

Course Name – Artificial Intelligence, Law and Justice
Professor Name – Dr. Krishna Ravi Srinivas
Department Name – Center of Excellence in Artificial Intelligence and Law
Institute Name – NALSAR University of Law
Week – 08
Lecture – 36



Artificial Intelligence, Law and Justice

Session 36

AI and Constitution-Part-II

Dr. Krishna Ravi Srinivas
Adjunct Professor of Law &
Director, Center of Excellence in Artificial Intelligence and Law
NALSAR University of Law



Artificial Intelligence, Law and Justice, Session 36, AI and Constitution, Part Two.



Recap

- In the last session we looked at how AI can impact constitution and constitutional values. We highlighted power of the digital technology companies and their control.
- We also touched upon the need to regulate technology and why constitutional values should not be subverted by technology



As a recap, in the last session, we discussed how AI can impact the Constitution and constitutional values. We also highlighted the power of the digital companies and their control. Further, we dwelled at length on the need to regulate technology and why

constitutional values should not be subordinated to technology. In this session, we will go a little further into some of them and also address some of the newly emerging issues.



Historical Context of Technology Regulation



- **Historical Context of Technology Regulation**
 - Architects must learn and follow building codes
 - Building codes ensure public safety by preventing collapses
- **Automobile Safety Regulations**
 - Cars must undergo type approval for safety reasons
 - Seatbelt laws significantly reduced traffic deaths
- **Law vs. Absence of Law**
 - Law serves the public interest in critical technology
 - Absence of law can lead to public harm



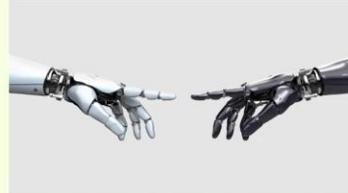
First of all, the historical context of technology regulation tells us that technology regulation is necessary so that society can harness technology to the maximum benefit of society. For example, building codes ensure public safety by preventing collapses. Cars are tested at different points in time for various matters relating to safety, and while seatbelt laws expanded convenience, they also reduced the scope for accidents. So basically, regulation brings safety, regulation brings confidence, and it makes technology much more useful to society. In the case of AI in law, particularly, the problem is that law serves as a public interest in critical technology, and when there is an absence of law, it can result in public harm either by default or by other means.



Existing Ethical Principles & Codes



- **Challenges AI Poses**
 - Impacts rule of law
 - Affects democracy
 - Threatens individual rights
- **Catalogues of Ethic Rules**
 - 10 codes of ethics identified by Alan Winfield
 - Statement by European Group on Ethics in Science and New Technologies (9 March 2018)
 - Paper by French Data Protection Authority CNIL (15 December 2017)



And then we discussed in detail the existing ethical principles and codes, and the challenge AI poses is how it impacts the rule of law, which we have seen in depth. It affects democracy, which we have also seen. We have also seen the threats and how they negatively impact individual human rights. So, there are a lot of ethics rules. For example, there are 10 codes of ethics identified by Alan Winfield, and the European Group of Ethics in Science and New Technologies identified many ethical implications in 2018. So, how do we deal with them? Further, the French data protection authority in 2017 came up with a paper to address the ethical issues and the need for ethical codes and principles.



Principle of Essentiality in Legislation



- **Principle of Essentiality**
 - Guides legislation in constitutional democracies
 - Prescribes handling of essential matters by democratically legitimized law
- **Essential Matters**
 - Concerns fundamental rights of individuals
 - Important to the state



But in the legislation, there is a principle of essentiality. Essentiality guides the legislature of constitutional democracies and describes how the handling of essential

matters is managed by democratically legitimized law. So, it concerns the fundamental rights of individuals that are important to the state.



Risks of Unregulated AI

- **Risk of Unregulated AI**
 - Potential for substantial negative impacts
 - Comparison with the lawless Internet experience
- **AI Development and Deployment**
 - Controlled by powerful Internet technology corporations
 - Contrasts with the Internet's academic and idealist origins



And when it comes to AI, law, and justice, we need to bear in mind that the risks of unregulated AI are significant and could also create a lot of negative impact. Lawless internet experience: we also know that at one point in time, the internet was not well regulated, and there were a lot of issues. But now internet is regulated, it is governed. Still, we find there are a lot of issues when it comes to internet governance. In the case of AI, as we have seen earlier, it is controlled by powerful internet technology corporations, which contrasts with the internet's academic and idealistic origins. The Internet originated as an academic enterprise; it was funded by DARPA in the USA, and then it also blossomed as a network of computers where institutions and individuals can exchange ideas and things, primarily for sharing, networking, and academic purposes. So, the idea was that the internet would be something similar to a free-for-all community where people can collaborate, communicate, and work together, in the sense that the internet's origins were rooted in a democratic, idealistic perspective so that people can flourish as communities on the internet.



Impact of GDPR on Innovation



- **Greening of Industry**
 - Environmental protection legislation incentivized innovation
 - Focus on environmental sustainability
- **GDPR and Data Protection**
 - EU's General Data Protection Regulation (GDPR)
 - Drives innovation in data collection and processing
 - Respects individual rights and privacy
 - Importance of privacy in democracy



But things changed when Web 2.0 and then Web 3.0 came because a lot of technological options that were not available earlier were also added, while in the earlier years, the internet was considered more of a social good available to very few. As it became widespread, the internet also became home to many tech companies that started ruling the internet and came up with their own rules. As a result, today the internet is more like a fragmented community with different internet service providers and operators, with everyone working together; but the problem here is that the internet is also used for so many other purposes. So today, the internet, or World Wide Web, is much more than communication; it is also a platform, a communication tool, and a medium for democracy, making it a combination of everything. On the other hand, what is important is that when it comes to emerging technologies, regulation will also facilitate better innovation. For example, the impact of GDPR on innovation shows that it drove innovation in data collection and processing by respecting individual rights and privacy, and the importance of privacy and democracy cannot be undervalued.



Technology neutral law and GDPR



- **Technology Neutral Law**
 - Applies to various technological advancements
 - Remains relevant despite rapid tech changes
- **GDPR as a Modern Example**
 - Adapts to new technologies, including AI
 - Ensures continued legal relevance
- **US and Europe Implementation**
 - Shows effectiveness of technology neutral law
 - Disproves claim that law lags behind technology



Technology-neutral law and GDPR: GDPR is a technology-neutral law. It applies to different technological advancements as much as they relate to the data protection regime. And GDPR is also a technology that is technology-neutral, covering AI as well. So, it ensures its continued relevance irrespective of technological advancements. Whereas in Europe, the technological neutrality principle that has gone into GDPR tries to balance innovation with respect for individual rights. Whereas in the USA, there is no hard regulation corresponding to GDPR. What we are seeing is a very fragmented approach to data protection.



Personal Data & AI



- **AI and Personal Data**
 - AI algorithms can track and identify individuals online and offline
 - Personal data definition may change with AI advancements
- **AI Tool by Facebook**
 - 5000-point per human body in movement AI analysis tool
 - Developed by Facebook's Paris-based Machine Learning
 - Research Director Antoine Bordes
- **Applications in Fashion Industry**
 - Tool can match body forms and fashion
- **Privacy Concerns**
 - Tool may identify individuals from the back
 - Body form patterns could be considered personal data



When it comes to personal data and AI, the AI algorithms we know are the AI tool by Facebook (5000 points per human body movement analysis tool, in the sense that your body movement can be analysed and then configured based on these tools). So, the tool

can match body forms and fashion, or it can replicate your body; it can duplicate your body movements and also create something like a virtual view. So, the tool may also identify patterns from the back and then from the body form that can be considered personal data. So, if we extend the idea of personal data to body-forming parts, then the matter is something different.



Enforcement & Democratic Legitimacy

- **Law and Technological Development**
 - Corporations and neo-liberals prefer no legal obligations
 - Law holds entities accountable through enforcement
- **Ethics Code vs. Law**
 - Ethics codes lack democratic legitimacy
 - Ethics codes cannot be enforced
- **Advantages of Law**
 - Law has democratic legitimacy
 - Law can be enforced against powerful corporations
 - Creates a level playing field beneficial to all
 - Provides orientation and incentives for innovation
 - towards public interest



So, corporations and neo-liberals prefer no legal obligations or very minimal regulation. Whereas, the law should hold entities accountable for their legal entitlements and for their actions and responsibilities, as a legal person. So, the ethics code problem is that it is also driven by a set of people, but it is not democratic in the sense that it does not come from parliament or legislatures. And often, ethics codes are more voluntary guidelines or soft law principles. They cannot be enforced in a court of law. So, we need a code or regulation with strong democratic legitimacy as a background. And it is exactly here that laws can step in and do the needful.



Relationship Between Technology & Law



- **Technology and Law Interdependence**
 - Technology shapes the law
 - Law shapes technology
- **Necessity for Regulation**
 - Silicon Valley and digital Internet industry must accept legal regulation
 - Regulation is essential for democracy
- **Impact of Internet and AI**
 - Internet and AI are becoming all-pervasive
 - Lack of regulation could threaten democracy



The relationship between technology and law is that technology shapes the law, but law also shapes technology. So, it is mutual in the sense that it is something like a cycle. Law shapes technology because it mandates what is feasible, what is possible, and what should not be done. Technology, in turn, disciplines or regulates law and shapes law by making certain things available to it for the first time, and then law can find ways to regulate that innovation. So, the necessity for regulation comes from this interaction between law and technology. Regulation is essential for democracy so that society has some control mechanisms over technological advancements. And then, with the internet and AI being all pervasive, a lack of regulation could threaten democracy. We have seen a whole lot of issues in the last few years on account of disinformation, misinformation, and electoral democratic processes being subverted through the use of AI and the internet, and more importantly, the circulation of deep fakes and false misleading information. These are the threats that could really derail some of the democratic processes, if not democracy itself.



Importance of Democratic Regulation



- **Democracy's Role in Regulation**
 - Democracy must not abdicate its responsibilities
 - Particularly important in times of pressure from populists and dictatorships
- **Technology and Democratic Rules**
 - All technologies, including the Internet and AI, must be subject to democratic laws
 - Ensures technology does not become all-pervasive and powerful without oversight



So, we need to figure out democratic regulation because we need to think of democratic regulation in the context of AI's impact on the constitution. Democracy must not abdicate its responsibility. At important times, pressure from various groups would come, and democracy should not become subservient to external pressure or internal pressure. All technologies, including AI, should be subject to democratic laws and values; more importantly, technology does not become all-pervasive and powerful without oversight, whether it is owned by the government or by private entities.



Role of Ethics in Technology



- **Role of Ethic Rules in Technology**
 - Can serve as precursors to legal rules
 - Provide orientation on potential legal content
- **Limitations of Ethic Rules**
 - Lack democratic legitimacy
 - Do not have binding nature
 - Cannot be enforced by government or judiciary



So, the role of ethics in technology becomes very important. Ethics can serve as a precursor or a prequel to legal rules in the sense that it can lead to the creation of legal rules. It can provide the right orientation for potential regulation. But, as we said, ethics rules do not have democratic legitimacy. They are again run by a select group of

individuals. They do not have a binding nature, and they cannot be enforced by the government or judiciary unless they are directly linked to or made part of the law or legislation.

 **Principle of Essentiality in AI Law** 

- **Guiding Principle**
 - Essentiality principle helps in decision-making for AI laws
- **Identifying AI Challenges**
 - Focus on challenges affecting fundamental rights or state interests
- **Existing Laws**
 - Check if current laws can address AI challenges
 - Assess sufficiency and proportionality of existing laws
- **New Law Consideration**
 - Determine the need for new laws based on existing law's scope and problem-solving ability



So, essentiality in AI law means decision-making in AI law, focusing on challenging fundamental rights or state interests. Now we need to first check whether the current laws are able to really address the challenges that AI poses to the constitution. Are they sufficiently and proportionately aligned with existing laws? And then we need to determine whether we need new laws or changes to existing laws for problem-solving ability.

 **Transparency in Political Discourse** 

- **Importance of Identifying Human vs. Machine in Political Discourse**
 - Ensures integrity of democratic discussions
 - Prevents distortion of discourse
- **Lack of Legal Framework**
 - No current laws mandate disclosure of machine participation
- **Need for Legal Transparency**
 - Law should ensure transparency in political dialogue
 - Sanctions for intransparent machine speech and impersonation
- **Responsibility of Infrastructure Maintainers**
 - Ensure full transparency regarding machine speech



And then there is a need to understand the differentiation between humans and machines in political communication because human communications are human-mediated, and

machine communication can be manipulated by humans and by the systems themselves, which may be something that humans may not even be aware of, as there a whole lot of manipulation has been done. So, the legal framework for machine participation or the use of machines in internet and democratic purposes is very important. And the law should ensure that there is transparency in public dialogue. Law should ensure that machine speech and impersonation are not allowed to flourish without any regulation. And then full transparency regarding machine speech is required so that we can not only identify and separate this precisely from humans' but also take precautions that machine speech may be false, misleading, or manipulative.



Technology Impact Assessment

- **Return to Old Principles**
 - Apply the most recent state of the art of technology impact assessment systematically to AI
- **Renaissance of Technology Impact Assessment**
 - Good tradition of parliaments in Europe and the US since the 1970s
 - Increased dialogue between democracy and technology
- **Instilling a Culture of Responsibility**
 - Obligatory and flexible approach
 - Encompasses any new technology developments



One way to deal with these issues is to conduct a technology assessment. Technology assessment, or technology impact assessment, or TA, or TAF, as it is called, is an old practice that has been tried since the 1960s. So, parliaments in the USA had technology assessment units right from the late 1960s till quite some time. The US had the Office of Technology Assessment, which existed for at least two and a half decades and produced numerous reports and recommendations to Congress on technology regulation and the assessment of technologies. So, it brought about a dialogue between the democratic forces or the legislators and technology, and then we need to bring in a cultural responsibility in the context of the constitution and AI because we need to have a flexible approach; we need to identify the new technological developments that can impact the constitution as well as constitutional values.



Parliamentary Technology Impact Assessment



- **Purpose of Technology Impact Assessment**
 - Evaluate essential interests affected by technology
 - Determine necessary legislation to protect public interest
- **Timing of Assessment**
 - Ideally conducted before deployment of high-risk technologies
- **Decision Makers**
 - Governments and legislators
 - EU level: Commission, Council, and Parliament as co-legislators



And then, parliamentary technology impact assessment is one such mechanism that does technology assessment. The parliament itself does not do that but parliament has an office or outsources this technology assessment to a third party. For example, the German parliament has an office of technology assessment that is run by an institute called Technology Analysis and Strategic Management, ITAS. So, there are many ways through which parliaments can control or try to come to grips with technology. The UK's parliament has an office called 'POST,' which is the Parliamentary Office of Science and Technology that conducts a lot of studies for the parliament. Similarly, the European Parliament has its own research service, part of which is there to monitor emerging technologies and address, in general, the concerns raised by the members of Parliament on technology and technology assessment.



Developer & User Level Impact Assessment



- **Obligation of Impact Assessment**
 - Extend by law to all aspects of democracy, rule of law, and fundamental rights
 - Applicable when AI is used in public power, democratic and political sphere, or general services
- **Importance of Impact Assessments**
 - Enhance public knowledge and understanding of AI
 - Address the current lack of transparency in AI capabilities and impacts
- **Benefits for Corporations and Developers**
 - Encourage responsibility among leaders and engineers
 - Promote a culture of responsibility in technology



So, there are different ways that these things can be addressed. But when it comes to AI and the constitution, we need to do a lot of impact assessment so that the applications respect all aspects of democracy, the rule of law, and fundamental rights. Particularly when AI is used on public platforms, for public administration purposes, or for offering consumer services, we need to re-examine these aspects. So, the impact assessments will tell us what exactly the problem is or the pluses and minuses of the AI systems from this perspective. And then it will also result in some sort of transparency because a lack of transparency is a major problem with AI systems, so it will help both corporations as well as the developers gain some confidence and learn about certain essential features with which they need to build the systems; therefore, the user impact assessments and technology assessments are very important.



Transparency in Political Discourse



- **Importance of Identifying Human vs. Machine in Political Discourse**
 - Ensures integrity of democratic discussions
 - Prevents distortion of discourse
- **Lack of Legal Framework**
 - No current laws mandate disclosure of machine participation
- **Need for Legal Transparency**
 - Law should ensure transparency in political dialogue
 - Sanctions for intransparent machine speech and impersonation
- **Responsibility of Infrastructure Maintainers**
 - Ensure full transparency regarding machine speech





Individual Rights to AI Explanations



- **Right to Explanation of AI**
 - Individuals should have a legal right to understand AI functions
 - Explanation should cover AI logic and its impact on individuals
- **Impact on Individuals**
 - AI use affects individual interests
 - Right to information even if AI does not process personal data
- **Existing GDPR Rights**
 - GDPR already provides right to information for personal data processing



For example, the individual rights in the AI explanation are something that is critical. As an individual, my rights could be subverted, curtailed, or constrained by AI applications. We have also seen in earlier discussions that AI can play a major role in curtailing people's right to information, right to access food, and right to access certain things. So, the individual right to AI explanation stems from that so that it becomes part of explainable AI and responsible AI, but here we are talking more from a constitutional perspective in the sense that the right to freedom of information or the right to know is a constitutional right in the Indian Constitution, and many constitutions recognize it. So, if we extend this logic to AI systems, individual rights for AI explanation should be given as part of the AI system development. So, we have the right to understand how AI functions and how it impacts our lives; we should also get to know why AI is impacting our lives in a specific way, and more importantly, we should know whether AI functioning in that specific manner impacts our privacy as well. So, GDPR provides the right to information for personal data processing. This is necessary but not sufficient because AI systems can do much more than personal data processing. So, when it comes to individual rights regarding AI explanation, we need to have a broader perspective that goes beyond data processing.



AI & Constitutional Democracy



- **AI's Role in Decision Making**
 - AI will make or prepare decisions previously made by humans
 - Decisions will follow certain rules
- **AI as Law**
 - AI must be treated like the law itself?
 - AI must be checked against higher laws and constitutional democracy
- **Legal Tests for AI**
 - AI must align with fundamental rights
 - AI must not contradict democratic principles
 - AI must comply with the rule of law
- **Designing AI for Compliance**
 - Incorporate principles of democracy, rule of law, and fundamental rights from the outset



We have seen AI in constitutional democracy, AI's role in decision-making. AI cannot be treated as a law unto itself because the rule of law says no force, no system, or no individual can treat himself, herself, or itself as something above the law. So, AI can be treated as a law in one sense, but then AI cannot be treated as something that is above the rule of law. But if we were to treat AI as a law, then what should we do? We should apply the strict legal principles with which laws are scrutinized: Are they respectful of fundamental rights? Do they go against constitutional values, or do they mitigate against constitutional morality? Are they in conjunction with the overall constitutional framework, including the governance structure and other aspects? For example, if an AI application or the system does not support the course of law or support judicial independence directly or indirectly, it is a threat to constitutional democracy. So that cannot be allowed. So, to begin with, AI must align with all fundamental rights. It should not contradict democratic principles, and more importantly, it should comply with the rule of law. And then, when we discuss all these things, you should incorporate the principles of democracy, the rule of law, and fundamental rights right from the outset in system development.



Potential of AI



- **Advancements in AI Systems**
 - OpenAI's ChatGPT has shown significant improvements
 - Potential to interpret the Constitution objectively
- **Challenges in Constitutional Law**
 - Human bias and subjectivity have been persistent issues
 - AI could offer a neutral, data-driven approach
- **Potential Benefits of AI Interpretation**
 - Neutral analysis of text, history, and precedent
 - Resolution of contentious constitutional disputes



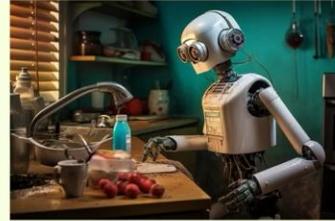
And it is possible that AI can do some of these things in the sense that AI can also be used to interpret the constitution, AI can be used to read the constitution, AI has the capacity to learn on its own and then interpret on its own and then pick up certain things and then come up with its own definition. So, OpenAI's ChatGPT shows that AI can read and understand the constitution, and it can also give interpretations of the constitution, which we will see later in a separate session. But the constitutional law challenges here are that human bias and subjectivity have been persistent issues; AI may offer a neutral, data-driven approach toward an understanding of the constitution. But the challenge here is whether that is sufficient or if we should pursue it. Suppose we allow AI to interpret the constitution in its own way; we can say that it is a very neutral text, historical precedent analysis, and it can help us in resolving certain constitutional disputes by identifying points that were not identified earlier or by bringing a new set of points derived from algorithmic thinking. So, there is a good potential for using AI in constitutional matters, particularly in constitutional cases, but not as a substitute for constitutional courts; rather, as a supplement to the way judges and others interpret and then implement the constitution.



Misunderstanding AI & Constitutional Interpretation



- **AI's Limitations in Constitutional Interpretation**
 - AI tools like ChatGPT and Claude are powerful but cannot replace human judgment
 - Judges using AI will still face moral and political questions
- **Conservation of Judgment in AI Usage**
 - AI shifts, disperses, or concentrates decision-making
 - Decisions may be made implicitly rather than explicitly
 - Judgment is transferred across different stages of the decision-making process



On the other hand, they cannot replace human judgment. The thing is that judges who write judgments and people who write judgments are answerable and accountable. And then they will also face moral and political issues. But then AI systems may not face either. But at the same time, AI can also play a role in the sense that AI's decisions may, in fact, shift the burden or the responsibility towards AI, where humans can say that it is an AI decision, not made by humans. So, it could mean that in one sense, if AI is used extensively in constitutional matters, it could result in the concentration of decision-making power, or at least the interpreting power, to AI. And then AI judgment again could vary because judgment is transferred across different stages in the decision-making process. For example, the AI may come up with one judgment today, and then if the model is updated, or if it undergoes further training, or if it itself learns certain things, it may update its own interpretation and judgment later; both the earlier one and the later one may not be 100% compatible. Whereas when we come to constitutional interpretations and constitutional judgments, we look not only for stability but also for consistency.



Development of AI Systems



- **Evolution of AI in Language Tasks**
 - Early systems relied on manually coded rules
 - Struggled with complexity and nuance of human language
- **Breakthrough with Transformer Architecture in 2017**
 - Improved understanding of context
 - Analyzed relationships between words in a text
- **Advancements Leading to Modern LLMs**
 - Training on massive datasets
 - Increased computational power



So, it is also important that the developers of AI systems are made aware of certain things, like constitutional values, constitutional rights, and individual fundamental rights that systems should always respect.



Breakthrough with Transformer Architecture



- **Release of ChatGPT 3.5 in Late 2022**
 - First AI system to reliably engage with text-based tasks
 - Trained on billions of documents including legal texts, academic articles, and historical materials
- **Learning to Detect Intricate Patterns**
 - Improved understanding of human language and reasoning
 - Earlier AI systems often produced nonsensical responses
- **Emergence of Advanced Models**
 - GPT-4o/o1 and Claude 3.5 Sonnet
 - Enhanced reasoning, problem-solving, and analytical abilities



One way to deal with some of these things is to recognize that AI can detect intricate patterns in human language. It can also identify certain patterns across different judgments and texts, and then put them together in a way that helps us understand the commonalities among them. For example, some of the advanced models have enhanced capacities for problem solving and reasoning. And since AI has been trained on thousands and thousands of documents, including legal texts and academic articles, AI can be used—at least the ones with reasoning capacity and well-trained ones—for some constitutional purposes.



Example of Third Amendment Interpretation



- **Importance of Human Judgment**
 - Technical capabilities of AI are impressive
 - Human judgment remains essential in legal decisions
- **Example of Third Amendment Interpretation**
 - Third Amendment: No Soldier shall be quartered in any house without consent
 - ChatGPT's interpretation: Governors are not soldiers
 - Claude's interpretation: Amendment applies to any government officials



But what happens when we ask the AI to interpret a constitution? In the USA, a case study was conducted. The Third Amendment was given to AI for its interpretation. We know AI's technical capability. So, the Third Amendment is simple: "No soldier shall be quartered in any house without consent." But ChatGPT interpreted this as governors not being soldiers. It has been trained on a particular model of text. It has been trained on a lot of texts. So, its interpretation came that governors are not soldiers. So, since soldiers are not governors, we can put it the other way around. Its reasoning is that this is not binding on governors. And then 'Claude' interpreted this; this is applicable to any government official because it was not able to clearly differentiate a soldier from a government official. So, when constitutional law is being interpreted by systems, we need to be aware of their limitations as well.



Interpretive Choices by AI



- **Different Interpretations by AI Systems**
 - ChatGPT's literal approach
 - Claude's purposive interpretation
- **ChatGPT's Interpretation**
 - Reads 'soldier' as only members of the armed forces
- **Claude's Interpretation**
 - Focuses on protecting private homes from government intrusion
- **Human Judges' Interpretive Choices**
 - Often made after careful deliberation
 - Weigh various legal and policy considerations



But why this happens is that ChatGPT took a very literal approach, whereas Claude took a very purposive interpretation. Because for ChatGPT soldier means only members of the armed forces, which is a very literal approach that a normal person will take. Claude took protecting private homes from government intrusion seriously, in the sense that private property is important. Thus, it took a purposive interpretation that we should protect private property from being taken away by the government to house soldiers. So, it took a totally different approach and then gave that interpretation. But humans, with their legal and policy considerations, also assign different sorts of weightages, and judges know that under no circumstances can they come up with an interpretation that falsifies or negates the constitutional morality or the fundamental structure of the constitution. Whereas in the case of AI, it may or may not be aware of these things. So, AI's interpretation could be misleading or could be found wanting in these things.



Invisible Decision-Making by AI



- **Complex Statistical Computations**
 - AI systems make choices invisibly
 - Even AI experts don't fully understand these computations
- **Perceived Objectivity**
 - Judges might think AI provides objective answers
 - AI decisions are influenced by training data patterns
- **Value-Laden Decisions**
 - AI makes numerous decisions behind the scenes
 - These decisions are based on how questions are posed



But when it comes to complex statistical computations, AI can make many things invisible. And even AI experts may not understand why AI interpreted this constitutional provision this way. And, more importantly, we may be misled by thinking that AI gave us a very objective assessment. In fact, the problem could be something else. The problem could be with training data platforms, with the literature it was trained on, or with something else. So, AI can also make value-laden decisions. AI can also make decisions that could be compatible with constitutional values, if not fully. One of the key problems in AI is that AI's answer will depend on how you phrase your question. This is obvious to anyone who has used any of the AI tools, including prompt engineering. How you pose the question and how you structure it result in how it is interpreted by AI and what sorts of answers it gives.



Human Biases and Cognitive Limitations



- **Human Judges**
 - Possess biases and cognitive limitations
 - True motives for decisions often opaque
- **AI Decision-Makers**
 - May be superior for certain tasks
 - Capabilities will improve with technology
- **Comparative Choice**
 - Humans better for some tasks, AI for others
 - Categories will evolve with technological advancements
- **Limitations of AI**
 - Cannot eliminate need for moral and political judgment
 - Reflects nature of constitutional interpretation



On the other hand, human judges have their own biases and cognitive limitations, and their decisions are often opaque in the sense that we may never fully understand the true basis for the judgments, although they could be obfuscated by hundreds of reasoning and examples. On the other hand, AI decision-making in constitutional law may be superior for some tasks where it is necessary to use AI as a supplement, not as the main tool. And then AI can do certain things better, computers can do certain things better, and humans can do certain things better. So, these categories will also undergo change because judges and the legal system will be interacting with AI systems, and judges will also get to know them better. So, it is a mutual learning, mutual co-evolving process when we take up AI in the constitution. So, we should also know that AI may have many limitations, but AI's presence and initiation do not relieve us of the need for political and moral judgment when it comes to constitutional matters. And, more importantly, we should not try to substitute AI for the problems of human biases and cognitive limitations. Rather, we should try to eliminate where these human biases and cognitive limitations stem from and understand them.



High-Stakes Constitutional Cases Simulation



- **Simulation of AI in Constitutional Cases**
 - ChatGPT and Claude were asked to decide on two major cases
 - Cases: Dobbs v. Jackson Women's Health Organization
 - and Students for Fair Admissions v. Harvard
- **Different Interpretive Approaches**
 - AI asked to follow originalism or living constitutionalism
 - Results varied based on interpretive method
- **Adherence to Supreme Court Precedent**
 - Without specific method, AI upheld abortion rights and affirmative action
- **Responses to Interpretive Instructions**
 - As liberal living constitutionalists, AI upheld precedents
 - As originalists, AI overruled precedents
- **AI's Response to Counterarguments**



So, in constitutional cases where the stakes are quite high, you can use AI in a much more creative way by doing simulations.

For example, AI can be asked to decide on cases on an experimental basis. ChatGPT and Claude were asked to decide on two major cases. The first case was Dobbs v. Jackson Women's Health Organization, and the second case was Students for Fair Admissions v. Harvard. So, AI was to follow originalism versus living constitutionalism. Originalism simply means that the interpretation of the Constitution should be based on the wishes, ideas, and ideals of the framers of the Constitution, because they were the ones who originated the Constitution; that should be taken into account and should serve as the guiding principles. Whereas the idea of living constitutionalism looks at the constitution as a living, changing document that can be interpreted in a dynamic way depending upon the changes in societal norms, values, ideas of justice, equality, fair play, and, more importantly, changes in the idea of human rights and justice for all. So, with these two major interpretative streams of thought in constitutional law in the USA, they ran this test. So, AI upheld abortion rights and affirmative action because it did so without a specific method. But when it was given the option to respond to interpretive instructions, it upheld precedents as a liberal living constitutionalist and overruled precedents as an originalist. So, the AI's response to counterarguments was also interesting because when they asked the AI to follow the original logic or original rationale and then come to the draft judgment, it would do so on that basis. Whereas when they asked the AI to focus on the living constitutional approach or the methodology and then to interpret or write this judgment, its approach would be different.



Human Biases and Cognitive Limitations



- **Human Judges**
 - Possess biases and cognitive limitations
 - True motives for decisions often opaque
- **AI Decision-Makers**
 - May be superior for certain tasks
 - Capabilities will improve with technology
- **Comparative Choice**
 - Humans better for some tasks, AI for others
 - Categories will evolve with technological advancements
- **Limitations of AI**
 - Cannot eliminate need for moral and political judgment
 - Reflects nature of constitutional interpretation



So, we can use AI to test or assess how AI can interpret different strategies for interpreting or reading the constitutional text and the judgments, and then come up with a decision. So, we now know why we cannot eliminate humans from this and what the problems with that are.



AI Sycophancy



- **AI Sycophancy**
 - AI systems tend to tell users what they want to hear
 - Raises questions about their reliability in constitutional cases
- **Interpretive Approach**
 - AI adopts the interpretive approach it is instructed to use
 - Reverses itself when presented with counterarguments
- **Judicial Reliance**
 - Judges may find it difficult to rely on AI answers
- **Moral and Political Judgment**
 - Framing questions for AI requires moral and political judgment
 - Similar to traditional constitutional interpretation



But there are also a couple of things to which we need to pay attention. One, when we talk about AI and other things, we know well by now that there is still a human tendency; we all like to hear what we want to hear or what we like, in the sense that I would like someone praising me. I would like someone to tell me that I am a nice person, that I am a great person, that I am an expert in this, and that I am an expert in that. But AI is also something very similar. AI tells systems being trained, having been trained, and also having learned from their own behaviour often tend to tell users what they want to hear.

Whether this is intentional, or whether AI has a mind of its own, is a philosophical cognitive science issue. We will not go into that. But since AI prefers to tell people exactly what they want to hear, how useful this will be in constitutional cases has to be checked. And again, AI's approach to interpretative use also depends on how it is instructed to use that. But when it is presented with counterarguments in many instances, AI reverses the judgment in the sense that it sees things the other way around; it considers the other arguments and then tries to reverse its own earlier judgment. But judges will not be comfortable with that sort of flipping behaviour or twist and counter-twist by AI systems. Because judges, whether they want consistency or not, want a certain sort of cogent approach, a system that is reliable, that does not change its decisions or its understanding, and then gives interpretations on and off in a different way.



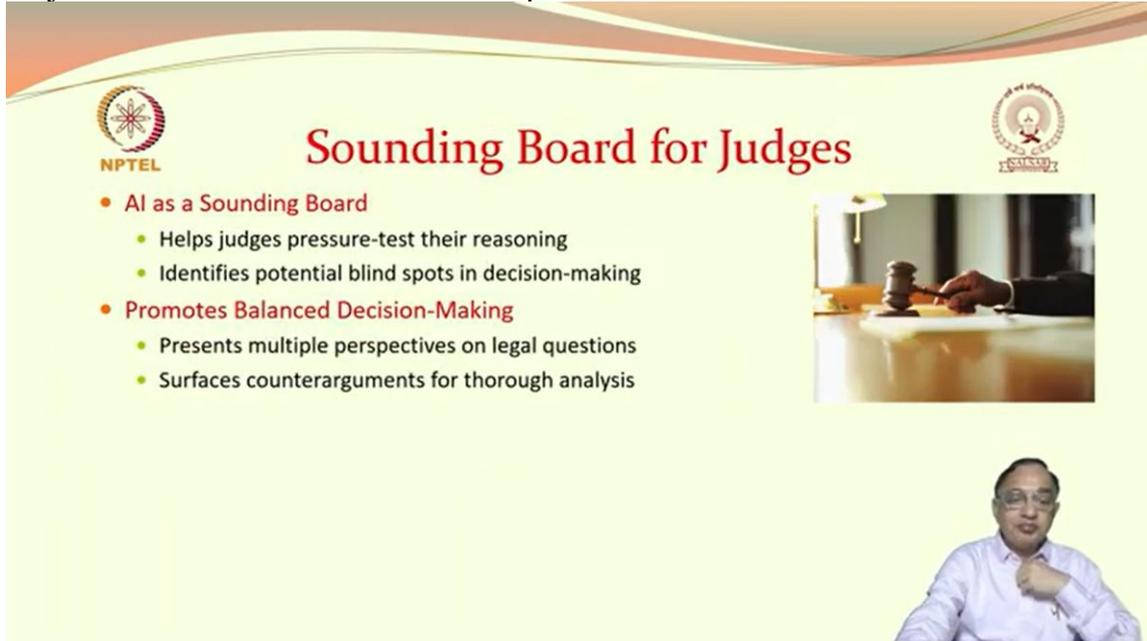
Research and Drafting Assistants

- **AI as Research Assistants**
 - Quickly synthesizes large amounts of legal information
 - Identifies relevant precedents
 - Summarizes complex arguments
- **AI for Resource-Constrained Lower Courts**
 - Valuable for judges with numerous pending motions
 - Helps process hundreds of pages of briefs
 - Assists in getting up to date on unfamiliar legal issues



So, in one sense, framing questions to AI itself is a moral and political judgment, and this is again very similar to constitutional interpretation. For example, if I specifically mention that AI should look into a case in India based on the Kesavananda Bharati precedent, or take that as the fundamental principle that is the constitutional scheme of things, or look at the fundamental approach, then it will tend to do it only in that way. But it could again take the other approach if I ask it in another occasion, you need not follow the Kesavananda Bharati judgments' principle of constitutional basic structure rather you are free to use your own approach and come up with something different then AI will come up with its own rational logic and then give a totally different judgment. So, in one sense, we can benefit from AI in the constitution by making it a good research assistant but not a constitutional judge. And AI can be used to identify relevant precedents, consolidate them, pick out the points, and then give a neat, quick summary. It can also give us complex arguments that can be summarized neatly so that judges know which arguments they can pick up and which ones they need not give importance to. So, AI, as a tool, will be relevant for judges who are struggling with too many cases, and it can also be helpful to judges in understanding briefs running to hundreds and hundreds of pages. It can also help them get updated on or update their knowledge on matters with which they are not familiar. So, if the most recent and most updated AI models are being used in

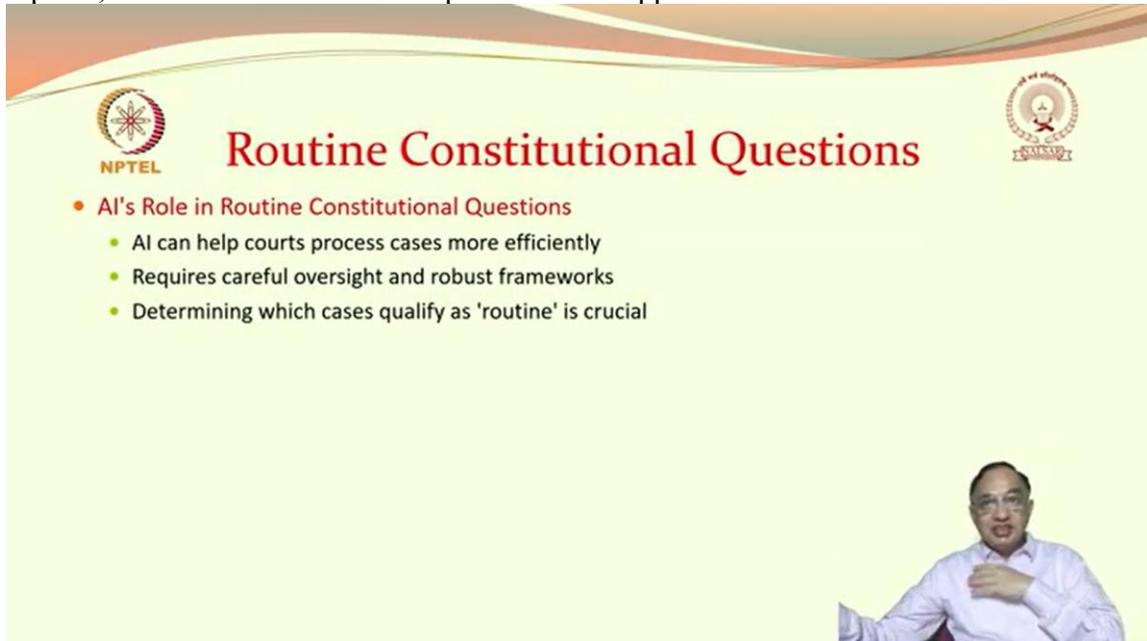
law and justice, they can be helpful to constitutional courts in more than one sense, subject to the limitations which we have pointed out.



The slide features the NPTEL logo on the left and the Indian Council of Legal Education logo on the right. The title "Sounding Board for Judges" is centered in red. Below the title, there are two main bullet points, each with sub-bullets. To the right of the text is a photograph of a judge's hands using a gavel on a wooden bench. At the bottom right of the slide is a small video inset of a man in a white shirt speaking.

- **AI as a Sounding Board**
 - Helps judges pressure-test their reasoning
 - Identifies potential blind spots in decision-making
- **Promotes Balanced Decision-Making**
 - Presents multiple perspectives on legal questions
 - Surfaces counterarguments for thorough analysis

So, we can use AI as a sounding board for judges, and we can compare how AI has decided versus how the judges have decided. So, it can result in balanced decision-making, but AI cannot and should not be construed as a parallel constitutional bench or a parallel bench when it comes to judicial matters. It is there to assist; it is not there to replace; it is not even there to complement and supplement.



The slide features the NPTEL logo on the left and the Indian Council of Legal Education logo on the right. The title "Routine Constitutional Questions" is centered in red. Below the title, there is one main bullet point with three sub-bullets. At the bottom right of the slide is a small video inset of the same man in a white shirt speaking.

- **AI's Role in Routine Constitutional Questions**
 - AI can help courts process cases more efficiently
 - Requires careful oversight and robust frameworks
 - Determining which cases qualify as 'routine' is crucial

So, in routine constitutional questions, AI can help courts process cases more efficiently. It needs robust oversight, solid frameworks, and more importantly, which cases should be assigned to AI should also be a matter that needs to be decided because not all cases should be given to AI, particularly the key constitutional cases where there could be

multiple interpretations, and where in the past there have been split divisions on account of similar cases; it is better not to assign them to AI because, again, AI may not be the right tool for them.



Understanding AI Model Variations

- **Importance of AI Literacy for Judges and Lawyers**
 - Essential for responsible use of LLMs
 - Understanding variations in AI models
- **Different AI Models and Their Conclusions**
 - Conclusions vary based on training data
 - Technical architecture influences outcomes



And AI literacy is equally important for judges, particularly to understand how the LLMs or large language models work, particularly in justice, particularly when it comes to constitutional interpretation. And they should also be able to differentiate the capacity, rationale, or reasoning arguments between different AI models because only then will they know which model is better or which model is more suited. More importantly, they will also be able to understand why different models come up with different judgments or different reasoning, and then different decisions, although they may be trained on very similar materials or trained on very similar judgments. So, conclusions, again, are based on training data, but they are not the ones that decide on the training data. Often, we should also look at the technical architecture and then at the other technical limitations in AI systems to understand them better.



Recognizing the Need for Human Judgment



- **Delegating Constitutional Decisions to AI**
 - Does not eliminate the need for moral and political judgment
 - Shifts judgments to different stages of the process
- **Stages of AI Constitutional Decision-Making**
 - Choosing which AI system to use
 - Framing constitutional questions
 - Providing interpretive instructions, if any
- **Human Judgment in Constitutional Meaning**
 - Essential for resolving fundamental questions
 - Crucial for the allocation of government power



So, we need to take a very clear-cut stand: AI systems can be part of the constitutional judgment interpretation process, but they cannot be the full constitutional bench. And then human judgment in constitutional meaning is the most important, most relevant, and the most reliable. So human judgment can be the one that should finally keep humans in the loop.



Sensitivity to Question Framing



- **AI Responses Sensitivity**
 - Highly influenced by question framing
 - Context provided affects responses
- **Randomness in AI Models**
 - Different answers to the same question
 - Built-in randomness in systems
- **Implicit Interpretive Choices**
 - Not always obvious to users
- **Testing AI Responses**
 - Crucial for difficult and high-stakes questions
 - Pose questions in multiple ways
 - Consider counterarguments



We have discussed the randomness and some of these issues again and again.



Competing Values and Interests



- **Inherent Nature of Constitutional Interpretation**
 - Involves competing values and interests
 - Requires weighing and balancing by human decision-makers
- **Judicial Decision-Making**
 - Judges may defer to the legislature
 - Following original meaning is another approach
- **Technological Advances**
 - Cannot transform constitutional questions into purely objective inquiries
 - Demonstrably correct answers are not possible



But the inherent nature of constitutional interpretation is important because constitutional courts often struggle with conflicting values and interests. For example, is it the right to freedom of religion versus gender rights, or is it the fundamental right to freedom of expression versus the right to say something with which society may not be comfortable? These are competing values, and they also give us some idea of how people want to reconcile the competing ideals. A court or a constitutional court can say that although the right to freedom is not an absolute right and there are some restrictions, in some circumstances those restrictions can be a little relaxed, or certain things that society may not find palatable or acceptable can be considered an expression of freedom of expression. But the other argument can also be made that freedom of expression, under no circumstances, should result in social disharmony or social disintegration, nor should it sow the seeds for violent behaviour. So, when we try to balance many of these things, the common competing values, the common goals, and the competing interests need to be identified and factored in. Technological advancements are there. They can advance to a great extent. They can help us understand better. But then on no grounds can we try to reduce them to purely objective inquiries. They can also tell us that demonstrably correct answers are not possible. Judicial decision-making ultimately is the judgment or decision-making that humans do with a fuller understanding of their responsibilities to constitutional issues or constitutional courts, whereas the same cannot obviously be expected from AI.



Frameworks for AI Integration



- **Advancing AI Capabilities**
 - Continuous improvement in AI tools
- **Challenges for Courts and Judges**
 - Developing frameworks for AI integration
 - Maintaining human oversight on value choices
- **Initial Applications**
 - Focus on enhancing judicial efficiency
 - Improving analytical thoroughness
- **Refining Best Practices**
 - Careful refinement before expanding AI use



So, we know how AI should be integrated, how AI should be tested, and how it should be assessed.



Future of Constitutional Interpretation



- **Complex Interplay Between Human and AI**
 - AI's impressive capabilities
 - Limitations of AI
 - Necessity of human judgment
- **Harnessing AI in Judicial Decision-Making**
 - Balancing AI's strengths and weaknesses
 - Ensuring accurate interpretation of legal documents



And then, the AI's impressive capacities and limitations should be taken into account when we say that AI will have an important role in constitutional law interpretation. So, we need to balance AI's core strengths as well as its problematic weaknesses. We should ensure that the accurate interpretation of legal documents is also part of the training. So, constitutional interpretation in the future is likely to be decided with AI's help because AI is not going to fully replace interpretation.



New Ideas and Contextualisation



- There are new ideas like Digital Constitutionalism
- and use of AI to review/revise Constitutions
- AI and Constitution has to be contextualized in the light of Indian Constitution. We have not done that in this course but have cited a relevant work in the literature slide.



But AI will play a major role. In this course, we did touch upon AI and the constitution very briefly, and there are also new ideas that are evolving like digital constitution. For reviews and revisions of the constitution and other constraints, we are not going to discuss them in detail in this course because doing so is beyond the purview of this course. Some of the ideas, like digital constitutionalism and particularly contextualism in India, need a totally different approach. And when it comes to the specificity of constitutions, we should also bear in mind that although most democratic countries' constitutions have some core elements, the way they are interpreted, the way they are applied, and the way they evolve also differ. So, AI and constitutions may again be something that could vary from country to country, from constitution to constitution, from context to context. So, it is not a mere question of which AI system is being used in constitutional courts or for interpreting and then giving judgments on the constitution. It is also important to consider which aspects of the constitution, which aspects of constitutional morality and values are stressed, and what the unique features of the constitution are that we need to factor in. For example, we can say that the Indian courts, which have evolved over the period, find the fundamental basic structure doctrine unique to India. Although its origins are from Germany, particularly the Weimar Republic, it is much more entrenched in the Indian constitution than anywhere else in the world. In that case, when we want to look at AI and the Constitution, we need to contextualize it. And then new ideas, like Digital Constitutionalism, are emerging. And then in the decades to come, we will find a lot of debates on how our constitutional courts can use AI, how advocates and other litigants can use AI for constitutional matters, and as the scope of the rights, responsibilities, and duties of citizens also undergoes changes, what role AI will play will also be a dynamic one.



Literature (Selective)



- Nemitz P. 2018 Constitutional democracy and technology in the age of artificial intelligence. *Phil. Trans. R.Soc. A* **376**: 20180089. <http://dx.doi.org/10.1098/rsta.2018.0089>
- April G. Dawson, Algorithmic Adjudication and Constitutional AI— The Promise of A Better AI Decision
- Making Future?, 27 SMU SCI. & TECH. L. REV. 11 (2024)
- Coan, Andrew and Surden, Harry, Artificial Intelligence and Constitutional Interpretation (February 12, 2025). 96 University of Colorado Law Review 413 (2025) , Arizona Legal Studies Discussion Paper No. 24-30, U of Colorado Law Legal Studies Research Paper No. 24-39, Available at SSRN: <https://ssrn.com/abstract=5018779> or <http://dx.doi.org/10.2139/ssrn.5018779>
- Edoardo Celeste Digital Constitutionalism The Role of Internet Bills of Rights Routledge 2023
- Shruthi Bedi (Ed) AI and Constitutionalism : The Challenges in Law Oakbridge Publishing 2025



So, these are some of the literatures that I have given here.



Next



- AI, Law, Justice and Innovation



In the next session, AI, law, justice, and innovation will be the topics we will be dealing with. Thank you.