
AGENTS OF THE FUTURE: UNDERSTANDING AI'S ROLE IN MODERN AGENCY RELATIONSHIPS

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INTRODUCTION

The proliferation of artificial intelligence (AI) has ushered in a new era of technological advancement. AI presence in fields which were considered solely human has created much complexity; especially considering the legal ramifications of such AI interventions. Agency is one such legal avenue that by legal definition requires a contract between natural humans.

With the rise of e-commerce giants, and not enough employees, companies have turned to AI to ease efficiency and overcome human error. However, with this comes the question of their legality and the vulnerability of the public. AI, automated or autonomous, has begun to take on the role of “agent”. Agent for an online retailer, or agent for an online user, now AI is creating and completing full-fledged contracts between humans.

This puts into question, the role and liability of AI agents within agency relationships; their status, capacity, authority, and liability under existing legal frameworks. With the evolution in the landscape of AI technology and its intersection with agency law principles, it is critical to shed light on some of the most pressing questions surrounding the legal personality of AI entities, their ability to represent principals, and the allocation of responsibility for their actions.

We must consider the implications of AI's increasingly autonomous decision-making capabilities, the potential for delegated and apparent authority, and if there is a need for human oversight to ensure ethical conduct and legal compliance.

Furthermore, the adequacy of current regulatory regimes in addressing the unique challenges posed by AI-powered agency relationships, is a question of debate. The current solutions that are proposed in the discourse surrounding this topic, and their applicability in the Indian legal context, will be discussed in the course of the paper.

EMERGENCE OF AI IN AGENCY RELATIONSHIPS

An agent, in simple terms, is a person who is authorized to act on behalf of someone else, the principal, when dealing with third parties. The essential for agency to subsist between two people, is for the principal to be bound by the actions of his agent. In the Indian Legal System, more precisely in the Indian Contract Act 1872, Agency is defined through S.182 – S. 238.

Here too, arise the same basic principles for establishing agency,

- Agent and Principal must be persons who have attained majority and are not unsound of mind. (S. 182-S.184)¹
- Principal must be bound by the agent till the extent of the authority given expressly or impliedly. (S. 187)

However, the advent of Artificial Intelligence (AI) has introduced a new dimension to agency relationships. AI technology, notably employed in e-commerce and stock trading platforms, is increasingly assuming agent-like roles. For instance, AI chatbots such as Google Bard; Bing AI; Amazon Lex; Chatsonic, facilitate transactions between parties without explicit consent. While traditional agency criteria may not be met, AI effectively acts as an intermediary, representing either the customer or the retailer.

1. RETAIL AND E-COMMERCE

The most common use of AI is observed in E-Commerce Companies like E-Bay, Amazon, Flipkart, using AI based ‘Chatbots’ that “converse” with the users to provide easier access and a diverse choice, it makes it easier for the consumer to compare prices, quality, etc. It analyses the data input from the user, and lays down the terms of the transaction. AI may, even with a base-work of instructions given or rules set, “tweak” the terms of that contract.² The operators, apart from setting the rules that artificial agents must adhere to during interactions with customers, do not directly influence the decisions made by the agent. When the AI takes on this role of agent, the particular consent of the operator is not there. Does this then mean that

¹ ICA 1872

² Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008).

the contract did not take place? Or are the operators, and the companies above them, to be held liable?

2. STOCK MARKETS AND TRADING

The field of the stock market trading is renowned for its unpredictability, volatility, and lack of discernible patterns. What used to be the most persistent challenge for traders and investors was the formidable task of foreseeing the unforeseeable. Investors' sentiments, global economic conditions, geopolitical factors, unforeseen occurrences, corporate financial standings, and a plethora of other influences factor into this. The introduction of AI into this world has caused a great paradigm shift where it can now be used to make actionable choices based on an unimaginable amount of data from hundreds of sources. Participants no longer need to dwell on and analyse data when a fully automated machine can do it for them. AI Stock Market Prediction uses Natural Language Processing, Sentiment Analysis, High Frequency Trading, etc. to arrive at Data- Driven conclusions that reduce human bias and errors, and manage the risk involved in trading. It is easy to see then why moderators of the Stock Exchange might turn to AI to fulfil all roles that required too much time and money.

In this scenario, when AI is used by such Market Moderators, takes on agent-like roles. When users access or buy information from such services, and make their decisions based on such information, the service providers are liable for the accuracy of that information. However, now if an AI modulates that information, without direct intervention of the operators, can they still be liable for the information they delivered?

Websites and Apps that enable users to more effectively trade in the Stock market, take on the responsibility of portfolio management, giving personalized financial advice, etc. The contract between these parties is of a basic service providence. However, when AI is introduced to take on this role, its inherent fallibility endangers both the user and the provider. Who is then liable for the failure of the AI to function properly? The user, the operator, or even the developer?

AUTOMATION V. AUTONOMY

Perhaps the greatest debate surrounding AI is whether it is simply an automated machine that follows pre-set instructions and only adapts better than regular automations, or it has autonomy of some degree that makes it capable of making sound decisions based on collection and

analysis of data sets. The result of this debate implies heavily on the establishment of Agency in the scenarios discussed previously.

If AI is simply automated and following instructions given expressly, it would be reasonable to hold the operator liable, or the user who consented to the terms set by the operator. However, when there is a possibility for a degree of autonomy in AI, who then is liable for the decisions it makes. This leads us into the discussion of “Weak AI” and “Strong AI”.

3. WEAK AI V. STRONG AI

Weak AI and Strong AI are distinct levels of artificial intelligence based on their functioning and capabilities. Weak AI, also known as Narrow AI, are AI systems that are designed for specific tasks or domains, lacking general cognitive abilities that are generally expected in artificial intelligence more akin to human. In the case of e-commerce Chatbots, the AI employed typically exemplifies weak AI, as it is tailored to perform specific functions such as conversing with users, processing data inputs, and facilitating transactions within predefined parameters.

On the other hand, strong AI, also referred to as Artificial General Intelligence (AGI) or human-level AI, represents a form of AI that hypothetically possesses human-like cognitive capabilities, applicable to a wide range of tasks and activities. Unlike Weak AI, which operates within narrowly defined domains and relies heavily on operator input, Strong AI would exhibit consciousness and the ability to learn and adapt in diverse situations.

In the context of the discussion on Agency, the implications of adapting either form of AI are apparent. In terms of liability awarded, disregarding the party on whom it is awarded, it is clear that since the reliability of both models on the input of either the operator or the user is of different level, and their degree of autonomy too is distinct, so would be the liability.

If an e-commerce website relies on Weak AI, liability for any damage caused due to its actions may logically be placed on the operator on whose instructions it was working. Alternatively, should Strong AI be applied, it is again doubtful what the source of its decision making is, and how much operator/user input is being used or complied to.

THE CONTRACTING PROBLEM

The entirety of the discussion thus far has been a to establish the premise of the discussion that is to now be taken up.

The terms of formation of a contract follow a set of essentials, almost identical worldwide.

- Existence of two distinct, legally valid, parties
- Consensus Ad Idm, or agreement between the parties on the same terms, in the same manner
- Intention to create a legal relationship

In India's context too, Section 10 of the Indian Contract Act, 1872, provides all the essentials for a valid contract.

The existence of AI within such traditional terms of a contract is, on the face of it, impossible. AI is not recognized as a legal person nor has a legal personality and thus is unable to contract on its own. In terms of Agency, where agents are required to be natural persons, again AI has no valid place. However, such transactions using AI as agents so in fact take place, even if they are outside legal purview. When contracting, the user and the retailer, have to give their express or implied agreement to the terms of the contract, the significant risk that arises from concluding this through AI is that more often than not the operator is not personally overseeing each transaction made and thus his consent is missing. If the AI Agent's principal is unaware of the contract how then can he be induced to suffer liability from it.

4. PROBABLE SOLUTIONS

Several theories to solve this have been brought up, the major categories being

- Closed Agreements
- Open Agreements
- Agency Law Approach

Here, all three will be briefly discussed while their problems are also pointed out.

A. CLOSED AGREEMENTS

Closed Agreement solutions work on the goal of limiting or severing the role of AI as an agent so as to not attract the legal clauses associated with it when it cannot inherently meet the conditions for agency. It is essentially cutting off the offshoots of authority that are unregulated by law.

The most basic solution to settle disputes caused by the involvement of AI in agency- like roles, is to have either the user or the operator simply agrees to be liable for the actions taken by the AI, only the user and the operator are the contracting parties.

Firstly, this may be done through ‘Umbrella Contracts’ that expressly state that both parties will be bound by the decisions of the AI. Following the acceptance of both parties, regular principles of contract may then be applied. Examples of this are very prominent in E-Commerce companies that include the liability of the AI in their Terms and Conditions, without agreeing to which the user cannot proceed. An example of this is ‘Browse Wrap Contracts’³.

The obvious problem with this solution is that users will have to thoroughly read the terms and conditions applied, which is almost impossible to do for every transactions and people can hardly be expected to take the time and read every clause.

It also takes into contest the Automation v. Autonomy debate previously discussed. There would be differentiations in the degrees of liability awarded based on whether Weak AI or Strong AI is used. Furthermore, the functionality and reasonability of the AI cannot be guaranteed for by neither the developer nor the operator. In this case, it would go against the principles of law and justice to award full liability to the developer/operator for any defaults that they did not expressly or impliedly consent to. Even when given express instructions, AI is created to adapt and apply a degree of intelligence of its own, which are not regulated by any limits. Similarly, it takes away the rights a 3rd party has against the principal through the agent. All sections in the ICA 1872,⁰ which deal with the liability of agents in regards to third parties (230, 231, 232, 233) become redundant when actual agency was never established, as AI has

³ Mann R and Siebeneicher T, “Just One Click: The Reality of Internet Retail Contracting,” (2007) 108 Columbia Law Review 989

no legal personality of its own. This leaves both parties with no recourse to address any mistakes or defaults that the AI makes.

A second Closed Agreement type solution may be to give an express set of policies and rules that the AI, even when adapting to the situation, will have to adhere to. This limits the capacity of the AI to tweak the conditions of the contract, limiting its role as an agent-like entity. An example of this may be general offers. If users can only contract once they have completed the prerequisite conditions of the contract, only then it may bind both parties. AI will have no role in stating the terms of the contract, only communicating them.

Here, the problem arises, again, in the fact that AI is inherently built to adapt and alter the terms to suit the situation, as is the case when AI may alter the market prices displayed by stock traders, on the basis of market fluctuation, without the knowledge of the operator. Some traders and even e-commerce sites try to circumvent this by providing that no agreement reached by the AI is complete until an affirmative human action takes place. This however, is impractical to do on larger scales and does not address the need to include AI in these processes in the first place. Thus, it may be concluded that Closed Agreement solutions may work in some situations however, they still have a lot of gaps.

B. OPEN AGREEMENTS

An essential of forming contracts is the consensus ad idem and the intention to contract from both parties. Open Agreement contracts are thus based on the goal of relaxing the limits of the express/implied intention that is required during contracting to a more “generalized intention.”⁴

This solution provided that even if the intention of the operator, for example an online retailer who conducts his business through an e-commerce website that employs AI, is loose or even non-existent, he still may be bound by the terms of the contract simply for the reason that he has elected to advertise his goods on sale knowing the employment of the AI.

This solution is appealing, solely from the doctrinal perspective, as it limits the amount of change legislation would have to go through to accommodate such changes in contracting terms. This is however severely disadvantageous to both parties.

⁴ Allen T and Widdison R, “Can Computers Make Contracts?” (1996) 9 Harvard Journal of Law & Technology.

The user who believes he has completed a particular contract and expects delivery from the retailer, will not have sufficient guarantee of his rights as the essential of intention from the retailer is no complete when he only gave a “generalized intention or none at all.

Similarly, in case of the operator, all liability of any malfunction defect that an AI can suffer, including manufacturing or design error, will fall on him who had no role in causing such defect.

Another solution along the same lines of function is using AI as merely a tool of communication. The most prominent example of this is the United States’ Uniform Computer Information Transactions Act (UCITA). Although not adopted nor implemented by any state, the UCITA laid the basis of AI integration, using the same definition of “Electronic Agent” as given in the UNIF Computer Info. Transactions Act, 2002.⁵

“ ‘Electronic agent ‘ means a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic messages or performances, on the person ‘s behalf without review or action by an individual at the time of the action or response to the message or performance.”

This too had its pitfalls, namely that operators are unable to anticipate the behaviour of AI agents and lack direct control over their actions at all times. This limitation is integral to the functionality of AI agent models; if operators had direct control, the essence of the AI agent model would become redundant. Further, expecting principals to communicate their intentions for every transaction mediated by AI agents proves impractical. If AI agents are viewed merely as tools of communication, any statements they make may bind the principal, placing unfair burdens on operators who cannot oversee every individual action taken by the AI agent. He becomes liable for any type of fault be in Specification, Induction or Malfunction Errors.⁶

OBJECTIVE THEORY

A subset under Open Agreements is the Objective Theory. The objective theory is most often applied in legal context to establish whether a person’s actions were objectively reasonable

⁵ UNIF Computer Info. Transactions Act, 2002.

⁶ Bain M and Subirana B, “Legalising Autonomous Shopping Agent Processes”, (2003) 19(5) Computer L. & Security Rep. 375

based on whether an ordinary prudent person would take the same course of actions in the same situation.

Here, it is contended that the actions of an AI Agent be attributed to the principal/operator if it were reasonable for the user interacting with the agent to believe the principal was assenting to that behaviour. Instead of known intent, just the manifestation of intention to agree is enough. If one party believes that the other will most likely agree to the terms, if the user believes that the retailer will agree to such terms, then it is enough to bind them (with nothing to indicate the contrary).⁷

This again, leaves the operator's liability in the hands of the AI, with no sanction or control over its actions. Furthermore, mere belief that the operator will assent to these terms makes the contract unilateral, disparaging the essential of consensus ad idem. Finally, following already established precedents of contracting, advertising any product or service does not classify as an express intention to sell.⁸ This severely limits the choices in recourse available to the operator/retailer.

C. AGENCY LAW APPROACH

The final solution to address the problems, is perhaps the most radical as well. Instead of managing AI and regulating its actions and decisions, it advocates for altering doctrinal law to accommodate either:

- Full legal personality to AI.
- Agent-like duties/rights without legal personality of its own.

The first proposed approach is the most extreme and impractical solution provided as it opens up the scope of AI to much larger extents, and thus it merits a much more detailed discussion. For the purpose of this paper, due to its inherent subjectivity, it will not be discussed further.

⁷Chopra S and White L, "Artificial Agents And The Contracting Problem: A Solution Via An Agency Analysis" (2009) *Journal Of Law, Technology & Policy* 363

⁸ *Partridge v Crittenden* [1968] 2 All ER 421, HC QBD; *Pharmaceutical Society v Boots* [1953] 1 All ER 482, CA

The second solution suggests utilizing AI agents as intermediaries, endowed with their own set of duties and obligations but lacking the capacity to sue or be sued. Unlike previous suggestions, neither party would bear full liability under this model. AI agents would assume the authority to enter contracts on behalf of their principals, yet they would not possess the ability to litigate in their own name. As they currently lack intention or consent, treating them as mere tools suffices, rendering them agents devoid of legal personality.

In recent discourse, a curious perspective has emerged, drawing parallels between AI agents and slaves in ancient Rome. In that era, slaves were granted authority to conduct transactions and deals on behalf of their owners. However, when defaults occurred, owners could evade liability by either revoking the slave's authority or denying its existence altogether. In a similar stream, AI lacks intrinsic intention or consent, allowing principals to shrink responsibility by exploiting the vagueness of its decision-making capacity. This situation leaves third parties vulnerable, as principals can evade accountability by attributing faults or unauthorized actions to the intermediary AI.

A principle entrenched in Agency law dictates that even when conferring broad authority upon a human agent, principals must reckon with the possibility that the agent's decisions may diverge from their own. Consequently, principals bear liability for all actions undertaken by their agents. However, distinguishing between Actual and Apparent authority, it's stated that:

*"Where the agent's authority results from a manifestation of consent... made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority."*⁹

In this formulation, apparent authority dispenses the necessity for express/implied authority, eliminating the need for assent from the principal to the agent. Further, in regards to artificial agents, it circumvents the requirement for the agent's consent to such a manifestation. Consequently, there exists sufficient authority, by virtue of the principal's conduct, in establishing the Agent and giving it the means to enter into contracts with third parties. Therefore, full contractual capacity is not a prerequisite for capability as an agent.

⁹Baskind E, Osborne G and Roach L, "3. An Introduction to the Law of Agency," *Oxford University Press eBooks* (2019).

This would then allow AI to perform the functions of an agent devoid of a legal personality, and then additional provisions may be enacted to absolve liabilities for users of such intermediaries in cases of design errors or software complications.

However, when considering the Agency Law Approach, one invites all the exceptions to that rule. Agency is not established through only a singular means:

1. Actual express authority

The first case is that of actual express authority: where an agent has actual authority to enter a contract, the principal is liable, whether or not the principal would have entered that contract if he or she had had the opportunity to review it.¹⁰ A form of this is seen in the Closed Agreements discussed before.

Here, the principal is the least-cost avoider of the risk of entering an unwanted contract, and can easily instruct the agent as to its wishes. Accordingly, the operator/principal should be liable for such contracts. There is no material difference here between the role of a human and an AI agent.

2. Actual implied authority

The second case is that of actual implied authority: where an agent is employed and as a result the actions of his principal may reasonably infer that he has authority to enter an into contracts with third parties on behalf of his principal.¹¹

However, in the case of AI there is no degree of reasonability that can be accurately attached to its actions. There is no means for the operator to imply his authority through actions or omissions. For arguments sake, even if we can attribute the ability of the AI to understand and apply implied authority, as is the case with human agents, the principal will be liable for his actions.

¹⁰ *Supra* Note 1, § 186 - § 187

¹¹ *Ibid.*

3. Apparent authority; Agency through Estoppel

The third case is that of apparent authority, where an agent appears, by reason of words or conduct of the principal, to have authority to bind the principal.¹² The principal is liable on the agent's contracts, even where there is no actual authority.

Here, if a natural agent goes beyond his apparent authority, and incurred obligations to the third party, the principal is liable. In the case of AI, it is seemingly impossible for it to go beyond any direct command of its operator. However, if a malfunction occurs and it does exceed its authority, the principle of estoppel to preserve the right of the third parties must be applied and the principal should be made liable.

4. Agency by ratification

The fifth case is that of a principal's ratification after the agent has acted on his behalf but beyond his authority.¹³ The liability for ratification may hold similar to actual express authority because ultimately the principal's ratification shows that he sees no mistake in the agent's actions. The same may hold true for AI agents and their operators.

It is observed then that in most scenarios the liability will fall solely on the Principal. This is because the case in which liability is awarded to either the third party or the Agent are cases where an active manipulation of intent is involved. Be it an inducement of the third party¹⁴; untrue representation by the agent¹⁵; or where the agent has an interest in the subject.¹⁶ etc.

CONCLUSION

There has been much discussion internationally on framing legislation to prepare for such changes in Agency Law. Some suggest a common law solution of keeping an uncodified law for such situations to leave space for rapid adaptations, while others are in favour of writing completely separate statutes. So far India has not brought out any framework or possible additions to its legislation. It may be that, for India who follows both the Civil and Common

¹² Supra note 1, §237

¹³ § 195 - § 200

¹⁴ § 234

¹⁵ § 235

¹⁶ § 202

Law systems, the Agency Law Approach becomes the most suitable as it gives both the flexibility of change as well as the rigidity of already established code. It is high time lawmakers take appropriate actions to ensure the preservation of individual rights and uphold the integrity of its legal system.