

LHAG Insights

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Could Artificial Intelligence replace Lawyers in Malaysian Courts?

'AI program earned passing bar exam scores in evidence and torts law exams..'

'Robot lawyer to use AI in Court for the first time...'

'ChatGPT as a replacement for human lawyers?'

'Colombian judge says he used ChatGPT in ruling'

These headlines are dominating the news - and they are not clickbait!

An artificial intelligence ("AI") program, ChatGPT-3.5, has passed the evidence and torts sections of a multiple-choice, multistate Bar exam.¹ This development comes on the heels of a law school dean co-authoring a 14-page law article in one hour with the assistance of ChatGPT.² Without the assistance of AI, this task could have taken weeks, if not months. Meanwhile, a judge in Colombia used ChatGPT as a tool in his judgment in an insurance case.³

¹ American Bar Association (ABA) Journal, 'AI program earned passing bar exam scores on evidence and torts; can it work in court?' dated 12.1.2023, available online at <<https://www.abajournal.com/news/article/ai-program-earned-passing-bar-exam-scores-on-evidence-and-torts-can-it-work-in-court>>.

² Open AI's Assistant and Andrew M. Perlman, 'The Implications of OpenAI's Assistant for Legal Services and Society' dated 5.12.2022, available online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197>.

³ The Guardian, 'Colombian judge says he used ChatGPT in ruling' dated 3.3.2023, available online at <<https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling>>.

For the first time in history, there were plans for an AI legal assistant, dubbed the “*world’s first robot lawyer*”, to take on a case in a United States court to help a defendant fight a traffic ticket case.⁴ Created by DoNotPay, the AI would have run on a smartphone and listened to court arguments in real-time, before telling the defendant what to say via an earpiece. Any fines imposed would have been covered by DoNotPay.

The AI will not automatically react to everything it hears in court. Instead, it would listen to the arguments and analyse them, before providing instructions on how to respond. The company’s ultimate goal is to have AI replace some lawyers altogether, saving litigants money. However, DoNotPay subsequently announced that those plans will be halted for now, due to concerns about the legality of the usage of AI in Court.⁵

Nonetheless, the proposal of utilising AI to represent litigants in court, altogether replacing lawyers, is an interesting prospect and is certainly one worth examining.

Can AI replace lawyers in Malaysian courts?

We know that AI already plays an increased role in the criminal sentencing of defendants in Malaysia. In February 2020, a Sabah court used AI to help mete out a sentence in a drug possession case.⁶ This case was a pioneer effort towards plans to provide judges and judicial officers with AI to minimise disparity in criminal sentences.⁷

⁴ New Scientist, ‘AI legal assistant will help defendant fight a speeding case in court’ dated 4.1.2023, available online at https://www.newscientist.com/article/2351893-ai-legal-assistant-will-help-defendant-fight-a-speeding-case-in-court/?utm_source=rakuten&utm_medium=affiliate&utm_campaign=2116208:Skimlinks.com&utm_content=10&ranMID=47192&ranEAID=TnL5HPStwNw&ranSiteID=TnL5HPStwNw-i_UmiK2mg8RcDTdWMVcGrA&utm_source=rakuten&utm_medium=affiliate&utm_campaign=2116208:Skimlinks.com&utm_content=10&ranMID=47192&ranEAID=TnL5HPStwNw&ranSiteID=TnL5HPStwNw-k0D9h53iK_GKK9VD.oxcRw>; see also: New York Post, ‘Robot lawyer’ powered by AI will help fight speeding ticket as it takes first case in court’ dated 5.1.2023, available online at <<https://nypost.com/2023/01/05/robot-lawyer-powered-by-ai-will-help-fight-speeding-ticket-as-it-takes-first-case-in-court>>.

⁵ CBS News, ‘AI-powered “robot” lawyer won’t argue in court after jail threats’ dated 26.1.2023, available online at <<https://www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/>>.

⁶ PP v. Denis P Modili [2020] 2 SMC 381 (Magistrate Court, Kota Kinabalu); see also Artificial Intelligence (AI), e-Kehakiman Sabah and Sarawak, available online at <https://ekss-portal.kehakiman.gov.my/portals/web/home/article_view/0/5/11>.

⁷ The Right Honourable Chief Justice of Malaysia, Tan Sri Datuk Seri Panglima Richard Malanjum, ‘Opening of the Legal Year 2019 Speech’ dated 11.1.2019, available online at <https://www.kehakiman.gov.my/sites/default/files/OLY%202019%20CJ%27s%20Speech%20-%20Final_0.pdf> at paragraph 18.

The million-dollar question is – could AI eventually replace a lawyer in Malaysian courts altogether?

Right of audience

In Malaysia, only an Advocate and Solicitor of the High Court who is a ‘qualified person’ under the Legal Profession Act 1976 and holds a valid practising certificate has a right of audience in court.⁸

AI systems are not legal persons in law, therefore it is clearly not a ‘qualified person’ to appear in court. So, how could AI be used to present arguments in Malaysian courts? Could self-representing litigants in Malaysian courts use an earpiece for AI to tell them what to say and do in real-time?

There are several challenges to the implementation of this in Malaysia.

Usage of electronics in court

Firstly, the usage of earpieces (such as Apple AirPods) by litigants in Malaysian courts are unlikely to be allowed. The ‘Open Court Etiquette’ published by the Office of the Chief Registrar of the Malaysian Federal Court clearly states that mobile phones, pagers and other electronic devices are to be switched off while court is in session,⁹ and these rules are strictly enforced by court bailiffs.

The recent implementation of remote court hearing protocols signifies that the Malaysian judiciary has shown their willingness to depart from such etiquette rules to accommodate the use of technology. In practice, lawyers use electronic devices such as laptops during hearings. With that said, the usage of laptops by lawyers during court proceedings and the usage of AI earpieces by litigants are two different things.

DoNotPay had proposed to circumvent such practical hurdles in the United States by determining which courts allow defendants to wear hearing aids, some versions of which are Bluetooth-enabled. However, as DoNotPay’s plans have been scrapped for now, this method remains untested.

Recording of court proceedings

There is, however, another major issue that would need to be considered for AI to work – court proceedings would technically have to be recorded before AI is able to propose legal arguments in real-time. In order for the AI to provide consistent and coherent legal arguments throughout court proceedings, it would have to retain the information it has been fed. This means that the AI would

⁸ Sections 11 and 29 of the Legal Profession Act 1976.

⁹ Office of the Chief Registrar, Federal Court of Malaysia, ‘FAQ – Open Court Etiquette’, available online at <<https://www.kehakiman.gov.my/ms/faq-open-court-etiquette>> at item 10.

retain a transcript of the court proceedings it hears through the earpiece worn by the litigant.

The 'Open Court Etiquette' expressly prohibits court recordings in either audio or visual form.¹⁰ The High Court recently reiterated the following court directions applicable to virtual hearings:¹¹

"The Virtual Hearing shall be electronically recorded by the Host (Recording). The Recording shall be made available by the Court to Parties, Parties' counsel and Parties' Representatives as soon as practicable to enable the preparation of a transcript of the Virtual Hearing. No other recording of the Virtual Hearing, electronic or otherwise, shall be made by any of the Parties, Parties' counsel and Parties' Representatives, unless otherwise permitted by the Court."

Unless a litigant has obtained the consent of all parties to record court proceedings, including and especially the judge, it is unlikely that AI would be able to enter a Malaysian courtroom anytime soon.

Language barrier

Even if the abovementioned practical issues can be overcome, there lies another major barrier to the usage of AI in Malaysian courtrooms.

'Sorry, I am unable to understand. Please try again.'

Does this sound familiar? Most of the existing AI voice assistants, such as Siri and Alexa, are western-centric and primarily only fully understand western languages and accents.

However, there are multiple languages frequently used in Malaysian courts, including Malay, English, Chinese and Tamil. We also have multiple dialects, including Hokkien, Hakka, Cantonese, Kelantanese Malay dialect, Sarawakian Malay dialect, and numerous others. Further, the accents used by Malaysians may not be readily understood by western-programmed AI.

Therefore, until and unless AI is programmed to understand all languages, dialects, and accents of Malaysians, it may not be feasible for AI to be utilised in Malaysian court proceedings.

Attribution of liability for loss or damage caused by AI

¹⁰ Office of the Chief Registrar, Federal Court of Malaysia, 'FAQ – Open Court Etiquette', available online at <<https://www.kehakiman.gov.my/ms/faq-open-court-etiquette>> at item 9.

¹¹ Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors and another case [2022] MLJU 00178, at paragraph 10.

It is trite that a lawyer's actions which prejudice their clients can constitute malpractice, and they may be sued for professional negligence. Lawyers are also bound by specific duties and rules pursuant to the Legal Professional (Practice & Etiquette) Rules 1978, which, amongst others, stipulates that a lawyer's paramount duty is to the Court.

How would this apply to AI?

It has been held in England and Wales that an automated system cannot in itself be regarded as an 'agent' because only a person with a 'mind' can be an agent in law.¹² This position is echoed in the US – 'robots cannot be sued'.¹³

Since AI does not have separate legal personality, there is an issue with the determination of liability in relation to the acts and/or omissions of AI. Could the acts and/or omissions of AI acting autonomously be attributed to a party involved in the supply of the AI? This might include: the AI software programmer, the person licensing and distributing the system, the system tester, the operator of the AI system etc.

Our existing laws simply do not have the answers to these questions. As it stands, a litigant using AI in a Malaysian court would have to fully bear the risks of doing so without potentially any recourse if something goes wrong. In fact, the ChatGPT chatbot comes with a legal disclaimer which expressly informs users: *"It is important to note that ChatGPT is not a legal expert and cannot provide accurate or reliable legal information or advice."*¹⁴

Final thoughts

Could AI lawyers replace lawyers in Malaysian courts altogether? We conclude that it is unlikely to do so, not in the foreseeable future anyway.

The practical difficulties for the complete substitution of Malaysian lawyers by AI are abundant. At this juncture, an AI is only capable of executing a pre-assigned task based on the data and knowledge input by humans, which still involves a degree of subjectivity. Simply put, what AI knows is somewhat limited to the

¹² Software Solutions Partners Ltd, R (on the application of) v. HM Customs & Excise [2007] EWHC 971, at paragraph 67.

¹³ United States v. Athlone Industries, Inc., 746 F.2d 977, 979 (3d Cir. 1984), U.S. Court of Appeals for the Third Circuit, at paragraph 2 of the Opinion of the Court.

¹⁴ Attorney At Law Magazine, 'ChatGPT and Legal Content Marketing' dated 9.1.2023, available online at <<https://attorneyatlawmagazine.com/legal-marketing/content/chatgpt-and-legal-content-marketing#chatgpt-itself-recommends-against-using-it-to-create-content>>.

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ambit of knowledge it is fed. In fact, OpenAI has acknowledged that ChatGPT's responses might not always be accurate.¹⁵

Lawyers are required to think outside the box in performing their duties. This would include coming up with legal strategies and solutions for clients and dealing with cross-examination points during trial. Litigators undergo years of practical training to hone their advocacy skills. Even if AI is programmed to do so, it will be limited in capacity. There are many varying factors to be considered in arguing a case in court. There would be immense difficulty for AI, without body language and other subconscious signals, to supersede the capability of a human litigation lawyer.

Perhaps, the more relevant question should be – how AI and Malaysian lawyers can co-exist in legal practice?

The adoption of technology in legal practice has generally benefitted the Malaysian legal industry. Lawyers who take it a step further and embrace the potential of AI to enhance their practice only stand to benefit from it. The potential of AI in performing assistive legal tasks is endless, from generating forms and analysing voluminous documentary evidence, to writing briefs and conducting legal research. Lawyers keen on doing so should watch the AI space for the latest news, or perhaps even start by experimenting with an AI chatbot.

With the plethora of advancements, lawyers should look to adapt to change and incorporate technology, or risk being left behind.

If you have any queries on legal issues relating to Technology, Media and Telecommunications (TMT), please do not hesitate to contact associates, **Nicole Shieh E-Lyn** (sel@lh-ag.com), **Ng Yih Xiang** (nyx@lh-ag.com), **Wee Yun Zhen** (wyz@lh-ag.com), or team partner, **G. Vijay Kumar** (vkg@lh-ag.co).