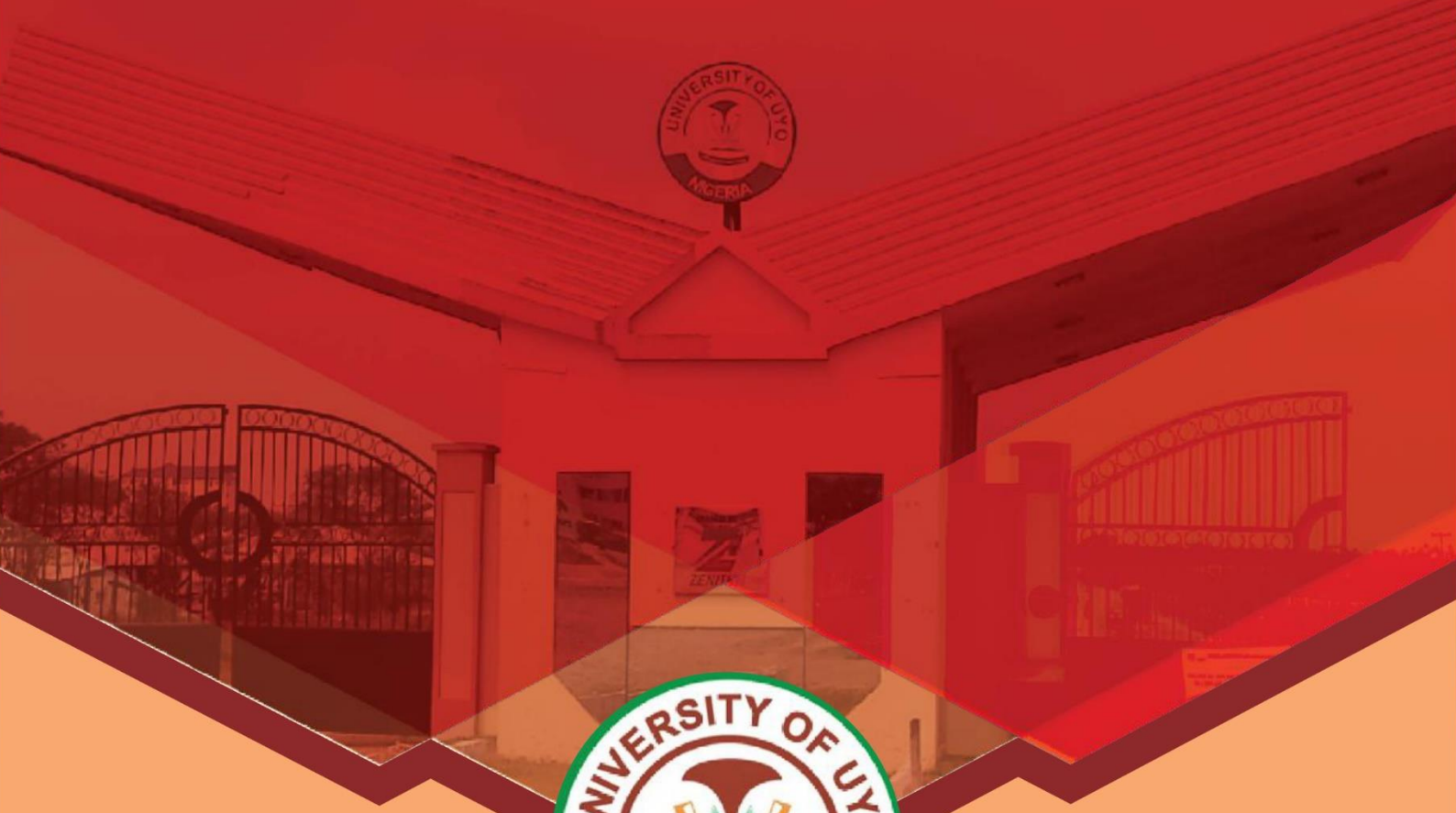

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Artificial Intelligence in Contracts

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Abstract

The integration of artificial intelligence (AI) in contract negotiations and e-commerce has ushered in transformative changes in business operations and consumer interactions. This paper discusses the use of artificial intelligence in e-commerce and the legal issues that arise from its application. The work highlights the benefits of AI in e-commerce, including personalised recommendations, predictive analytics, and chatbots, but also raises concerns about data privacy and security, algorithmic bias, and the lack of transparency and accountability in AI-driven decision-making processes. The use of AI in e-commerce raises critical legal issues and also delves into judicial decisions and legislative developments to illustrate the evolving legal landscape surrounding AI in contracts and e-commerce. Moreover, non-legal issues related to the use of AI in e-commerce are raised. This paper concludes by emphasising the need for regulations and responsible AI practices to address these challenges.

Keywords: Artificial Intelligence, contracts, e-commerce, accountability

1. Introduction

Artificial Intelligence (AI) refers to the simulation of human intelligence processes by computer systems. These processes include learning, reasoning and self-correction. AI encompasses a wide range of technologies and techniques, including machine learning, natural language processing, computer vision, robotics, and more.[1] The draft recommendation on the ethics of artificial intelligence (AI), elaborated by an ad hoc expert group established by the United Nations Educational, Scientific and Cultural Organisation AI systems as technological platforms or information-processing technologies that encompass models and algorithms capable of processing data in a manner akin to intelligent behaviour. These systems commonly incorporate features such as reasoning, learning, perception, prediction, planning, or control. Moreover,

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[1] S. Russell, Artificial Intelligence: A Modern Approach, 3rd ed. (NJ: Prentice Hall, 2009), at 70

AI systems are crafted to function autonomously to some extent, achieved through methods like knowledge modelling, data exploitation, and correlation calculation.[2]

The ultimate goal of AI is to create systems that can perform tasks that typically require human intelligence, such as visual perception, speech recognition, decision-making, and language translation. Artificial intelligence has evolved rapidly since 1956 when it was first coned, with significant advancements in algorithms, computing power, and data availability driving its progress.[3] Since its evolution, it has been put into use in various fields including contracts and electronic commerce. This paper explores among other things, ethical considerations and legal issues of AI in contracting.

2. The Use of AI in E-commerce

The use of artificial intelligence (AI) in e-commerce has revolutionised the way businesses operate, optimise processes, and interact with buyers/consumers. AI technologies, such as machine learning, natural language processing, and predictive analytics, enable e-commerce companies to personalise user experiences, automate tasks, and make data-driven decisions.[4] Here are some key ways AI is used in e-commerce.

i. Personalised Recommendations

AI algorithms analyse customer data, browsing behaviour, purchase history, and preferences to generate personalized product recommendations. These recommendations can be displayed on product pages, streaming software, in email marketing campaigns, or on the homepage, increasing the likelihood of conversion and enhancing the overall shopping experience.[5]

ii. Predictive Analytics

AI-powered predictive analytics algorithms forecast customer behaviour, demand trends, and inventory needs based on historical data and real-time inputs. E-commerce companies can use these insights to

[2] Revised Draft Legal Taxonomy – Revised Section on Artificial Intelligence and Automation Section. United Nations Commission on International Trade Law Fifty-Fourth Session Vienna, 29 June–16 July 2021. https://uncitral.un.org/sites/uncitral.un.org/files/1064_add_1_advance_copy_e.pdf (Accessed on May 13, 2024)

[3] J McCarthy, M Minsky, N Rochester, & C Shannon. 'A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence'. (1956). http://wwwformal.stanford.edu/jmc/history/dartmouth/dartmouth.html (Accessed on May 13, 2024)

[4] A Kumar, & S Singh. 'Artificial Intelligence in E-Commerce: A Review', 6 International Journal of Advance Research, Ideas and Innovations in Technology 4 (2020), 628.

[5] *Ibid*

optimize pricing strategies, inventory management, and marketing campaigns, reducing costs and maximising revenue.[6]

iii. Chatbots and Virtual Assistants

AI-powered chatbots and virtual assistants provide real-time customer support, answer inquiries, and assist with product searches and purchases. Chatbots use natural language processing to understand and respond to customer queries, improving customer engagement and reducing the need for human intervention in customer service operations.[7]

iv. Fraud Detection and Prevention

AI algorithms analyse transaction data, user behaviour, and patterns to detect and prevent fraudulent activities, such as payment fraud, account takeovers, and identity theft. E-commerce companies can implement AI-powered fraud detection systems to safeguard transactions, protect customer data, and mitigate financial losses.[8]

v. Image and Voice Search

AI technologies enable image and voice search capabilities in e-commerce platforms, allowing customers to search for products using visual or voice-based queries. Image recognition algorithms identify products based on images uploaded by customers, while voice recognition technologies enable voice-activated searches, enhancing the accessibility and convenience of online shopping.[9]

vi. Dynamic Pricing

AI algorithms analyse market dynamics, competitor pricing strategies, and customer demand to optimize pricing in real-time. E-commerce companies can implement dynamic pricing algorithms to adjust prices dynamically based on factors such as demand fluctuations, inventory levels, and competitor pricing, maximizing profitability and competitiveness.[10]

vii. Supply Chain Optimisation

AI-powered supply chain management systems optimise inventory forecasting, procurement, logistics, and fulfilment processes. By analysing historical data, demand forecasts, and supply chain parameters, AI algorithms can streamline operations, reduce costs, and improve efficiency throughout the supply chain.[11]

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[6] A Jain., & S Gupta, 'Impact of Artificial Intelligence on E-commerce' A Literature Review. In Proceedings of the 10th International Conference on Cloud Computing, Data Science & Engineering (Confluence) (2020), 473.

[7] A Kamilaris, & F Prenafeta-Boldú, 'The Rise of Blockchain Technology in Agriculture and Food Supply Chains.' 1Trends in Food Science & Technology, 91(2018), 652.

[8] *Ibid*

[9] J Bielski, 'How AI Is Revolutionising Retail.' 34 AI & Society 3(2019), 606.

[10] P Verhoef, & F Eggers, 'Creating Value with Big Data Analytics: Making Smarter Marketing Decisions', 24 Journal of Interactive Marketing 3 (2010), 160.

[11] *Ibid*

viii. Sentiment Analysis

AI-powered sentiment analysis tools monitor customer feedback, reviews, and social media mentions to gauge customer sentiment and identify trends, issues, and opportunities. E-commerce companies can use sentiment analysis insights to improve product offerings, customer service, and brand reputation management.[12]

Other AI tools used in other fields include virtual and digital assistants for example Siri, Navigations, Chatbots for example Chat GPT, Claude 2, Bing AI, grammar checkers and rewording tools, facial recognitions, electronic payments for example Google pay.[13]

3. Legal Issues Arising from the Use of Artificial Intelligence in Contracting and E-Commerce

The emergence of artificial intelligence generally has led to the emergence of legal issues. Legal and non-legal issues have also arisen in contracting, commerce, electronic commerce and consumer protection. These issues will be discussed hereunder.

i. Legal Personality of AI

The increasing use of artificial intelligence in contracting and e-commerce has given rise to a plethora of legal issues. These issues include the negotiation, formation, and performance of contracts, as well as their interpretation, and the attribution of output from automated systems. A key question is whether AI systems should be conferred legal personality, and if so, how this would impact the attribution of output and the parties involved in contracts.

While some jurisdictions have recognised automated contracts, they generally regard AI systems as mere tools without independent will or legal personality. As a result, the output is attributed to a natural or legal person, although the specific person responsible may not be clearly defined in legislation or case law. In some instances, the person programming or operating the system, or on whose behalf the system is programmed or operated, may be held responsible.[14]

ii. Establishing Intention in AI-Facilitated Contract Negotiations

A significant legal challenge arises when automated systems are used to negotiate and enter into contracts, specifically in determining the intention of the parties involved. The requirement of intention, a fundamental principle of contract formation, remains essential even with automated contracting. However, the issue of intent becomes more complex when the party operating the automated system is unaware of the

[12] *Ibid*

[13] Real-World Examples of AI Products in Action- From Start to Finish. Data to Biz. https://www.linkedin.com/pulse/real-world-examples-ai-products-action-from-start-finish-datatobiz-rzdgc/ (Accessed on 10 May 2024).

[14] *Ibid*

contract's conclusion or its specific circumstances. In jurisdictions that recognize automated contracts, the intention of the party operating the system is typically determined by their state of mind or that of the person who programmed the system at the time of its deployment. This raises questions about how to establish intention when the automated system is acting autonomously, without direct human oversight or awareness. The attribution of intention becomes a critical issue in such cases, as the party operating the system may not have directly intended to enter into a contract. Instead, their intention may have been to simply deploy an automated system, without realizing the specific contractual obligations that would arise from its actions.[15]

In the *B2C2 Ltd. v. Quoine Pte. Ltd*. case, the Singapore courts took a similar approach to addressing the issue of intention and state of mind in automated contract formation, namely determining whether one party operated an automated system knew of a mistake made by another party. In the court of first instance, Singapore International Commercial Court held that Algorithmic programs used to enter into trading contracts are, in effect, mere machines carrying out actions which in another age would have been carried out by an appropriately trained human. They are no different to a robot assembling a car rather than a worker on the factory floor or a kitchen blender discharging a cook of the manual act of mixing ingredients. All of these are machines operating as they have been programmed to operate once activated.

Where it is relevant to determine what the intention or knowledge was underlying the method of operation of a precise machine, it is rational to have regard to the knowledge or intention of the operator or controller of the machine. In the case of the kitchen blender, this will be the person who put the ingredients in and caused it to work. His or her knowledge or intention will be simultaneous with the operation of the machine. But in the case of robots or trading software in computers this will not be the case. The knowledge or intention cannot be that of the person who turns it on, it must be that of the person who was responsible for causing it to work in the way it did, in other words, the programmer. Essentially this will have been done at a date earlier than the date on which the computer or robot carried out the acts in question.[16] On appeal, the Court of Appeal of Singapore agreed with this analysis and held that algorithmic trading is an area of dynamic change, and it might be more appropriate for legislative

[15] UNIDROIT Principles of International Commercial Contracts of 2016, Article 2.1.1.

[16] Legal Issues Related to the Digital Economy – Artificial Intelligence. United Nations Commission on
International Trade Law Fifty-third session New York, 6–17 July 2020.
A/CN.9/1012/Add.1.
https://documents.un.org/doc/undoc/gen/v20/024/53/pdf/v2002453.pdf?token=Ypbi0B0bpMJxwTVUUO&fe=true (Accessed on 9 May 2024)

intervention in due course, if it were thought that a more essential redesign of the applicable legal framework is needed.[17]

In a separate judgment, Mance IJ dissenting with the approach, finding that it was not appropriate to adapt the relevant existing body of law (that is, the doctrine of unilateral mistake at common law) by shifting the enquiry from the actual state of mind of the parties in light of the circumstances surrounding the formation of the contract (of which they were not aware) to the programmer's actual state of mind at the time of programming the system. However, the judge did adapt the more flexible equitable doctrine of mistake by imputing on the state of mind of parties that they would have had if they were aware of the circumstances surrounding the contract formation. The *Quoine* case indicates that existing law of contract rules requiring a determination of state of mind in connection with the contract formation may not be sufficiently adapted to the use of automated systems. It also suggests that adapting those rules should be carried out on a rule-by-rule basis, taking into consideration to legal certainty and predictability and the promotion of trade.[18]

iii. Interpretation and Validity of Coded Contracts

A legal issue that has been raised by UNCITRAL in the context of smart legal contracts is the validity and interpretation of a contract that is memorialised – in whole or in part – in code (that is, the code of the program deployed on the distributed ledger system) to facilitate the automated performance of the contract. As code is a form of data message, the validity of contracts memorialised in code would ordinarily be covered by laws that recognise electronic contracts.[19] However, while the interpretation of the contract might not be problematic for some jurisdictions in which the courts are accustomed to interpreting code in the context of software-related disputes, a question may arise as to whether the contract is sufficiently certain and complete to be valid or enforceable.

While laws recognising electronic contracts may cover the validity of such contracts, questions arise regarding their certainty and completeness. This is particularly relevant when smart legal contracts rely on dynamic external data sources, such as market prices, which may change periodically or continuously.[20] If AI systems represent the next

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[17] *Singapore International Commercial Court, B2C2 Ltd. v. Quoine Pte. Ltd.*, Suit No. 7 of 2017, Judgment, 14 March 2019, [2019] SGHC(I) 03, paras. 209–210. In the case of *Australian Competition and Consumer Commission v. Trivago N.V.*, it was uncontroversial that the output of algorithms "used" by Trivago to offer services were attributed to it for the purposes of applying consumer protection law: Federal Court of Australia, Case No. VID 1034 of 2018, Judgment, 20 January 2020, [2020] FCA 16.

[18] *Ibid*

[19] Legal Issues Related to the Digital Economy – Artificial Intelligence *Supra* at 12.

[20] Vincent Ooi & Kian Peng Soh, 'Rethinking mistake in the age of algorithms: *Quoine Pte Ltd v B2C2 Ltd*', 31 King's Law Journal 3, (2020), 367. Lord Sales of the Supreme Court of the United Kingdom, writing extrajudicially, has observed that "in future the programs may become so sophisticated and operate so independently that it may be that this

generation of automated systems, a question arises as to whether the features that distinguish AI systems from automated systems permit differentiated treatment of the use of AI in the formation of contracts. Writing extrajudicially, Lord Hodge of the Supreme Court of the United Kingdom has enquired into the ability of English contract law to deal with the issues addressed in the foregoing examination in the case of AI systems using machine learning techniques that autonomously make transactions. According to him, "If there is to be a contract drafted or adapted by machines, there will have to be significant development to our law of contract which will require careful and imaginative consideration." Questions regarding the intention to enter into legal relations, to whom that intention is to be ascribed and how the terms of a contract generated by computer are to be recorded to achieve legal legitimacy and interpreted will require creative thinking.[21]

Similarly, the Court of Appeal of Singapore in the Quoine case, stressed on several occasions that the automated system in question in that case was programmed to operate in a deterministic manner, in the sense that it would always generate the same output given the same input. While the court did not specify whether its legal analysis of contract law specifically, the doctrine of unilateral mistake at common law as applied to automated contracts would have varied if the system had not been programmed to operate in a deterministic manner but rather to develop its own responses to varying conditions, some commentators have suggested that such systems would require a different approach.[22]

iv. Product Liability

The use of AI in trade raises legal concerns, including product liability. Existing product liability laws may not be directly applicable to AI systems, as they often focus on goods rather than services. Even when AI-enabled goods are concerned, these laws might only cover specific types of harm, such as personal injury or property damage, and may not apply to products used for commercial purposes. [23] Furthermore, traditional product liability regimes assume that products remain static over time, whereas AI systems powered by machine learning algorithms are dynamic

process of looking back through them to the minds of those who created them will seem completely unreal".

[21] Lord Hodge, "The Potential and Perils of Financial Technology: Can the Law Adapt to Cope?" Edinburgh FinTech Law Lecture delivered at the University of Edinburgh, 14 March 2019, 13. www.supremecourt.uk/docs/speech-190314.pdf (Accessed on May 5 2024.

[22] Vincent Ooi & Kian Peng Soh op. cit. fn. 20 at 350.

[23] In Australia, the product liability regime, set out in part 3–5 of the Australian Consumer Law (schedule 2 to the Competition and Consumer Act 2010), applies to "goods", a term which is defined in section 2(1) of the law to include "computer software". However, in Nigeria, under the FCCPA, goods in section 167 does not include this but it extends to services, though no mention is made of software as a service kind of services.

and continually evolving. This poses challenges in establishing liability, as the product's development and circulation may not be fixed points in time.

Additionally, product liability laws often exempt manufacturers from liability if the product was developed according to the prevailing knowledge and technology at the time of production, or if the defect did not exist when the product was first circulated. These exceptions may not be applicable to AI systems, which learn and adapt over time. [24] As a result, the existing product liability frameworks may have limited applicability in the trade context, and new legal approaches may be necessary to address the unique challenges posed by AI-enabled products and services.

v. Contractual Implications of AI Utilisation in Trade: Challenges and Considerations

Where AI is used in trade, a contractual relationship may exist between the person deploying the AI system and the person operating the system (for example, a contract for the supply of AI-enabled goods) or between the person operating the AI system and an affected person (for example, a utilisation agreement for the supply of AI-enabled services). In both of these cases, machine learning and big data can present hardship in applying existing contract law rules, particularly with regard to establishing the presence of breach of contract and establishing causation of harm. Lack of information about the algorithm running an AI system and the data processed may make it tough for a party claiming breach to establish a correlation between the inputs and outputs of the system.[25] For example, in the case of the terms of use agreements, the difficulty may be in establishing whether the party providing the AI-enabled service has performed what it undertook to perform according to the terms of the agreement (for example, to support a claim of system malfunction or defective programming).

Lack of information may also make it hard for the party to establish that the breach was the cause of harm for the purposes of establishing liability in contract. For example, in the case of the contract for the sale of AI-enabled goods, the difficulty may be in establishing whether damage or injury suffered was caused by the operation of the AI system itself, as opposed to the quality of the data processed by the AI system that is attributable to a third party (or indeed the party claiming breach). These difficulties have the potential to shift the balance between contracting parties in the traditional sale context by putting the seller or supplier in a stronger position alongside the purchaser.[26]

vi. Challenges in Tort Law: Establishing Liability for Harm Caused by AI Algorithms

Legal issues also arise in the law of Tort because hard as it is to prove that some hardware defect was the reason someone was injured, for

[24] Legal Issues Related to the Digital Economy – Artificial Intelligence *Supra* at 13.
[25] *Ibid*
[26] *Ibid*

example, it becomes very difficult to establish that the cause of harm was some flawed algorithm. It is even harder if the algorithm suspected of causing harm has been developed or modified by some AI system fuelled by machine learning and deep learning techniques, on the basis of multiple external data collected since the start of its operation.[27] Nonetheless, Lord Sales is of the opinion that while these difficulties may not be insurmountable, they may add to the cost and time of dispute resolution.[28]

Similarly, many legal issues regarding the development and utilisation of AI-based software, including how to deal with the relationship of rights and who bears liability that might arise in connection to that development and utilisation, remain unclarified because these are novel issues, and existing legislation is insufficient. In light of these circumstances, there is a pressing need to determine the relationship of rights, attribution of liability, and other similar issues that arise when parties execute contracts.[29]

vii. Data Privacy and Security Concerns

AI systems rely on vast amounts of data to learn and make predictions, raising concerns about data privacy and security. Consumers may worry about how their data is collected, stored, and used by AI algorithms, leading to potential privacy violations or data breaches if proper safeguards are not in place.[30] Thus, e-commerce companies must ensure compliance with data protection regulations, such as the Nigerian Data Protection Act 2023, the Nigerian Data Protection Regulations 2019, and in other jurisdictions, the General Data Protection Regulation 2018 and the California Consumer Privacy Act 2018, to protect customer data from unauthorised access, misuse, and breaches.

4. Non- Legal Issues in the Use of AI in E-commerce

Non legal issues may also arise from the use of AI in e-commerce. Some of which include.

i. Algorithmic Bias and Discrimination

AI algorithms may inadvertently perpetuate biases present in training data, resulting in discriminatory outcomes for certain groups of

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[27] The EU Expert Group on Liability and New Technologies. Liability for artificial intelligence and other emerging digital technologies. November 27 2019. https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en (Accessed on May 5 2024).

[28] Lord Sales, "Algorithms, Artificial Intelligence and the Law." Sir Henry Brooke Lecture delivered at the Freshfields Bruckhaus Deringer, London, 12 November 2019, 12 www.supremecourt.uk/docs/speech-191112.pdf (Accessed on May 5, 2024).

[29] Contract Guidelines on Utilisation of AI and Data: AI Section. Japan, Ministry of Economy, Trade and Industry, P.1 June 2018, www.meti.go.jp/press/2019/04/20190404001/20190404001-2.pdf (Accessed on May 11, 2024)

[30] M Hajizadeh, & M Mousakhani, 'The Role of Artificial Intelligence in E-commerce: A Systematic Literature Review and Bibliometric Analysis', 58 Journal of Retailing and Consumer Services 2 (2021), 135.

consumers. For example, biased algorithms may inadvertently discriminate against individuals based on factors such as race, gender, or socioeconomic status, impacting their access to products, services, or opportunities. There may also be discriminatory outcomes in e-commerce processes such as product recommendations, pricing decisions, and customer support interactions.[31]

ii. Loss of Human Interaction

AI-powered automation in e-commerce, such as chatbots and virtual assistants, may reduce the level of human interaction and personalised customer service. While AI can enhance efficiency and scalability, it may also lead to a loss of empathy and emotional connection with customers, particularly in sensitive or complex situations.[32]

iii. Dependency on Technology and Infrastructure

E-commerce companies that rely heavily on AI technologies may become overly dependent on technology and infrastructure, making them vulnerable to disruptions, failures, and technical glitches. Downtime or malfunctions in AI systems can disrupt business operations, affect consumer satisfaction, and lead to financial losses.[33]

iv. Fair Pricing and Competition

AI-powered dynamic pricing algorithms can adjust product prices based on factors such as demand, competitor pricing, and market conditions. While dynamic pricing can benefit consumers by offering competitive prices, it may also lead to price discrimination or unfair pricing practices if not regulated properly. Consumers may perceive such practices as unfair or exploitative, leading to concerns about market manipulation or anticompetitive behaviour.

v. Transparency and Accountability

AI-driven decision-making processes can lack transparency, making it challenging for consumers to understand how algorithms arrive at their recommendations or decisions. This lack of transparency can undermine consumer trust and confidence in AI-powered e-commerce systems.[34]

In as much as artificial intelligence offers opportunities to enhance consumer experiences and streamline commercial and e-commerce processes, it also poses several challenges as seen above. As such, E-commerce companies must prioritise consumer protection principles, implement robust safeguards, engage in responsible AI practices to build trust and confidence among consumers and regulatory authorities alike,

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[31] T Davenport, & R Ronanki, 'Artificial Intelligence for the Real World', 96 Harvard Business Review 1(2018), 116.

[32] G Gheorghe, & E Vătămănescu, 'Big Data and Artificial Intelligence: New Trends in E-commerce'. In Proceedings of the 4th International Conference on New Challenges in Management and Business, (2023), 54.

[33] P Seetharaman, & A Kumar, 'A Study on Impact of Artificial Intelligence on E-commerce Industry'. 7 Journal of Critical Reviews 9 (2020), 892.

[34] *Ibid*

and regulations in the developing field of AI that pertains to contracts and e-commerce should be enacted.

5. Conclusion and Recommendation

This work has examined artificial intelligence in the context of contracts and electronic commerce. Some of the key legal issues identified include the attribution of legal personality to AI systems, intent determination during negotiations, and the interpretation of coded contracts. These challenges underscore the need for innovative legal solutions and regulatory interventions to ensure clarity, fairness, and accountability in AI-driven transactions. Moreover, tort law complexities arise in establishing liability for harm caused by AI algorithms, necessitating comprehensive legal frameworks to address emerging risks and uncertainties. Non-legal concerns, such as algorithmic bias, loss of human interaction, and data privacy, underscore the importance of responsible AI practices and regulatory compliance in e-commerce ecosystems.

This work recommends regulatory intervention, in that, legislative bodies should enact comprehensive regulations tailored to address the unique legal and ethical implications of AI in contracts and e-commerce. These regulations should promote transparency, accountability, and fairness while fostering innovation and competitiveness.

In addition, stakeholders in the AI ecosystem, including businesses, policymakers, and academics, should collaborate to develop ethical guidelines and best practices for AI deployment in contracts and e-commerce. These guidelines should prioritise consumer protection, privacy rights, and algorithmic fairness. Also, courts and legal institutions should provide clear guidance on issues such as the attribution of legal personality to AI systems, intent determination in automated negotiations, and liability for AI-generated harm. Case law and precedents should evolve to accommodate the complexities of AI-driven transactions.

Given the global nature of e-commerce and AI development, international collaboration and harmonisation efforts are essential to ensure consistency and interoperability in regulatory frameworks. Multilateral initiatives should aim to address cross-border legal challenges and promote a cohesive approach to AI governance.

By embracing these recommendations, stakeholders can harness the transformative potential of AI while mitigating risks and safeguarding the interests of consumers, businesses, and society at large. Effective regulation, ethical guidance, and collaborative efforts are essential to foster trust, innovation, and responsible AI adoption in contracts and e-commerce.