on July 9, 2021).

a physical set of documents in front of them at the time of hearings.<sup>81</sup> Some other courts and tribunals, such as the National Company Law Tribunal, insist that physical filings be made in addition to e-filing. Most arbitrators who can dispense with formal requirement of discovery under the Code of Civil Procedure, 1908,<sup>82</sup> during arbitration choose not to do. This is perhaps because these arbitrators, being former judges, are too steeped in the traditional ways and means of the profession.

Therefore, the scope of e-discovery is limited in court and most arbitrations, and consequently in the use of any AI based technologies which could assist it. A litigating lawyer's work using technology and computers is limited to legal research using online tools and preparing filings that have to be printed. Further, it is generally observed that litigators in the country tend to charge either on a lumpsum basis or on a per-appearance basis, and not on hourly rates thus negating the need for any time and billing software applications, based on AI or otherwise.

### 3. BCI's Outdated Standards for Regulating Lawyers

The regulations governing lawyers, the BCI Rules, have not kept pace with the evolving legal practice in the country. The BCI Rules were imagined in reference to and in context of a world where a lawyer practices law only in a courtroom. These rules are divided into four parts – Duty to the Court;<sup>83</sup> Duty to the Client;<sup>84</sup> Duty to Opponent;<sup>85</sup> and Duty to Colleagues.<sup>86</sup> Ideally, the BCI Rules should contain bespoke rules which could apply to transactional lawyers and use of technology as well. Notwithstanding that, one would expect the part on 'Duty to the Client' as one which would govern the dealings of transactional lawyers.

However, even that part is mostly silent with respect to transactional lawyers or any form of duty to use technology, AI-based or otherwise. For example, to nit-pick on a few of these rules, Rule 11 says that an advocate is bound to accept any brief in courts or tribunals before which he proposes to practice and reject a brief only under special circumstances.<sup>87</sup> Rule 13 says that an Advocate should

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<sup>81</sup> To the Supreme Court's credit, it has taken steps to digitise the bench. It has come out with software called SCI – Interact, developed in house which helps judges access, files, annexures, and annotate on them. Judges have been provided tablets and soon lawyers will be provided with a companion application to facilitate the working of courts, *see Ajmer Singh, Supreme Court Develops Software to Make All its 17 Benches Paperless*, THE ECONOMIC TIMES, May 26, 2020, available at <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-develops-software-to-make-all-its-17-benches-paperless/articleshow/75989143.cms?from=mdr> (Last visited on November 17, 2021).

<sup>82</sup> The Code of Civil Procedure, 1908, §19(1).

<sup>83</sup> The Bar Council of India Rules, 1975, Chapter II, §I.

<sup>84</sup> *Id.*, Chapter II, §II.

<sup>85</sup> *Id.*, Chapter II, §III.

<sup>86</sup> *Id.*, Chapter II, §IV.

<sup>87</sup> *Id.*, Chapter II, §I, Rule 11.



not accept a brief in which he may be called upon as a witness.<sup>88</sup> Further, Rule 22 A states that an advocate shall not bid for in court auction or otherwise acquire any property which is the subject matter of any suit appeal or other proceedings in which he is in any way professionally engaged.<sup>89</sup> Each of these rules reveal that they were framed keeping in mind a traditional litigator's scope of duty as these situations may be only encountered by them.

#### 4. The Preamble – BCI's Saving Grace

However, the Preamble to the Standards of Professional Conduct and Etiquette under the Rules,<sup>90</sup> states that an advocate at all times shall comport himself in a manner befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind what may be lawful and moral for a person who is not a member of the bar. An advocate shall fearlessly uphold the interests of his client and his conduct conform to the letter and spirit of the rules. The superfluous language aside, most notably, the Preamble says that while the rules contain canons of conduct and etiquette adopted as a general guide, the specific mention of these rules shall not be construed as a denial of the existence of other rules equally imperative but not specifically mentioned.

The Preamble is self-evidently extremely wide-sweeping and inclusive. The existence of the Preamble perhaps explains one of the most significant deficiencies in the BCIRules– not regulating transactional lawyers and further why they do not have a separate code or bespoke rules governing their practice. Although purely on the basis of anecdotal evidence, the fact that no major scandal involving transactional lawyers has been in the news, it seems that transactional lawyers have done a decent job of self-regulation.

The Preamble further states that a lawyer must fearlessly uphold the interests of her client. This suggests that lawyers must provide a standard of service to their clients that matches global standards – delivery of value in terms of efficiency, reliability, and cost savings. Drawing from the Preamble, even though lawyers in India do not have a specific duty to use technology and AI based legal technologies, the absence of such a rule does not mean such a rule does not exist or that it is not equally as important as others. It can therefore be argued that they do in fact have such a duty to their clients if it means that the same will deliver more value to their clients or uphold the interests of their clients.

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<sup>88</sup> *Id.*, Chapter II, §I, Rule 13.

<sup>89</sup> *Id.*, Chapter II, §I, Rule 22-A.

<sup>90</sup> *Id.*, Preamble.

#### IV. THE CASE FOR USE, CHALLENGES AND RECOMMENDATIONS

Having discussed the current uses of AI in the provision of legal services and the ethical considerations it poses to lawyers, one needs to discuss if there even is a case for the use of AI in the provision of legal services in India. There is no doubt that there are many advantages of using AI in the provision of legal services. However, these advantages have to be viewed in the context of the market in which they are sought to be deployed. Therefore, it may be useful to ask whether the preached benefits of AI would be applicable to the legal services industry in India. This part discusses the positive case for adoption of AI based legal technologies in the country, the multifold challenges and resistance their wider adoption faces, and the rules which ought to be put in place by the Bar Council of India to regulate ethics involved in their use.

##### A. *THE CASE FOR DEPLOYMENT OF AI BASED LEGAL TECHNOLOGIES IN INDIA*

From the standpoint of delivery of services, there is an urgent need to adopt AI in the Indian legal services industry as well. As discussed in the preceding Part, there is yet to be any substantial penetration of technology in the provision of legal services in the country. While the digitisation of courts and of other parts of the legal infrastructure is well underway<sup>91</sup> and has made progress, it is worth wondering if digitisation alone could help with the efficient delivery of legal services. As per data compiled by the National Judicial Grid, there are about 40 million cases pending before various judicial forums in the country. Out of these about 8.7 million cases are civil cases and 22 million criminal cases.<sup>92</sup> This massive backlog in courts directly impacts the access to justice and certainty for businesses.<sup>93</sup> It is one of the stated goals of the government to make India rise up in the World Bank's ease of doing business rankings.<sup>94</sup> Out of all the ranking parameters, India ranks the lowest in 'enforcement of contracts.'<sup>95</sup> It is possible to argue

<sup>91</sup> Japnam Bindra & Shreya Nandi, *Digitization of Judicial Process Gets Big Push amid Pandemic, Says Govt*, LIVE MINT, July 17, 2020, available at <https://www.livemint.com/news/india/digitization-of-judicial-process-gets-big-push-amid-pandemic-says-govt-11594950575437.html> (Last visited on November 17, 2021).

<sup>92</sup> NATIONAL JUDICIAL DATA GRID, November 2021, available at <http://njdg.ecourts.gov.in/> (Last visited on Nov. 26, 2021).

<sup>93</sup> Johannes Boehm, *(Un)ease of Doing Business: How Congested Courts Hinder Firm Productivity*, VOXDEV, February 7, 2019, available at <https://voxdev.org/topic/institutions-political-economy/un-ease-doing-business-how-congested-courts-hinder-firm-productivity> (Last visited on November 17, 2021).

<sup>94</sup> Subhayan Chakraborty, *Ultimate Aim of Ease of Doing Business Reforms is to Improve Lives: PM Modi*, BUSINESS STANDARD, November 20, 2018, available at [https://www.business-standard.com/article/economy-policy/ultimate-aim-of-ease-of-doing-business-reforms-is-to-improve-lives-pm-modi-118111901258\\_1.html](https://www.business-standard.com/article/economy-policy/ultimate-aim-of-ease-of-doing-business-reforms-is-to-improve-lives-pm-modi-118111901258_1.html) (Last visited on November 17, 2021).

<sup>95</sup> The World Bank, *Ease of Doing Business in India*, available at <https://www.doingbusiness.org/en/data/exploreconomies/india> (Last visited on July 9, 2021).

that this low ranking can entirely be attributed to the functioning of courts that are responsible for the enforcement of contracts. They are inefficient and do not have the capacity to resolve commercial and other disputes quickly.

While there are systemic problems for policy makers to deal with,<sup>96</sup> AI can help to make systems including lawyers, more efficient. The use of AI can help both the bar and the bench. The benefits of widespread use of AI based legal technologies by lawyers is likely to trickle down to the courts as well. For example, document review and discovery, which are time-consuming processes, can be sped up with AI. The time savings could trickle down and make courts more efficient as well. These are, of course, secondary benefits which would accrue to institutions from AI technologies designed for practitioners. Institutions like courts would benefit a lot more from AI technologies specifically designed for use by them.

The Supreme Court of India has led the way in digitisation and adoption of technology so far. It has constituted an e-Committee,<sup>97</sup> which is leading digitisation and other technological initiatives. In November, 2019, the Supreme Court launched an indigenously engineered neural translation tool, Supreme Court Vidhik Anuvaad Software ('SUVAS'), to translate judicial orders and rulings from English to vernacular languages faster and efficiently.<sup>98</sup> More importantly, the Supreme Court has also constituted an Artificial Intelligence Committee which in April 2021 launched an AI portal called Supreme Court Portal for Assistance in Courts Efficiency ('SUPACE').<sup>99</sup> SUPACE, it has been proposed, would help the judiciary to process, collect, and analyse data to expeditiously dispose the backlog of cases in the judiciary. It was clarified that the functions of SUPACE would not bleed into the decision-making processes of the judges.<sup>100</sup> Not a lot is known about SUPACE's scope, functions, usability, or outcomes yet. It is not known whether

<sup>96</sup> For example, there are thousands of vacancies in the lower and higher judiciary which do not get filled for various reasons. As on March 2021, there was a thirty-nine percent vacancy in the higher judiciary in the country, see Chitrakshi Jain, *Vacancies in the Judiciary are Troubling. But other Issues Exist, too*, THE INDIAN EXPRESS, March 23, 2021, available at <https://indianexpress.com/article/opinion/columns/judicial-appointments-high-courts-ministry-of-law-and-justice-7240327/> (Last visited on November 17, 2021); STANDING COMMITTEE ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE, REPORT ON DEMANDS FOR GRANTS (2021-22) OF THE MINISTRY OF LAW AND JUSTICE, 107TH REPORT (March 2021).

<sup>97</sup> E-COMMITTEE, SUPREME COURT: INFORMATION AND COMMUNICATION TECHNOLOGY IN INDIAN JUDICIARY, INTRODUCTION, available at <https://ecommitteesci.gov.in/about-department/introduction/> (Last visited on November 17, 2021).

<sup>98</sup> Shanthi S., *Behind SUPACE: The AI Portal of the Supreme Court of India*, ANALYTICS INDIA MAGAZINE, May 29, 2021, available at <https://analyticsindiamag.com/behind-supace-the-ai-portal-of-the-supreme-court-of-india/#:~:text=The%20Supreme%20Court%20of%20India%20launched%20its%20first%20Artificial%20Intelligence,huge%20chunks%20of%20case%20data> (Last visited on November 17, 2021).

<sup>99</sup> *CJI Launches Top Court's AI-driven Research Portal*, THE INDIAN EXPRESS, April 7, 2021, available at <https://indianexpress.com/article/india/cji-launches-top-courts-ai-driven-research-portal-7261821/> (Last visited on November 17, 2021).

<sup>100</sup> Santhi, *supra* note 98.

SUPACE was developed in-house like some of the Supreme Court's other digital initiatives or whether an external developer was hired to develop the application and its underlying AI.

## B. CHALLENGES TO THE ADOPTION OF AI-BASED LEGAL TECHNOLOGIES IN INDIA – LEGAL AND OTHERWISE

The preceding section makes a case for the adoption of AI based legal technologies in India. However, the Indian legal services industry faces bigger challenges, legal and otherwise, to the adoption of these technologies which are discussed below.

### 1. Low Penetration

Currently, there is substantially little penetration of AI in the Indian legal services industry, even by the leading firms. Cyril Amarchand Mangaldas, in 2018, became the first law firm in India to deploy AI in the provision of legal services. The firm used Kira, a popular contract analysis application.<sup>101</sup> There is little data available on the use of AI by other firms, even for the biggest, by revenue, firms in the country. Moreover, there are only a few such companies operating in the country, and the overall investment has been muted.<sup>102</sup>

### 2. Low Cost of Labour of Lawyers

It is also pertinent to note that lawyers in India, at least starting out, are paid much less compared to their peers in the West. Cost of labour, even of lawyers, in a developing country like India is less than developed economies with sophisticated legal markets.<sup>103</sup> While the cost of labour across markets varies, the cost of AI applications developed in the West is likely to remain consistent across markets. It will most likely be tough for developers to achieve efficiencies of scale at current levels of low penetration and lower cost appetite of Indian lawyers and law firms. It therefore may not be expected of the application developers to give discounts to Indian law firms for the use of their applications. It is fair to assume that the research and development costs associated with these AI applications are significant and scaling is going to be a lot harder in India. Firms therefore would

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<sup>101</sup> Cyril Amarchand Mangaldas, *Cyril Amarchand Mangaldas – The First Firm in India to Provide Efficient Legal Services using Artificial Intelligence Says: The Lawyer Magazine*, February 28, 2018, available at <https://www.cyrilshroff.com/news/cyril-amarchand-mangaldas-the-first-firm-in-india-to-provide-efficient-legal-services-using-artificial-intelligence-says-the-lawyer-magazine/#> (Last visited on November 17, 2021).

<sup>102</sup> Between 2015 and 2019, total funding of AI based legal technologies in India has been less than twenty-five million USD, see Vyas, *supra* note 1.

<sup>103</sup> This is an inference drawn from the data available to the author. Wage statistics on Indian lawyers are not published by authoritative sources.

rather utilise junior lawyers than such technologies purely because of the costs involved.

### 3. A Different Legal System with its Own Set of Challenges

A significant obstacle in the adoption of AI in the legal field in India is likely that the legal system in India is still largely paper-based. With little penetration of digital systems and interfaces in place, it is hard to imagine AI being efficient without a significantly large dataset to scour through. Even as a starting point, millions of pieces of paper would be needed to be converted to digital formats, which itself is a herculean task.

Another point to consider would be that the output of each ML application is derived from the dataset given to it. An AI application developed for the American legal market may not be compatible to be used in India. The legal system in India is significantly different – with respect to the structure of courts, precedents, and even the kind of legal language used, among other things.

For example, document automation applications will need to adapt to formats and styles of Indian documentation. Issues under the Indian legal system may not be issues under the American legal system. For example, the Indian judicial system is a unitary one, which is to say that cases from any court or tribunal in the country can ultimately reach the Supreme Court of India by appeal or special leave, irrespective of subject matter.<sup>104</sup> The US on the other hand, has a federal judicial system where cases are allocated to federal or state courts based on subject matter – the federal courts being confined to matters of federal law.<sup>105</sup> This means an AI technology which determines the precedent value of judgments would have to account for this variation. Therefore, it is possible that an application developed for the US may not flag issues which are problematic in India, which would not be problematic in the US. These applications would need to develop Indian law and context specific programmes appropriate for the country.

### 4. Lack of a Data Privacy Law

India does not yet have a data privacy law in place. The Personal Data Protection Bill, 2019 ('the Bill') is still pending before the Parliament.<sup>106</sup> Under the Bill, private entities are strictly regulated much like under the European Union's

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<sup>104</sup> Art. 132 of the Constitution of India states that an appeal shall lie to the Supreme Court from any judgment, decree or final order of any High Court in India. High Courts hear appeals from lower courts and tribunals, *see* The Constitution of India, 1950, Art. 132.

<sup>105</sup> Comparative Constitutional Law, *Chapter Eight: Unitary and Dual Courts Systems and the Role of Constitutional Values in Private Litigation* (2009), 2-8, available at [https://pennstatelaw.psu.edu/\\_file/Ross/Chapter\\_Eight.pdf](https://pennstatelaw.psu.edu/_file/Ross/Chapter_Eight.pdf) (Last visited on November 17, 2021).

<sup>106</sup> The Personal Data Protection Bill, 2019, 373 of 2019.

General Data Protection Regulation (“GDPR”).<sup>107</sup> However, in its current form, the Bill gives a disproportionate amount of leeway to the government – which is a potential concern that has been flagged by advocacy groups.<sup>108</sup>

The Bill gives India’s central government the power to exempt any government agency from its requirements – on grounds of national security, national sovereignty, and public order. While the GDPR offers EU members similar escape clauses, they are tightly regulated by other EU directives. For example, the GDPR mandates that the country invoking such an escape clause forms more specific laws to exercise it. The Bill gives the Government the power to access individual data over and above laws already in place. The Bill also allows the government to order private entities to share any of the non-personal data they collect with it, with the stated intention to improve the delivery of government services.<sup>109</sup> The Bill however does not explain how this data will be used, and whether it will be shared with others, or whether any compensation would be paid.<sup>110</sup>

The government is the number one litigant in the country, litigating on everything from crimes to property disputes to constitutional rights of the citizenry of the country. The government having disproportionate leeway under the Bill will create potential ethical issues surrounding the use of AI-based legal technologies by the government. For example, in the near future, it is possible that data which is otherwise confidential may be ordered available to the government by itself. If the Bill were to become a law, the government may then be incentivised to use this law to gather data and build the datasets for the AI in use by it to augment its legal representation.

There will be potential data privacy concerns without the data protection law in place, especially since these applications would be processing sensitive and confidential data. The Bill adequately safeguards information at least from private entities.<sup>111</sup> However, the Bill has not become law yet and enforcement will be a concern even when the law is in place. In any case, lawyers would need to evaluate the use of these applications with regard to their ethical duties. The AI applications would need robust data protection policies in place for widespread adoption.

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<sup>107</sup> Regulation 2016/679 of the European Union and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Vol. 119(1) (2016).

<sup>108</sup> Anirudh Burman & Suyash Rai, *What Is in India’s Sweeping Personal Data Protection Bill?*, CARNEGIE INDIA, March 9, 2020, available at <https://carnegieindia.org/2020/03/09/what-is-in-india-s-sweeping-personal-data-protection-bill-pub-80985> (Last visited on November 17, 2021).

<sup>109</sup> The Personal Data Protection Bill, 2019, §91(2).

<sup>110</sup> *Id.*

<sup>111</sup> Yash More & Shailendra Shukla, *Analysing the Impact of the Personal Data Protection Bill, 2019 on the Fundamental Right to Privacy*, Vol. 6, INDIAN JOURNAL OF LAW AND PUBLIC POLICY, 44 (2020).

### C. WHAT RULES SHOULD BE PUT IN PLACE?

The ethical duties of lawyers do not vary much across jurisdictions. These tenets remain largely the same. Just as a lawyer has a duty of confidentiality towards his client in the USA<sup>112</sup> or in England,<sup>113</sup> a similar duty exists for lawyers in India towards their clients.<sup>114</sup> One might argue that the Preamble in the BCI Rules sufficiently expands the scope of the ethical duties of lawyers and is broad enough to cover such a duty, even in the absence of a bespoke rule. The important qualifier, however, would be that such a duty would be implicated only when the technology becomes reliable, efficient and cost effective.

As has been discussed in this paper, the use of AI in legal technology is fairly new and there are a vast number of use cases for this technology. At this stage, it would not be appropriate to heavy-handedly regulate AI based legal technologies in India because it has not penetrated much in the Indian legal market. Moreover, there are yet to be any rules in place by the BCI to regulate the use of technology by lawyers. The BCI should not singly rely on the very broadly worded Preamble of the BCI Rules, as discussed in the previous part. It would be imprudent to leave the legal services industry to self-regulate the use of technology, whether using AI or not, in relation to their ethical duties. Rather surprisingly, it is the judiciary which has taken steps towards the adoption of AI in its functions. While the Supreme Court's SUPACE is new, the judiciary's learnings could be gainfully applied while formulating a regulatory apparatus by the BCI.

#### 1. Bespoke Rules

Bespoke rules must be made to address the use of technology. For example, an Indian equivalent of the Technological Competence Rule would be a good starting point. It would make it abundantly clear that lawyers have a duty not only to manage their affairs ethically but also be in sync with what technological developments are best suited to meet their clients' needs. The common areas such a rule can be applied to are data security and effective use of technologies commonly used in the practice of law, such as e-mail, cloud document storage, case management systems, among other things. As technologies evolve and get implemented by lawyers, the requirements of this rule will evolve. The mandate would be to keep up with the trends, such as AI.<sup>115</sup>

Similarly, the BCI must also consider introducing a rule on the use of non-lawyer assistance, like the ABA has. As discussed in Part III of this paper,

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<sup>112</sup> See *supra* Part II on "Regulation and Guidance Established in the US, England, and India".

<sup>113</sup> *Id.*

<sup>114</sup> The Evidence Act, 1872, §126.

<sup>115</sup> See Scott Uhl, *Legal Technology Tips, Tricks, & Treats 2019*, UNIVERSITY OF MINNESOTA LAW SCHOOL: LAW LIBRARY, July 22, 2020, available at <https://libguides.law.umn.edu/TechTricksAndTreats> (Last visited on November 17, 2021).

the remit of such a rule would be for lawyers to supervise and modify the output of the AI they are using as per their professional judgment, much like they would do for a junior colleague. It would make clear that lawyers are responsible not only for the assistance they take from human non-lawyers but the output of technologies they employ as well, whether AI based or not. The above discussed rules may be incorporated in the BCI Rules by way of an amendment.

As a side note, the BCI should be proactive in bringing about regulations to govern the legal practice more holistically and must not wait for a scandal in order to wake up to a need for regulation and deterrence to unscrupulous practices, whether involving the use of AI-based legal technologies or not. Furthermore, the Supreme Court AI Committee's learnings with SUPACE and other initiatives could be instructive in the formulation of the required rules.

## 2. Regulatory Approach

The BCI faces twin problems while dealing with regulation of AI in legal services. The *first* being that it does not have in place an updated and codified set of ethics for lawyers to deal with the evolving facets of the legal practice. It is heavily reliant on the Preamble and assumes that lawyers would self-regulate. The *second* problem is that there has been no effort to execute regulation. These problems are evident from the fact that there neither have been any contemporary amendments to the BCI Rules, nor has there been any effort to regulate transactional lawyers or the use of technology, whether involving AI or not. A regulatory approach could be adopted once basic bespoke rules, as discussed in the preceding part, are implemented.

The BCI could then adopt a light-touch approach, reminiscent of the framework followed by the SRA in England, wherein technology, including the one that uses AI, is viewed as a means to an end – the end being the provision of legal services. This is to say that the BCI should regulate the outcomes that lawyers and law firms provide to their clients and whether that is in line with the ethics codes. The BCI should not police how or what AI based legal technologies are used.

The SRA has been pragmatic and chosen to regulate that end. This is an approach that would bode well for the BCI to adopt. Such an approach allows for flexibility in the regulation without foreclosing the possibility of bespoke rules specific to the use of AI in the provision of legal services, if the need ever arises.

The BCI should not be caught unaware when AI based legal technology reaches its inflection point. In this context of AI adoption, the BCI needs to bring about the needed regulation and formulate a pragmatic regulatory approach in order to ensure lawyers' adherence to ethical and practice standards on behalf of clients and the society at large – the spheres in which legal ethics operate.



## V. CONCLUSION

Several ethical rules are applicable to the use and non-use of AI in the provision of legal services by lawyers. Lawyers need to be informed about AI based legal technologies' ability to deliver reliable, efficient and cost-effective results for their clients. This use of AI by lawyers has to be balanced with the ethical implications of the use of such technology, using their independent judgment. The ethical issues raised by AI are another permutation of ethical issues that lawyers have faced before with respect to other technologies. Legal ethics rules on the use of AI must therefore be pragmatic and reflect this understanding. These rules must be capable of adapting to new technologies.<sup>116</sup>

The coming of AI in the provision of legal services is inevitable, driven by both lawyers and clients who wish to save time and resources on routine and repetitive tasks that lawyers undertake. The USA and England are some jurisdictions that have prepared ethics regulations and guidance for the adoption of AI in the legal services industry, at least to an extent. The introduction of technology and AI in the Indian legal services industry should not take the Indian legal ethics regulator, the BCI, by surprise. The BCI does not have rules in place governing the use of AI or any other technology for that matter in the provision of legal services presently. It should adopt a pragmatic approach to regulation and formulate flexible rules governing the use of technology by lawyers. Relying solely on self-regulation by the legal services industry would be unwise.

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<sup>116</sup> Cerny et al., *supra* note 50.