

ARTIFICIALLY INTELLIGENT ARBITRATOR OR ARTIFICIAL INTELLIGENCE IN ARBITRATION?

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Introduction

Arbitration became an accepted method of dispute resolution because of its prompt and inexpensive resolution mechanism. Similarly, after arbitration, to be more fecund and time-saving, the idea of Online dispute resolution (hereinafter, ODR) came up, which substantiated itself to be both, cost and time-efficient. Human beings have the propensity of embracing changes and so has been done in the case of ODR and technology. Since the outbreak of COVID-19 pandemic, exigent matters has been successfully resolved with the aid of ODR. Therefore, it can be rightly said, innovation is the reason for any organisation or sector to flourish; Artificial intelligence (hereinafter, A.I.) is one such innovation. A.I. is an offspring of the mortal mind. A.I. has already formed itself an integral part of our lives since it works on self-learning and deep learning mechanism, making it faster and independent. Artificial Intelligence has emerged triumphant in fulfilling the needs of humans. Since A.I. has proved its relevance in assisting lawyers, but can we foresee the time when these machines will substitute lawyers in their practice?

Use of A.I. in Arbitration

Machines have been introduced to lessen the workload of humans. Similarly, A.I. has made it easier to facilitate the proceedings. With its capacity to store and organising abundant data, it relieves the person to manage all the data. A.I. can help in finding cases of similar nature as that of the problem at hand, which usually consumes much time. In the U.S., a software named Ross Intelligence² has been designed which uses A.I. to assist lawyers in searching relevant laws and cases. A company, named Blue J Legal³, uses an A.I. to predict the outcome of cases mainly related to tax law. As claimed by the company, the prediction of this A.I. is 90 % accurate. With the help of A.I., the processes are now based on data then that earlier was intuitively based, the arbitrator that is best suited for a particular type of arbitration can be determined with the use of machines, only by filling a questionnaire. A.I. software helps in electronic billing, to make the invoices as per the work done by the lawyers, this, in turn, helps both the lawyers and the client.

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² The intelligent legal research choice <<https://www.rossintelligence.com/>> accessed 6 June 2020

³ The legal prediction platform <<https://www.bluejlegal.com/>> accessed 6 June 2020

Blockchain in arbitration and A.I.

Blockchain is a digital platform that holds transactional records with utmost transparency and security, uploaded on a network making it decentralised, accessed by all the people on that network. Once any data is uploaded on the network, it becomes challenging to alter it. Since all the data on a blockchain is dematerialised, such data should be handled without any human intervention, and this is when A.I. comes into play. Reviewing contract is a very tedious process and consumes much time, A.I. can be used to go through complex contracts to find out the clauses which can be troublesome for the party. Many established companies like E-bay uses Artificial intelligence software to review their contract. An A.I. software name Kira System⁴, as defined by its makers "Kira is a powerful machine learning software that identifies, extracts, and analyses text in your contracts and other documents", this software can highlight the grey areas in a contract and perform the task of due diligence in minutes, taking the burden off the shoulders of the lawyers. Although the contracted can be reviewed by Kira, the solution to the problem cannot be provided by it. Blockchain and A.I. together cannot solve a dispute single-handedly without human intervention because human intervention is required on various stages of arbitration. After all, the results produced by these machines do not guarantee 100% accuracy, and therefore, human supervision becomes the utmost parameter in these activities. Innovation in the technology is required to make A.I. work as arbitrators without any human assistance.

A.I. Arbitrators.

A.I. has come a long way since its inception; the day is not very far when these will be used as arbitrators in an arbitration proceeding. The UNCITRAL Model Law provides for appointing an arbitrator, but is silent on the issue of the type of arbitrator, whether the arbitrator can be a machine or not. This is a grey area that can be used by the parties as per their suitability. A.I. uses Natural Language Processing, which makes it easier for the machine to understand the human language and make one to one interaction easier. Certain factors lie behind using A.I. as arbitrators as these arbitrators rule out even the slightest possibility of being biased towards any party. The emotions do not get into the way of delivering an award to the party. The proceedings are cost and time effective, as all the data is stored within the machine, which makes it easier to find it and also thwarts the arbitrator charges. In 2014, a team from Chicago-Kent college of law created software to predict the outcome of the already decided U.S. Supreme Court Cases; the software was able to predict

⁴ Kira Systems <<https://kirasystems.com/>> accessed 6 June 2020

the cases with 70% accuracy⁵. A software named Siarelis⁶ is used as a guide to assist a lawyer or a judge to find out the possible outcome of a corporate dispute. The same is used as an assistant in the Loomis case by the judge to decide on the bail application provided by the petitioner. Therefore, it can be seen that judges are using AI to find out the possible outcome of any case and for risk assessment. On the other hand, in the case of a human arbitrator, the reasoning of the award is provided, but the A.I. might fail to do so. The reasoning for the award is an essential element of the proceedings as it satisfies the party of the ground on which such an award has been rendered, the inability of the A.I. in providing reasoning defeats the purpose of acting as an arbitrator. The parties may be reluctant to involve A.I. in their dispute resolution. These machines do not have built within themselves the idea of equity and fairness because of its incapability of emotional feelings; this acts as a hindrance for robots acting as arbitrators. The awards given by these robots will be based on the data, and there is no guarantee of overall accuracy. There may occur instances when it will be required to apply divergent thinking, and an A.I. may not be very successful at that compared to a human arbitrator.

Use of A.I. in the Indian legal sector

India has incorporated the practice of virtual courts to resolve urgent matters in the times of pandemic. Also, the practice of virtual courts cannot be regarded as the use of A.I. in the legal sector; it is merely the involvement of technology for dispute resolution. India is not a very technologically advanced country concerning inculcating A.I. in their dispute resolution. The major drawback which holds India to emerge as a technological friendly country is the non-implementation of Personal Data Protection Bill, 2019. The Bill seeks to protect the personal data of the individual and further provides for the establishment of Data Regulation Authority⁷. The Bill under clause 40 makes an effort to encourage innovation in AI by providing a sandbox provision that provides for an exemption for using the user data. Due to this non-implementation, the practice of online dispute resolution is yet not very prevalent, and hence, dispute resolution by the aid of A.I. remains at an infant stage. There is no surety of data protection even in the court hearings, but that is the risk we were bound to take due to massive pendency of cases on the Indian courts. Right to privacy has been recognised as a

⁵ Daniel Martin Katz, Michael James Bommarito and Josh Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States' (19 January 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463244> accessed 6 June 2020

⁶ Siarelis <https://www.supersociedades.gov.co/delegatura_mercantiles/Paginas/siarelis.aspx> accessed 11 June 2020

⁷ Personal Data Protection Bill, 2019 <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf> accessed 6 September 2020.

fundamental right under Article 21 of the Indian constitution⁸, that is why the data protection bill, 2019 has been introduced in the parliament but yet not passed. Section 43A and 72 of the Information Technology Act, 2000 provides for punishment in case of breach of data privacy. However, the act does not explicitly talk about data protection and privacy that takes place in other sectors like medical information of patients, protection of evidence in proceedings etc. On November 26, 2019, Supreme Court Vidhik Anuvaad Software (SUVAS), a software app trained by A.I. was introduced to people who could translate judicial documents into nine vernacular languages, making judgements easily understandable to the majority of the population of India. The scope of this app will further be expanded by introducing more languages and high court cases. The Supreme Court with its Technology department is working on another project called SCI-Interact, making all the seventeen benches paperless, which will include scanned copy of all the judicial documents, making it environmentally friendly and prompter in resolving disputes with lesser human interaction. The testing of this project is going on and will be unveiled to the public very soon. Another project named SUPACE (Supreme Court Portal for Assistance in Court Efficiency) has also been worked on to track the development of the ongoing cases, legal research, to ensure timely delivery of justice and to uphold the belief, justice delayed is justice denied. Chief Justice of India, Mr Sharad Arvind Bobde in a conference, emphasised on the need for involvement of high-end technology like A.I. in Indian courts to prevent undue delayed justice, he further emphasised that judges need not worry about A.I. replacing them. The Indian judiciary realises involvement of technology for faster dispute resolution, and therefore initiatives are taken to encourage its usage. The use of A.I. will eventually benefit the client also to check whether the advice given by the Lawyers is accurate or not. The Artificial Intelligence Association of India(AIAI)⁹, founded in the year 2009, is one such not-for-profit organisation committed to improvements in A.I. Indian ventures are yet new to the idea of A.I. when contrasted with its western partners. There is far to go for the nation to understand the maximum capacity and effect that A.I. can have on expanding the productivity of various fields, including the legal sector. NITI Ayog realised the importance of A.I. and was assigned the task to establish the National Program on A.I., in according to which it released the paper on National Strategy for Artificial Intelligence (NSAI)¹⁰ in June 2018, which discusses potential areas for the growth

⁸Justice K.S Puttaswami & another Vs. Union of India, India Supreme Court, Writ Petition (C) 494 of 2012.

⁹Artificial Intelligence Association of India (AIAI) <<http://www.aiai.org.in/backing-lastest/>> accessed 12 June 2020

¹⁰NITI Ayog, National strategy for Artificial Intelligence #AIFORALL' (June 2018) <<https://niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf>> accessed 12 June 20

of A.I. and highlights the concerns of privacy, security, ethics and intellectual property rights. In January 2020, NITI Ayog released an approach paper AIRAWAT: A.I. Specific Cloud Computing Infrastructure. The paper proposes to establish India's own AI-first compute infrastructure which is aimed to facilitate and speed up research and solution development for solving India's societal challenges using high performance and high amount AI-specific supercomputing technologies¹¹.

Ethical Duty of a Lawyer while Using A.I.

- The lawyer must keep himself updated with all the technology which might be convenient for him in practice and must know everything about the A.I.; its working, its processing etc.
- The use of A.I. and confidentiality of the data must be communicated to the client in order to maintain transparency. The lawyer must always try to maintain client data privacy.
- If the clerical work is assigned to the A.I., the lawyer must try to maintain an excellent personal touch with the client as the workload is now distributed.

Drawbacks of A.I. to act as Arbitrator :

1. Non-intervention of humans: It is a very early and immature stage for A.I. to act as arbitrators independently and to rely on them for the resolution of disputes. It is said that an A.I. is only as good as data fed by the creator. The data fed can cause A.I. to make bias decisions because humans are biased and A.I. can reflect the same. There are various instances of machinery bias like, the COMPAS model which was used in the US for determining whether a perpetrator is likely to commit further criminal activity, the A.I. predicted falsely double the positive cases for African Americans and than the native Americans¹². Another example is the Google feature of automatic image labelling which tagged certain black people with the word gorilla¹³. These are the clear cases of racism done by A.I. Therefore, human intervention is a must while dealing with A.I.
2. Choice of the parties: The Arbitrator is decided by the parties and we have yet not reached at a stage where people will choose A.I arbitrators and not human arbitrators for

¹¹ NITI Ayog, 'AIRAWAT: Establishing an AI-specific cloud computing infrastructure for India' (January 2020) <https://niti.gov.in/sites/default/files/2020-01/AIRAWAT_Approach_Paper.pdf> accessed 12 June 2020

¹² Machine bias, <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 18 July 2020

¹³ A major flaw in Google's algorithm allegedly tagged two black people's faces with the word 'gorillas' <<https://www.businessinsider.in/tech/A-major-flaw-in-Google's-algorithm-allegedly-tagged-two-black-peoples-faces-with-the-word-gorillas/articleshow/47903914.cms>> accessed 18 July 2020

dispute resolution. Human touch is always required for the parties. A.I. will be unable to use subjective thinking in matters that require to arrive at a decision with empathy and feelings. Other than the law related matters, A.I. will be of no help. Therefore, it is very understandable that parties might not opt for A.I. arbitrators.

3. Could be unsuccessful in upholding the principles of justice: The principles of justice must be upheld while delivering any award to the parties and that is what makes people trust the process of arbitration. Equal treatment to the parties might fail due to bias data, equal opportunities of being heard might also fail due to lack of empathy towards any party. Therefore, A.I. is not ready yet to take over the work of human Arbitrators.
4. Unreasoned Awards: A.I. provides its awards on the basis of previous awards rendered, and does not provide the reason due to which it has reached such a decision. The humans are the seekers of answers and without getting a proper reasoned answer it might not satisfy the parties and especially the party against whom such an awards is rendered. Additionally, if any situation demands a new type of award or a novel situation arises than A.I. would be unsuccessful in rendering an award and therefore, human arbitrators are required.
5. Flexibility in proceedings: A.I. works on a set of rules, if in any case the number of pages in which the evidence must be submitted and any party exceeds the number of pages, such evidence would be directly rejected by the A.I. or if in any case, the situation demands flexibility in a certain procedure in such a case, A.I. will be unable to do so.
6. Lack of laws that lays down penalties: Other than the General Data Protection Regulation (GDPR) enforced in the European Union that protects the data of the user, no other country has such stringent laws that secure the data of the user and penalise in case of violation. This shortcoming also acts as a backdrop for people to accept AI as the new normal. Therefore, it is high time to provide for principles of jurisprudence and criminal liability of AI.

Analysis

A.I. is a product of the human mind. Therefore the phobia of these machines outsmarting humans must be aloof. The work done by these machines is usually clerical work like legal research, reviewing contracts, etc. Even after machines taking over these clerical tasks, total reliance cannot be placed on the work done by these machines, human interference and supervision is a must. The task of the machines must be kept at par with assisting lawyers in

their work or any advice they give to their clients, whether they are up to date with the laws. Any client demands a human touch to the solution of their problems, which cannot be fulfilled by these robots. It is very rightly said, "those who do not adopt changes are left behind"; therefore, it becomes necessary to adapt with the changes but not with the constant fear of being left behind. An ODR platform can be made where petty matters can be dealt with by the A.I. using the data provided by the parties; these A.I. can then decide the outcome of the case. When the outcome is decided by the A.I., and both the party agree to it, such an outcome will then be approved by the competent court. This will ensure two things; firstly, the total power is not provided to these machines to resolve disputes. Secondly, it will act as a trial to see how successful an A.I. can be resolving disputes. In various countries, concerns relating to A.I. have been discussed, but no law that is A.I. centric has been implemented. We cannot hold back in innovation; that is why this issue needs to be addressed instantaneously. To combat the problem of the need of A.I. for dispute resolution, the need for legal engineers arises. Professionals are required who can develop software for such dispute resolution keeping in mind legal requirement as well as protection of client data.

Conclusion

In 2018, the report by Thomson Reuters on A.I. Predictions, it has been pointed out that a lawyer needs to keep himself abreast of all the technological changes happening in the profession, and A.I. must be seen as an assistant rather than an enemy or competitor¹⁴. The time has not come to hand over the task of resolving disputes to the machines exclusively. It also depends upon the parties whether they are comfortable in resolving their disputes with the help of non-human interference. The end goal of using technology in law is not to replace lawyers but to ease their workload, to free them from the work which can be done by A.I., and to focus on more vital issues, making them more dynamic. A system is needed whereby both humans and machines can co-exist peacefully. Humans are masters and creators of these machines and not servants. The time has not arrived yet to rely on these A.I. entirely, it will surely come, but today is not the day.

¹⁴Thomson Reuters, 'AI Predictions' <<https://www.thomsonreuters.com/en/reports/2018-ai-predictions.html>> accessed 6 June 2020