



International Bar Association

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Guidelines and Regulations to Provide Insights on Public Policies to Ensure Artificial Intelligence's Beneficial Use as a Professional Tool



IBA Alternative and New Law Business Structures Committee
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Acknowledgments

The Artificial Intelligence Working Group of the Alternative and New Law Business Structures (ANLBS) Committee of the International Bar Association (IBA) is proud to present this first handbook, which covers the main topic for a number of jurisdictions around the globe.

This project is the first IBA publication on the existing guidelines and statutory regulations on the use of artificial intelligence (AI) as a professional tool. As a publication of the ANLBS Committee, it is intended to be updated every two years, and it has coverage of all the listed jurisdictions.

We are thankful for the contributions from all participant firms, which made a tremendous effort not only to cover the legal aspects but also to work together in the best interest of our legal community.

We are particularly thankful to the IBA Technology Law Committee, the IBA North American Regional Forum and the AI and Ethics group of the Future of Legal Services Commission for their active involvement in this project and for their contributions, without which this project would not be possible.

In this context, we believe that this publication is an important tool to provide insights on public policies to ensure AI's beneficial use as a professional tool, particularly for the legal profession in the jurisdictions considered.

We also thank the IBA for its continuing support of this initiative, and encourage the members of the IBA ANLBS Committee, the IBA Technology Law Committee, the IBA North American Regional Forum and the AI and Ethics group of the Future of Legal Services Commission to contribute to future editions.

If any IBA member is interested in contributing to drafting a country chapter not yet included in this publication, please do contact Riccardo G Cajola (rgc@cajola.com).

Disclaimer

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CONTENTS

MULTILATERAL ORGANISATIONS	8
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COUNTRY CHAPTERS

1.	Argentina	16
2.	Canada	22
3.	England and Wales	30
4.	France	37
5.	Germany	47
6.	Hong Kong (Special Administrative Region)	55
7.	India	63
8.	Italy	69
9.	Japan	79
10.	Sweden	89
11.	The People's Republic of China	98
12.	The United States	104

Multilateral organisations

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In January 2020, Google Chief Executive Officer (CEO) Sundar Pichai made waves when he declared that ‘there is no question in my mind that artificial intelligence needs to be regulated’, and called ‘international alignment critical’.¹

International alignment on AI policy is important, not only to curb the risks that AI poses to human rights but also to make the most of the benefits that AI can deliver. For starters, to the extent that ‘values-by-design’ approaches impact software and hardware engineering,² global technical interoperability is necessary for inherently global technologies to function and succeed.

The goal of this chapter is to briefly highlight some of the most critical intergovernmental AI policy initiatives currently underway. Most deal in high-level, generally applicable principles rather than being tailored to the context of AI use in legal or other professional contexts. But a sense of the worldwide efforts taking place in this area should be relevant to all professionals who have an interest in anticipating the future of technological progress, incoming regulation and possible liability while leveraging the ethical use of AI as a competitive advantage.

1. Organisation for Economic Co-operation and Development (OECD)

The OECD’s Principles on Artificial Intelligence – the first intergovernmental standards on AI – were adopted by 42 countries on 22 May 2019.³

Although these principles are meant to apply across all sectors, the possibility of overlap with other professional regulation is acknowledged by the preamble, which ‘underlines’ that ‘certain existing regulatory and policy frameworks already have relevance to AI, including those related to... responsible business conduct’.⁴

Contained in the OECD Council Recommendation on AI, the principles are delivered in two sections. The first section, ‘principles for responsible stewardship of trustworthy AI’, elaborates on five ‘complementary value-based principles’:

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- 1 Sundar Pichai, ‘Why Google Thinks We Need to Regulate AI’, *Financial Times* (London, 20 January 2020), see www.ft.com/content/3467659a-386d-11ea-ac3c-f68c10993b04 accessed 2 July 2020.
 - 2 Virginia Dignum, Matteo Baldoni, Cristina Baroglio, Maurizio Caon, Raja Chatila, Louise Dennis, Gonzalo Génova, et al, ‘Ethics by Design: Necessity or Curse?’ (2018) In Proceedings of the 2018 AAAI/ACM Conference on AI, Ethics, and Society, New Orleans, LA, US 60–66, see <https://doi.org/10.1145/3278721.3278745> accessed 2 July 2020.
 - 3 OECD, ‘OECD Principles on Artificial Intelligence’, see www.oecd.org/going-digital/ai/principles accessed 2 July 2020.
 - 4 OECD, ‘Recommendation of the Council on Artificial Intelligence’ (2019), see <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> accessed 2 July 2020.

1. inclusive growth, sustainable development and wellbeing;
2. human-centred values and fairness;
3. transparency and explainability;
4. robustness, security and safety; and
5. accountability.

The second section, 'national policies and international cooperation for trustworthy AI', explicates five 'recommendations' for signatories:

1. investing in AI R&D;
2. fostering a digital ecosystem for AI;
3. shaping an enabling policy environment for AI;
4. building human capacity and preparing for labour market transformation; and
5. international cooperation for trustworthy AI.

The OECD Committee on Digital Economy Policy is responsible for monitoring the implementation of these recommendations, as well as the development of more practical guidance through fostering international dialogue at the OECD AI Policy Observatory.⁵

Although OECD recommendations are not binding, they 'are highly influential', and in the past, have formed the starting point for government negotiations on national legislation – as seen by the influence of the OECD Privacy Guidelines on privacy legislation worldwide.⁶

The influence of the OECD's recommendations is also instantiated by two other intergovernmental pacts on the responsible development and use of AI.

G20

In June 2019, the Group of Twenty (G20) issued the 'Osaka Leaders' Declaration' on the digital economy. Along with pushing for concepts like cross-border 'Data Free Flow with Trust', the G20 committed to a 'human-centred approach to AI' and welcomed the 'non-binding' G20 AI principles, which are drawn from the OECD principles.⁷

⁵ OECD, 'Artificial Intelligence', see www.oecd.org/going-digital/ai accessed 10 July 2020.

⁶ OECD, 'OECD Principles on Artificial Intelligence', see www.oecd.org/going-digital/ai/principles accessed 10 July 2020.

⁷ Government of Canada, Global Affairs, 'G20 Osaka Leaders' Declaration', see www.international.gc.ca/world-monde/international_relations-relations_internationales/g20/2019-06-29-g20_leaders-dirigeants_g20.aspx?lang=eng accessed 29 June 2019.

The Global Partnership on Artificial Intelligence

The Global Partnership on Artificial Intelligence (GPAI) stems from a pledge by Canada and France to bridge the theory and practice of ‘a vision of a human-centric artificial intelligence’.⁸ GPAI was inspired in part by the Intergovernmental Panel on Climate Change (IPCC) to develop global governance of AI.⁹ Founding GPAI parties, including the United States, Australia, France, Germany, Mexico, the Republic of Korea, Singapore, Slovenia, the United Kingdom, India, Italy and the European Union,¹⁰ have pledged to ‘support the responsible and human-centric development and use of AI in a manner consistent with human rights, fundamental freedoms, and our shared democratic values, as elaborated in the OECD Recommendation on AI’.¹¹

Hosted by the OECD in Paris, GPAI will focus its initial efforts on four working group themes: (1) responsible AI; (2) data governance; (3) the future of work; and (4) innovation and commercialisation, as well as on the use of AI to assist with Covid-19 economic recovery. GPAI Multistakeholder Experts Group Plenary meetings will be hosted annually.¹²

2. The United Nations

The UN is engaged in AI-related activities across the entire organisation,¹³ but the following are stand-out efforts at global coordination to secure the beneficial use of AI, in particular to achieve the Sustainable Development Goals (SDGs).

UN Educational, Scientific and Cultural Organisation (UNESCO)

In 2019, UNESCO commenced a two-year project to ‘elaborate the first global standard-setting instrument on ethics of artificial intelligence’. This project builds on the Preliminary Study on Ethics of Artificial Intelligence produced by UNESCO’s World Commission on the Ethics of Scientific Knowledge and Technology (COMEST). That study suggested that UNESCO’s approach could complement the OECD’s at international level, but ‘with a focus on aspects that are generally neglected such as culture, education, science and communication’.¹⁴

8 Innovation, Science and Economic Development Canada, Joint Statement from Founding Members of the Global Partnership on Artificial Intelligence, see www.canada.ca/en/innovation-science-economic-development/news/2020/06/joint-statement-from-founding-members-of-the-global-partnership-on-artificial-intelligence.html accessed 14 June 2020.

9 See <https://ourworld.unu.edu/en/why-we-need-an-intergovernmental-panel-for-artificial-intelligence> accessed 14 June 2020.

10 Formal ascension pending. See n 7 above.

11 See n 8 above.

12 *Ibid.*

13 ITU, UN Activities on Artificial Intelligence (AI) (2019), see www.itu.int/dms_pub/itu-s/opb/gen/S-GEN-UNACT-2019-1-PDF-E.pdf accessed 14 June 2020.

14 COMEST, ‘Preliminary Study on the Ethics of Artificial Intelligence’, see <https://unesdoc.unesco.org/ark:/48223/pf0000367823> accessed 14 June 2020.

UNESCO, in collaboration with Member States and other partners, aims to produce a recommendation for adoption by the UNESCO General Conference in 2021.¹⁵

International Telecommunications Union (ITU)

The ITU is a specialised UN agency for information and communications technology (ICT). A public–private membership that includes 193 Member States and over 900 companies, universities, and international and regional organisations, its functions include developing ICT policies and internationally interoperable technical standards.

Although technical standard setting may convey a sense of neutrality, this disguises an intense commercial and geopolitical struggle to control the future of AI.¹⁶ Worldwide acceptance of one’s proposed technical standard, especially when that standard tracks a company’s proprietary technology, allows that company or country to reap commercial rewards and set the norms for the development use of AI; the emergence of global standards ‘not only impacts the power of nation-states, but also changes the power of corporations’.¹⁷

Although two private regulatory standard networks – the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) – are the leading bodies for standard setting in digital technologies, the ITU is the only treaty-based organisation with Member States.¹⁸ More so than ISO, IEC, and prominent industrial associations and consortia like the Institute of Electrical and Electronics Engineers (IEEE), the ITU’s standards are notable for being driven by corporate and national interests outside North America and the EU. The standards that it produces are particularly influential in the developing world.¹⁹

Relevant ITU focus groups include the ITU Group on Machine Learning for Future Networks and on AI for Autonomous and Assisted Driving.²⁰ In line with China’s strategy to become the world’s standards supplier, Chinese companies have been

15 UNESCO, ‘Elaboration of a Recommendation on the Ethics of Artificial Intelligence’, see <https://en.unesco.org/artificial-intelligence/ethics> accessed 27 February 2020.

16 Alan Beattie, ‘Technology: How the US, EU and China Compete to Set Industry Standards’, *Financial Times* (London, 24 July 2019) www.ft.com/content/0c91b884-92bb-11e9-aea1-2b1d33ac3271 accessed 26 July 2020.

17 Aynne Kokas, ‘Cloud Control: China’s 2017 Cybersecurity Law and its Role in US Data Standardization’, see <https://ssrn.com/abstract=3427372> or <http://dx.doi.org/10.2139/ssrn.3427372> accessed 26 July 2020.

18 Jeffrey Deng, ‘Balancing Standards: U.S. and Chinese Strategies for Developing Technical Standards in AI’, The National Bureau of Asian Research (NBR), see www.nbr.org/publication/balancing-standards-u-s-and-chinese-strategies-for-developing-technical-standards-in-ai accessed 10 July 2020.

19 Yuan Yang, Madhumita Murgia, and Anna Gross, ‘Chinese Tech Groups Shaping UN Facial Recognition Standards’ *Financial Times* (London, 1 December 2019), see www.ft.com/content/c3555a3c-0d3e-11ea-b2d6-9bf4d1957a67 accessed 10 July 2020.

20 ITU, ‘International Standards for an AI-Enabled Future’ (ITU News, 6 July 2020), see <https://news.itu.int/international-standards-for-an-ai-enabled-future> accessed 10 July 2020.

particularly active in the ITU, gaining acceptance for their standards proposals in the areas of facial recognition and other types of visual surveillance.²¹

The ITU also convenes the AI for Good Global Summit, the ‘leading UN platform for global and inclusive dialogue on AI’, which collaborates with public and private bodies, as well as over 37 UN agencies to ‘identify strategies to ensure that AI technologies are developed in a trusted, safe and inclusive manner, with equitable access to their benefits’.²² Finally, it hosts an ‘AI repository’ to gather information on AI-related projects that aim to advance progress on the UN SDGs.

UN Convention on Certain Conventional Weapons (CCW)

The UN Convention on Certain Conventional Weapons (CCW) has been discussing the regulation of emerging lethal autonomous weapons systems (LAWS), with the UN Secretary-General repeatedly calling on states to conclude a new international treaty to ban ‘killer robots’.²³ But with military powers such as the US, China, the UK and Russia opposed, substantive progress has stalled.²⁴

UN Centre for Artificial Intelligence and Robotics (UNICRI)

Launched in 2015, UNICRI’s aim is to ‘enhance understanding of the risk-benefit duality of Artificial Intelligence and Robotics through improved coordination, knowledge collection and dissemination, awareness-raising and outreach activities’.²⁵

3. EU

The EU’s AI policy development is included in this chapter because EU policy precedent has proved highly influential globally. The process by which regulatory globalisation is caused by the extraterritorial influence of the EU’s laws has become known as the ‘Brussels Effect’.²⁶

The General Data Protection Regulation (GDPR) achieved the ‘Brussels Effect’ through the territoriality provisions of the GDPR under Article 3, which clarify that the GDPR’s provisions apply to the processing of personal data of data subjects who are in the EU by a controller or processor not established in the EU. Further, by conditioning personal data law transfers out of the EU on an ‘adequacy’ assessment – where ‘adequate’

21 See n 19 above. 19.

22 AI for Good Global Summit 2020, see <https://aiforgood.itu.int> accessed 10 July 2020.

23 ‘Autonomous Weapons That Kill Must Be Banned, Insists UN Chief’ (UN News, 25 March 2019), see <https://news.un.org/en/story/2019/03/1035381> accessed 10 July 2020.

24 Zelin Liu, and Michael Moodie, ‘International Discussions Concerning Lethal Autonomous Weapon Systems’, see <https://fas.org/sgp/crs/weapons/IF11294.pdf> accessed 10 July 2020.

25 UNICRI Centre for Artificial Intelligence and Robotics, The Hague, The Netherlands www.unicri.it/in_focus/on/UNICRI_Centre_Artificial_Robotics accessed 10 July 2020.

26 Anu Bradford, *The Brussels Effect* (Oxford University Press, 2020) 25–66, see <https://doi.org/10.1093/oso/9780190088583.003.0003> accessed 10 July 2020.

means ‘essentially equivalent’²⁷ – the EU secured leverage to demand that its international trading partners replicate its policy vision. Many jurisdictions have taken the GDPR as a starting point for designing their own legislation.²⁸

Any AI policy coming from the EU can be expected to at least attempt to exert similar global influence. Indeed, in its February 2020 proposal for a new AI regulatory framework for AI (see below) the European Commission declared that it ‘is paramount that the requirements are applicable to all relevant economic operators providing AI-enabled products or services in the EU, regardless of whether they are established in the EU or not’.²⁹

The EU has been prolific in its development of AI policy initiatives, considering that the absence of a common European framework for addressing the challenges created by AI risks fragmenting the internal market.³⁰

In April 2018, 25 European countries signed the Declaration of Cooperation on Artificial Intelligence, which underscores the importance of cooperation to resolve ethical and legal questions.³¹

In March 2018, the European Commission established a High-Level Expert group to develop ethical guidelines for trustworthy AI, which were published in April 2019.³²

The guidelines aim to provide a starting point for the discussion of ‘trustworthy AI in Europe’; that is, AI that is (1) lawful; (2) ethical; and (3) robust. In order to do so, the first chapter expands on developing AI systems that comport with the ethical principles of respect for human autonomy, prevention of harm, fairness and explicability. The second chapter provides guidance on how these principles can be met, through requirements such as:

- human agency and oversight;
- technical robustness and safety;
- privacy and data governance;
- transparency;

27 European Commission, ‘Questions & Answers on the Japan Adequacy Decision’, see https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_422 accessed 10 July 2020.

28 Paul Schwartz, ‘Global Data Privacy: The EU Way’ (2019) 94 NYU Law Review.

29 European Commission, White Paper on Artificial Intelligence: A European Approach to Excellence and Trust (2 February 2020), see https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf.

30 OECD, ‘AI Strategies and Policies in European Union’, see <https://oecd.ai/dashboards/countries/EuropeanUnion> accessed 2 July 2020.

31 European Commission, ‘EU Member States Sign up to Cooperate on Artificial Intelligence’ (10 April 2018), see <https://ec.europa.eu/digital-single-market/en/news/eu-member-states-sign-cooperate-artificial-intelligence> accessed 2 July 2020.

32 European Commission, ‘Ethics Guidelines for Trustworthy AI’, see <https://ec.europa.eu/futurium/en/ai-alliance-consultation> accessed 2 July 2020.

- diversity, non-discrimination and fairness;
- societal and environmental wellbeing; and
- accountability.

These EU principles apply to ‘stakeholders’ – a group that includes ‘deployers’ – that is, public or private organisations that use AI systems within their business processes and to offer products and services to others. Deployers ‘should ensure that the systems they use and the products and services they offer meet the requirements’ set out in the EU principles.

In February 2020, the European Commission published a White Paper on AI, ‘A European Approach to Excellence and Trust’ (the ‘White Paper on AI’) and *Report on the safety and liability implications of artificial intelligence, the internet of things and robotics*.³³

Apart from considering ways in which current EU legislation could be amended to account for the liability challenges presented by AI, in the White Paper on AI, the European Commission proposes a new regulatory framework for AI. In order to achieve the EU’s aim of developing trustworthy AI while avoiding disproportionate burdens to small and medium-sized enterprises (SMEs) and others, the European Commission is of the opinion that a risk-based approach should be followed. The requirements contained in a new AI regulatory framework would therefore just mandatorily apply only to ‘high risk’ AI activity.

Under the European Commission’s proposed definition, AI should be considered ‘high risk’ where: (1) it is employed in a sector where, given the characteristics of the activities typically undertaken, significant risks can be expected to occur – for example, healthcare, transport and energy; and (2) the AI application in the sector in question is, in addition, used in such a manner that significant risks are likely to arise (not every use of AI in the selected sectors necessarily involves significant risks).

AI that is considered ‘high risk’ will be subject to mandatory legal requirements, to be further specified through standards in the following proposed areas:

- training data;
- data and record-keeping;
- information to be provided;
- robustness and accuracy;
- human oversight; and

³³ European Commission, *Report on the safety and liability implications of artificial intelligence, the internet of things and robotics*, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0064&from=en> 2 July 2020.

- specific requirements for certain particular AI applications, such as those used for purposes of remote biometric identification.

As proposed, this regulatory framework would be implemented and monitored by a new European governance structure on AI consisting of a framework for cooperation of national competent authorities. The consultation period for the paper closed on 14 June 2020.

Conclusion

The intergovernmental efforts described above could validly be critiqued as overly vague ‘ethics-washing’,³⁴ with minimal substantive influence on behaviour. Others think that AI policy is best left to the private sector alone.³⁵ But Pichai, at least, would appear to disagree. Without minimising the considerable work that needs to be done in operationalising these myriad principles and developing ways to verify compliance, even these high-level efforts should not be simply dismissed. We have seen in the past how ‘soft law’ has led to transformed ‘hard law’ – as with the influence of the OECD privacy principles on privacy legislation around the world. And in an area as economically and geopolitically fraught as the future of AI development, any degree of cooperation towards the mission of steering AI towards good should inspire some hope for the future.

34 Karen Hao, ‘In 2020, Let’s Stop AI Ethics-Washing and Actually Do Something’ (MIT Technology Review, 27 December 2019), see www.technologyreview.com/2019/12/27/57/ai-ethics-washing-time-to-act accessed 2 July 2020.

35 Notable examples of corporate AI ethics statements have been produced by companies like Google, Microsoft, IBM and Sony. The World Economic Forum, which boasts 1,000 of the world’s top companies as its members, also has its own AI project, Shaping the Future of Technology Governance, which, among other things, aims to reimagine regulation for the age of AI, see www.weforum.org/platforms/shaping-the-future-of-technology-governance-artificial-intelligence-and-machine-learning accessed 2 July 2020.

Argentina

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1. What is the understanding or definition of AI in your jurisdiction?

The concept of artificial intelligence (AI) has scarcely been mentioned in recent Argentine legislation, and has not been regulated as such. There is currently no statutory definition of the term AI in Argentina, or a clear-cut or generally agreed upon definition of the term – the same as other modern technological concepts such as ‘Big Data’ and ‘machine learning’. Notwithstanding this, scholars’ legal doctrine has generally stated that AI may be defined as a device that can function in a similar manner to human intelligence, with the ability to learn, reason and outdo itself. To this end, it uses algorithms, machine learning or deep learning and neural networks to develop solutions. In general terms, it is agreed that AI implies that a system may collect large amounts of data, and on the grounds of such data, draw conclusions or make autonomous decisions replicating human intelligence, or at least developing rational thought in search of the best possible results. It is generally agreed that AI has certain degrees of autonomy in decision-making as opposed to machine learning, for example. Bear in mind that, in the future, all of this may be widened or narrowed depending on the legal evolution of the concept in Argentina, and in legislation that may be enacted accordingly. In Argentina, AI is expected to have an impact mainly on the health sector, financial and banking sector, manufacturing and retail commerce.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Nowadays, there are no locally developed AI tools used in Argentina in practice for legal services. However, the public sector and the Public Prosecutor’s Office of the City of Buenos Aires (the ‘Prosecutor’s Office’), along with AI Lab within the University of Buenos Aires, created a system named ‘Prometea’, aimed at providing a predictive tool to the judiciary and public administration for the resolution of cases and administrative documents. While it has been presented by the Prosecutor’s Office as an AI system, it should be noted that it operates as a machine learning system with no self-autonomy for decision-making. It currently

operates for cases involving low amounts and similar characteristics, such as traffic accidents, to determine tort liability.

3. If yes, are these AI tools different regarding

- **independent law firms;**
- **international law firms; and**
- **in-house counsel;**

and what are these differences?

Not applicable.

4. What is the current or planned regulatory approach on AI in general?

The current/planned regulatory approach related to AI is still not very clearly defined in Argentina. Although certain initiatives have taken place with regard to technology in recent years.

With regard to Big Data, in 2017, Regulation No 11/2017 created the 'Big Data Observatory', an entity within the IT and Communications Bureau. Although its specific tasks were to be defined by further regulation, it aims to 'study the regulatory framework of personal data use', 'foster and create Big Data technological platforms', 'promote good Big Data practices' and 'propose new regulations'. To date, Regulation No 11/2017 remains without further regulations, and none of these regulatory frameworks have been passed.

Also, in November 2018, Decree No 996/2018 was issued, by which the Argentine federal government set forth the basis for an 'Argentine Digital Agenda' ('Agenda Digital Argentina') aiming to establish guidelines for a technological legal framework and digital institutional strategy to be implemented within the public sector throughout the country for 2030. These guidelines mention AI, as well as other technological concepts. Given the terms of the decree, its broad guidelines and potential scope, further specific regulations may be issued in the future.

In March 2018, experts in the technological industry were invited to visit the Chamber of Deputies to debate the challenges of the 4th Industrial Revolution for Production, Labour and Social Security.³⁶ On this occasion, one of the topics was related to the use of AI in different types of productive processes, and experts agreed on the need to join forces to welcome new technologies.

Later in May 2019, Argentina, along with other 41 countries, adopted the Organisation for Economic Co-operation and Development (OECD) Principles on

³⁶ For a description, see www.hcdn.gob.ar/prensa/noticias/2018/noticias_0423.html accessed 24 July 2020.

Artificial Intelligence³⁷ that aim to lead governments, organisations and individuals in the drafting of the design and management of AI systems, to prioritise persons' interests, as well as warrant that those that design and manage AI systems respond to its correct functioning. Therefore, on this path, Argentina started to take actions towards the drafting of a National AI Plan.³⁸ However, this path was put on hold because of the change of government that took place in December 2019, and later with the sanitary emergency caused by Covid-19.

Furthermore, internet service providers (ISPs) are key actors in the processing of Big Data, and their liability is still unregulated to date, in spite of several bills on the matter.

Without specific legislation currently in place, ISPs' duties and liabilities with regard to processing Big Data is judged based on tort principles (Civil and Commercial Code) and privacy law, including matters such as database ownership, purpose and final usage (ie, misuse) of analytics made with Big Data and treatment of sensitive data.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

On a legislative level, there are no planned regulations to be issued on the general use of AI or machine learning systems. However, there is a bill project under examination in the Chamber of Deputies identified as No 0509-D-2019.³⁹ This project seeks the creation of a Federal Council of AI with the main mission of promoting the study, awareness, investigation and dissemination of topics related to AI and the like. This council would also be in charge of the following tasks: associating related actors involved in AI, providing an agreement space and promoting dialogue among them; acting as an observer of AI; preparing awareness campaigns regarding technology risks; drafting best practice guides, and promoting the transparency and use of open code in new technologies; among others.

Considering the lack of specific legislation on this matter, in AI-related matters, we will have to apply general legislation (such as the Civil and Commercial Code, Personal Data Protection Law, Trademark, Intellectual Property and Consumer Defense Regimes) trying to frame its provisions to the specific case, whether subsidiary or analogically. In a broad manner, below we state the most relevant provisions that may be applicable to an AI case.

37 This was notified by the OECD website, see www.oecd.org/centrodemexico/medios/cuarentaydospaisesadoptanlosprincipiosdelaoacdesobreinteligenciaartificial.htm. For the full text of the Recommendation of the Council on AI, see <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> accessed 24 July 2020.

38 Eg, on July 2019 meetings were held. For more information, see www.argentina.gob.ar/ciencia/desconferencia-sobre-inteligencia-artificial accessed 24 July 2020.

39 For the full text, see www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=0509-D-2019&tipo=LEY accessed 24 July 2020.

Data protection and privacy

The primary legislation governing data protection in Argentina is the Argentine Data Protection Act No 25,326 (the 'PDPA'), its Regulatory Decree No 1558/2001 and complementary regulations from the Agency of Access to Personal Information (AAIP), the enforcement authority of the PDPA. Using AI involves the processing of large amounts of data, including personal data, as defined under the PDPA, and compliance with this legislation must be strictly observed. The PDPA is grounded on consent and purpose principles, and rules on data controllers and processors, as well as on the collection and processing of sensitive data (personal data; racial and ethnic origin; political opinions; religious, philosophical or moral convictions; health data, among others) that may only be processed with the data subject's consent and if legally authorised to do so. This general provision must be duly considered when using AI technology.

Automatised processing of personal data

Moreover, another issue to be considered under Argentine law and the PDPA, is the processing of personal data through electronic or automatised means; the processing of 'informatised data' as the term is defined on the PDPA, and automatised decision-making, as when using AI technology. In these regards, the AAIP issued certain criteria for the better interpretation of the PDPA, and through Regulation No 4/2019, and with regard to automatised processing of personal data, determined that the data subject shall have the right to obtain from any data controller an 'explanation about the logic applied to an automatised decision', when the data controller makes decisions based only on the automatised processing of personal data, and such a decision produces the data subject's 'pernicious legal effects' or affects them negatively in a significant way. This shall be taken into account when processing personal data in Argentina, including with AI systems. Also, Argentina in 2019 executed 'Convention 108'⁴⁰ of the Council of Europe, which is a binding multilateral instrument on data protection related to the automatised treatment of personal data for members of the convention.

Torts and liability

In the case of AI, IT systems' capacity to make autonomous decisions seems to pose the greatest potential impact in terms of liability. The application of causation principles and determining who shall be considered liable for the fault that causes damages seems a crucial legal challenge, particularly if a negligence regime (as opposed to strict liability) is applicable. It is important to note that AI does not have legal capacity in Argentina, meaning that the

40 For the full text, see <https://rm.coe.int/16806c1abd> accessed 24 July 2020.

natural and legal persons behind the AI would carry all relevant rights and responsibilities related to the AI and its application.

Intellectual property rights

In Argentina: (1) Intellectual Property Act No 11,723, amended by Software Law No 25.036, applies to computer programs, and rules the rights of intellectual property and the use of software products, and Decree No 165/94 rules the use of software and its reproduction and databases; (2) Law No 22.326 rules Trademarks; and (3) Law No 24.481, Invention Patents and Utility Models, is applicable to AI technology, even though it makes no express reference to it and its implementation.

Consumer rights

In general, and with regard to AI, it should be noted that in Argentina's legal order and in the framework of consumer relations, sections 2 and 40 of the Consumer Defense Act No 24,240 state the responsibility of the entire chain of commercialisation for damages resulting from the provision of their products and/or services, and the defects or risks and warranties derived from them.

6. Is free data access an issue in relation with AI?

Yes, free data access is an issue in relation with AI in Argentina, as AI requires the use of large amounts of data, which may encompass personal data as defined by the PDPA and therefore protected by it. The PDPA defines personal data as 'information of any type referred to physical individuals, or legal entities, either determined or determinable', and provides that data subjects have not only the right to access their personal data, but the right to rectify, suppress and update their personal data for periods of time no less than six months and free of charge.

With regards to the security and confidentiality of the personal data, the PDPA provides the general duties of security and confidentiality of information in sections 9 and 10. AAIP Resolution No 47/2018, on the other hand, provides the Recommended Security Measures for the Processing and Conservation of Personal Data, and notwithstanding they are soft law and therefore not mandatory, they serve as a parameter or ideal standard to be respected when processing personal data, including through AI means.

Finally, it should be noted that in May 2020 – and in the context of Covid-19 – the Ministry of Security issued Regulation No 144/2020 that approves the general protocol to prevent crimes by using digital open sources. In this regard, it should be noted that this regulation is very wide, does not differentiate among open

source intelligence/social media intelligence and will be in force, in principle, only as long as the events caused by the Covid-19 pandemic scenario last.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To the best of the authors' knowledge, there are not yet any legal cases in Argentina regarding the provision of legal services or other sectors of relevance related to the use of AI or decisions concerning sectors that might be applicable to the use of AI in the provision of legal services.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

Lawyers are able to provide professional services and advise with the help of technology, and there are generally few regulatory limitations in Argentina with regard to the provision of legal services. What is generally regulated is the procedures before courts and the way lawyers should conduct themselves and practise law under the supervision of the bar association of the corresponding jurisdiction (membership of which is compulsory for the provision of legal services in the location where the lawyer is supposed to act).

9. What is the role of the national bar organisations or other official professional institutions?

The Bar Association of the Autonomous City of Buenos Aires has yet to give recommendations specifically on the use of AI technology, but it is a topic that has been addressed in several meetings and conferences considering the increasing importance it has in our profession.

Canada

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1. What is the understanding of AI in your jurisdiction?

In recent years, the concept of artificial intelligence (AI) has come to encompass an array of technological advancements in the legal field. Indeed, due to its novelty and inherent complexity, there is no consensus understanding of what the term AI entails. As the Law Society of Ontario (LSO) posits in their *Technology Task Force Update Report*, there are at least three generally accepted understandings of AI: (1) it is a branch of computer science that focuses on the simulation of intelligent behaviour in computers; (2) it is a machine's capability of imitating intelligent human behaviour; and (3) it is a collection of processes and techniques.⁴¹ However, to presumably create consensus among these viewpoints, the LSO outlined a 'generally acceptable' definition of AI by describing it as 'the ability for computers to accomplish tasks normally associated with the intelligent actions of human beings'.⁴² The need for such a consensus becomes apparent when considering the use of AI in Ontario's legal sector.

2. In your jurisdiction, besides legal tech tools, are there already actual AI tools or use cases in practice for legal services?

As one of the leading areas in AI development, Ontario has experienced a spike in emerging legal tech products that have been utilised by legal professionals to complement their practices. Common instances of such complementary uses include:⁴³

- document discovery and due diligence;
- assistance with routine questions;
- outcome prediction;
- contract analysis; and
- legal document generation.

41 See <https://lawsocietyontario.azureedge.net/media/lsso/media/about/convocation/2019/convocation-november-2019-technologytaskforce-report.pdf>, at p 387, accessed 15 September 2020.

42 *Ibid.*

43 At p 389, see n 1 above.

3. If yes, are these AI tools different regarding – independent law firms, international law firms, in-house counsel – and what are these differences?

Although there is commonality between firms with respect to the tools used to achieve the above capabilities, the use cases for a particular tool vary. For example, a larger law firm focusing on M&A transactions may use an AI contract analysis tool primarily for due diligence (eg, identifying change of control and assignment clauses, and providing general summaries of the target company's contracts). A company might use the same tool to identify which contracts need to be modified due to changes in laws or standards (eg, General Data Protection Regulation (GDPR), London Interbank Offered Rate (LIBOR), etc). Other tools may only be applicable for in-house counsel. For example, a tool that helps improve the contract negotiation process for a specific form of contract that is negotiated over and over again with different counterparties (eg, the vendor's form of SAAS (software as a service) agreement) will have plenty of value for a company that always negotiates using the same template, but will be of little use to a law firm that is less likely to perform this work on a regular basis for the same client. Much of the existing AI technology is not cheap – and the result of which is that smaller law firms have been less likely to adopt this technology. However, as the technology becomes more affordable, and as more younger lawyers open their own practices, we expect to see a dramatic increase in adoption by independent law firms.

4. What is the current or planned regulatory approach on AI in general?

Canada's regulation of AI is still in its early stages. However, there are several government initiatives and commitments that offer insight into how Canada is approaching the technology. In 2017, the Government of Canada announced a C\$125m Pan-Canadian Artificial Intelligence Strategy, to be developed and led by the Canadian Institute for Advanced Research.⁴⁴ Part of the Strategy's objectives include collaborating on policy initiatives, both domestic and international, which encourage the responsible, ethical and economic stewardship of AI.⁴⁵

One such initiative comes from the Organisation for Economic Co-operation and Development (OECD), who in 2019 released a Statement of Principles regarding the use of AI. These principles focused on ensuring the benefit of people; respecting the rule of law, human rights, democratic values and diversity; ensuring transparency and responsible disclosure; maintaining robust, secure and safe functioning of AI systems; and ensuring accountability on behalf of organisations

⁴⁴ See www.cifar.ca/ai/pan-canadian-artificial-intelligence-strategy accessed 15 September 2020.

⁴⁵ See www.cifar.ca/ai/pan-canadian-artificial-intelligence-strategy/artificial-intelligence-policy-initiatives accessed 15 September 2020.

and individuals involved in AI.⁴⁶ Though not legally binding, the OECD also provides five ‘highly influential’ recommendations to governments. These recommendations express the importance of facilitating investment in research and development, fostering accessible AI ecosystems, ensuring policy environments that facilitate the deployment of trustworthy AI systems, empowering people with the skills for AI and supporting workers for a fair transition, and cooperating across borders and sectors to ensure responsible stewardship of trustworthy AI.⁴⁷

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

In April 2019, the Government of Canada issued its Directive on Automated Decision-Making (the ‘Directive’). The Directive is aimed at ensuring that automated decision-making systems used by the federal government are used in an ethical and effective manner.⁴⁸ Notably, the Directive only applies to the federal government’s use of systems that provide external services, specifically, federal institutions referenced in the Policy on the Management of Information Technology. It does not apply to the use of AI or machine learning systems in the private sector or to provincial governments directly. There are five guiding principles to the Directive. To ensure the effective and ethical use of AI the [government] will:

1. understand and measure the impact of using AI by developing and sharing tools and approaches;
2. be transparent about how and when it is using AI, starting with a clear user need and public benefit;
3. provide meaningful explanations about AI decision making, while also offering opportunities to review results and challenge these decisions;
4. be as open as it can by sharing source code, training data, and other relevant information, all while protecting personal information, system integration, and national security and defence; and
5. provide sufficient training so that government employees developing and using AI solutions have the responsible design, function, and implementation skills needed to make AI-based public services better.⁴⁹

The use of AI is also regulated through the Personal Information Protection and Electronic Documents Act (PIPEDA), which generally applies to all organisations in

46 See www.oecd.org/going-digital/ai/principles accessed 15 September 2020.

47 *Ibid.*

48 See www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592 accessed 15 September 2020.

49 See www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai.html accessed 15 September 2020.

the private sector that collect, use, or disclose personal information in the context of commercial activities.⁵⁰ PIPEDA is ‘technologically neutral,’ meaning that AI is ‘governed by the same rules as other forms of processing’.⁵¹ As a result of the fact that PIPEDA was not created to deal with AI specifically, the Office of the Privacy Commissioner of Canada (OPC) is of the opinion that PIPEDA, in its current iteration, is insufficient in its application to such systems.⁵² The OPC has thus made several proposals for key reforms to PIPEDA:

- Proposal 1: Incorporate a definition of AI within the law that would serve to clarify which legal rules would apply only to it, while other rules would apply to all processing, including AI.
- Proposal 2: Adopt a rights-based approach in the law, whereby data protection principles are implemented as a means to protect a broader right to privacy – recognised as a fundamental human right and as foundational to the exercise of other human rights.
- Proposal 3: Create a right in the law to object to automated decision-making and not to be subject to decisions based solely on automated processing, subject to certain exceptions.
- Proposal 4: Provide individuals with a right to explanation and increased transparency when they interact with, or are subject to, automated processing.
- Proposal 5: Require the application of Privacy by Design and Human Rights by Design in all phases of processing, including data collection.
- Proposal 6: Make compliance with purpose specification and data minimisation principles in the AI context both realistic and effective.
- Proposal 7: Include in the law alternative grounds for processing and solutions to protect privacy when obtaining meaningful consent is not practicable.
- Proposal 8: Establish rules that allow for flexibility in using information that has been rendered non-identifiable, while ensuring there are enhanced measures to protect against re-identification.
- Proposal 9: Require organisations to ensure data and algorithmic traceability, including in relation to datasets, processes and decisions made during the AI system lifecycle.

50 See www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief accessed 15 September 2020.

51 See www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-ai/pos_ai_202001, accessed 15 September 2020.

52 *Ibid.*

- Proposal 10: Mandate demonstrable accountability for the development and implementation of AI processing.
- Proposal 11: Empower the OPC to issue binding orders and financial penalties to organisations for non-compliance with the law.⁵³

The OPC published these proposals on 28 January 2020 and sought input from stakeholders and experts in the field. The deadline for feedback was 13 March 2020.⁵⁴ To date, nothing has been published regarding the results of this consultation.

6. Is free data access an issue in relation with AI?

In order for AI systems to function accurately, vast amounts of diverse data are needed.⁵⁵ This raises a number of issues relating to who has access to Big Data and how such access is attained. In response to such concerns, the Competition Bureau released a report in 2018, outlining key implications of Big Data on Canadian competition policy.⁵⁶ The paper explored how the current approach to competition policy proposes to deal with concerns related to mergers and monopolistic practices, cartels, and deceptive marketing practices. Ultimately, the Bureau was confident that despite the new challenges posed by Big Data, a new approach to competition policy is not needed.

Another issue is that in rural communities across Canada, ‘hundreds of thousands of residents do not have basic, high speed internet access’.⁵⁷ Those that do have access often have unstable connections as a result of weather or internet traffic volumes. Further, connections may be limited by data restrictions. The National Research Council of Canada is working to improve these conditions through its government mandated High-throughput and Secure Networks Challenge programme. The programme seeks to develop innovative technologies ‘so network operators and service providers can offer faster, less costly and more secure internet services to rural and remote communities across the country’.⁵⁸ Interestingly, AI is actually being used to assist with this objective. AI can be used to detect and fix network problems, ultimately saving both time and money due to the reduced need for sending technicians to remote areas.⁵⁹

⁵³ *Ibid.*

⁵⁴ See www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200128 accessed 15 September 2020.

⁵⁵ See www.theglobeandmail.com/opinion/article-innovation-in-health-care-depends-on-responsible-expanded-data-access accessed 15 September 2020.

⁵⁶ See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html accessed 15 September 2020.

⁵⁷ See <https://nrc.canada.ca/en/stories/stepping-internet-services-rural-remote-locations> accessed 15 September 2020.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to use of AI in the provision of legal services?

Canadian case law on the provision of legal services using AI is sparse, and most of the judgments that do discuss the use of AI only do so in *obiter*. What can be gleaned from the few cases that mention AI, however, is that its use is not unwelcome in Canadian courts, especially when it comes to processes such as discovery in litigation proceedings.

In 2016, an Ontario Superior Court of Justice case, *Bennett v Bennett Environmental Inc*, addressed the use of predictive coding in conducting a first-review of documents obtained during document disclosure after the plaintiff's arrangement. In discussing the costs of document review, the judge noted the following:

'Given the use of predictive coding for the first level review of massive document disclosure, I do not find it unreasonable for the lawyer to then use paralegals to conduct the next level or levels of review. I make no adjustment on this account.'⁶⁰

Drummond v The Cadillac Fairview Corp Ltd is another Canadian case from the Ontario Superior Court of Justice that briefly discusses the use of AI within the legal profession. In discussing the parties' cost submission, and after finding technology-assisted research to be a recoverable counsel fee item, the judge shares their views on the future of AI in the practice of law, noting:

'The reality is that computer-assisted legal research is a necessity for the contemporary practice of law and computer assisted legal research is here to stay with further advances in artificial intelligence to be anticipated and to be encouraged. Properly done, computer assisted legal research provides a more comprehensive and more accurate answer to a legal question in shorter time than the conventional research methodologies, which, however, also remain useful and valuable.'⁶¹

The slightly more recent case of *The Commissioner of Competition v Live Nation Entertainment Inc* is a 2018 judgment from Canada's Competition Tribunal. In this case, the applicants brought a motion seeking an order compelling the respondents to produce additional affidavits of documents. This was due to the fact that the respondents produced a narrowed number of documents to the applicants after using document review software. In this case, the Tribunal went as far as to endorse the use of AI, stating:

⁶⁰ *Bennett v Bennett Environmental Inc*, 2016 ONSC 503, 2016 CarswellOnt 670 (WL Can) at para 44.

⁶¹ *Drummond v The Cadillac Fairview Corp Ltd*, 2018 ONSC 5350 (CanLII) at para 10.

'The Tribunal encourages the use of modern tools to assist in these document-heavy cases where they are as or more effective and efficient than the usual method of document collection and review.'⁶²

These cases suggest that Canadian courts are willing to accept the use of AI in the provision of legal services. This seems to be especially true when it comes to cases that involve the review and disclosure of documents that would otherwise require many hours of work if done by humans. This perhaps speaks to the importance that Canadian courts place on efficiency and considerations as to the cost of legal proceedings. However, it may also equally reflect the relative maturity of processes such as document review, for which the use of AI is more palatable as compared to other potential applications, such as the provision of legal advice.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

With such a broad scope of application to the legal field, the emergence of AI presents several regulatory and legislative concerns with respect to its usage. In efforts to address this, the LSO formed its Technology Task Force (the 'Task Force'): a group of lawyers, paralegals and publicly-appointed lay benchers, whose goal is to review the Law Society's framework and standard to determine whether they are adequate in serving the needs of the legal field.⁶³ To do so, the task force has grounded its approach to AI in the Law Society's mandate and foundational principles⁶⁴ – sections 4.1 and 4.2 of the Law Society Act.⁶⁵ These principles entail an ongoing focus on facilitating access to justice, evaluating regulatory risks and opportunities, and protecting the public interest. This focus must be conducted in a manner that is proportionate to the LSO's regulatory objectives. Currently, the Task Force has made inquiries into three key topics: (1) defining the scope of how far the LSO's mandate ought to expand to effectively meet its regulatory objectives; (2) determining how the LSO should be structured and who should bear responsibility to ensure these objectives are met; and (3) what steps should the LSO take to better promote innovation and the adoption of emerging technology in an informative way that educates those who use it or are impacted by it. However, as a self-regulator, the LSO is faced with the challenge of whether it is appropriately situated and has the resources necessary to effectively regulate persons and entities operating legal tech tools.⁶⁶ Inevitably, the key barrier to overcoming such a challenge is the necessary technological wherewithal required to regulate such

62 *The Commissioner of Competition v Live Nation Entertainment Inc et al*, 2018 CACT 17 at para 15.

63 See <https://lso.ca/about-lso/initiatives/technology-task-force> accessed 15 September 2020.

64 See <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/convocation-november-2019-technologytaskforce-report.pdf>, at pp 406–407, accessed 15 September 2020.

65 *Law Society Act*, RSO 1990, c L8, ss 4.1–4.2.

66 At p 411, see n 22 above.

legal tools. That said, there is little doubt that the changes resulting from Covid-19 are dramatically accelerating the adoption of technology in Canada's courts and the legal profession.

While the inquiries made by the LSO have yet to lead to concrete changes in legislation, on 13 March 2020, the OPC initiated a legislative reform policy analysis of federal privacy laws to aid in addressing this regulatory concern.⁶⁷

9. What is the role of the national bar organisations or other official professional institutions?

Currently, the Canadian Bar Association does not play a large role in regulating the use of AI in the field of law. However, many provinces have general guidelines that pertain to the use of technology more broadly. For example, the Law Society of Ontario has published *Practice Management Guidelines*, providing Ontario lawyers with a general set of professional standards by which to adhere. Section 5.5 of these Guidelines is titled 'Competent Use of Information Technologies' and states that: '[l]awyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding'.⁶⁸

Similarly, the Law Society of Saskatchewan's Code of Conduct includes the ability to use technology as necessary to the provision of legal services in the definition of a 'competent lawyer'. It also makes specific mention of understanding the risks associated with various technologies, which can easily be applied to the use of AI. Section 3.1(4A) of the Code of Conduct states:

'To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.'⁶⁹

An almost identical provision is also included in the Law Society of Alberta's Code of Conduct.⁷⁰

As a whole, the Canadian Bar Association as well as the Law Societies of each province have maintained a relatively hands-off approach when it comes to AI, playing a minimal role in its regulation and oversight.

67 See analysis of 'Which are the current or planned regulations on the general use of AI or machine learning systems?' at question 5 above.

68 See <https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/technology> accessed 15 September 2020.

69 See <https://www.lawsociety.sk.ca/wp-content/uploads/2020/03/codeofconduct13dec2019.pdf> accessed 15 September 2020.

70 See <https://documents.lawsociety.ab.ca/wp-content/uploads/2017/01/14211909/Code.pdf>, see section 3.1(5), accessed 15 September 2020.

England and Wales

Tracey Calvert, Oakalls Consultancy Ltd, Devon

Introduction

This is an examination of attitudes towards the use of artificial intelligence (AI) as a professional tool as used by the legal profession in England and Wales. The profession in this jurisdiction includes a number of different types of lawyers, of which solicitors are the largest group. This chapter focuses predominantly on the use of AI by solicitors.

Solicitors are authorised by the Solicitors Regulation Authority (SRA), which is described as an approved regulator with powers to issue practising certificates that enable individuals to carry on certain legal activities known as reserved legal activities. Solicitors are able to provide legal services, subject to various conditions, as sole practitioners and independent solicitors, in law firms, and also in in-house employment.

The SRA also authorises law firms, which include sole practitioners, traditional firms of solicitors and alternative business structures where ownership and management is shared with non-solicitors. Individual solicitors and authorised law firms must comply with the SRA Standards and Regulations,⁷¹ which set out the standards and requirements that must be achieved for the benefit of clients and in the wider public interest.

The Law Society of England and Wales is the independent professional body for solicitors, with a representative role designed to promote England and Wales as the jurisdiction of choice, and support its members through a variety of services.

Both the SRA, as the approved regulator, and the Law Society, as the representative body of solicitors, have considered the growth of AI. This is also true of the regulatory and representative bodies for the other parts of the legal profession (eg, barristers⁷² and legal executives⁷³), who also have similar interests in the topic. It is recognised, and not challenged, that AI will change the way in which legal services are provided both by qualified lawyers and law firms, and also non-lawyer individuals and businesses.

In this chapter, we examine both the national position and then issues for the legal services profession in responding to developments with AI technology.

71 www.sra.org.uk

72 The Bar Standards Board, see www.barstandardsboard.org.uk and the Bar Council, see www.barcouncil.org.uk

73 The Chartered Institute of Legal Executives, see www.cilex.org.uk

1. What is the understanding or definition of AI in your jurisdiction?

There is a burgeoning interest in AI and its use, but there does not appear to be a universally agreed definition of AI when discussing its use in the provision of legal services.

The SRA produced a risk report titled *Technology and Legal Services* in December 2018,⁷⁴ in which it did not seek to formulate its own definition and instead used the following meaning for the phrase, which it attributed to The Future Computed: AI and Manufacturing:

'AI refers to software systems that can interpret data in ways that would normally need human involvement. It is loosely defined as machine learning that can improve its own capabilities without needing humans to reprogram it. This allows the system to process information more quickly and accurately. AI systems are generally focused on specific tasks and aim to assist and enhance performance. They enhance human judgment and intelligence, rather than replace it.'⁷⁵

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

The Law Society published an article called 'Six Ways the Legal Sector Is Using AI Right Now',⁷⁶ explaining the use of AI by the legal sector. This was written by one of its commercial partners, Seedrs, and identified the six main ways in which the legal sector was using AI tools as follows:

1. practice management automation;
2. predictive coding;
3. document assembly;
4. legal research;
5. voice recognition; and
6. do-it-yourself (DIY) law and chatbots.

While the majority of these tools are used by solicitors subject to SRA oversight, DIY law and chatbots are also being used by businesses that are not authorised and/or do not employ solicitors. The AI enables these businesses to interact with customers to create their own legal documents and get access to certain legal advice.

74 See www.sra.org.uk/risk/risk-resources/technology-legal-services.

75 See <https://news.microsoft.com/futurecomputed>.

76 See www.lawsociety.org.uk/news/stories/six-ways-the-legal-sector-is-using-ai.

The SRA's research supports these findings. The SRA confirms that AI systems have been developed and applied in areas that include document reviews (eg, contract reviews and discovery); conflict checks and due diligence; identifying precedents; legal research and analytics; predicting case outcomes; and billing.

The SRA generally regards the use of AI positively, arguing that technology can help smaller firms to compete with unregulated businesses through the fact that it helps solicitors with their time management, and that it can also help firms complete more work, particularly that of a routine and formulaic nature, more quickly and accurately. AI is also used to provide legal services in innovative ways, such as virtual law firms and more online legal services.

3. If yes, are these AI tools different regarding
• independent law firms;
• international law firms; and
• in-house counsel;
and what are these differences?

Most solicitors and law firms will be using AI in its simplest form with case management systems to run client files, for time recording, accounting purposes and so on. Many firms also have access to online legal information resources, such as those provided by LexisNexis⁷⁷ and other businesses. With both of these AI solutions, cost will be a determining factor that influences take up.

Larger firms, often those with an international reach, and firms that service commercial clients, are more likely to develop the use of AI more quickly because of the realities of economics, and because the volume and type of work that they do is more likely to generate a commercial justification for the use of such AI as document assembly and predictive coding. Time-consuming tasks that might otherwise be performed by humans (often by paralegals and non-lawyer employees) in smaller firms will be performed more cheaply and more quickly through the use of AI in larger firms.

In-house counsel employed in commerce is also likely to be able to adopt AI answers because of the financial position of its employers.

4. What is the current or planned regulatory approach on AI in general?

The United Kingdom is a signatory to the Organisation for Economic Co-operation and Development (OECD) Principles on Artificial Intelligence.⁷⁸ These were agreed in May 2019, and are designed as standards for the safe development of innovative technologies. The OECD AI Principles are:

⁷⁷ See www.lexisnexis.co.uk.

⁷⁸ See www.oecd.org/going-digital/ai/principles.

- AI should benefit people and the planet by driving inclusive growth, sustainable development and wellbeing.
- AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and they should include appropriate safeguards, for example, enabling human intervention where necessary, to ensure a fair and just society.
- There should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them.
- AI systems must function in a robust, secure and safe way throughout their life cycles and potential risks should be continually assessed and managed.
- Organisations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles.

The OECD also provided five recommendations to national governments:

1. Facilitate public and private investment in research and development to spur innovation in trustworthy AI.
2. Foster accessible AI ecosystems with digital infrastructure and technologies, and mechanisms to share data and knowledge.
3. Ensure a policy environment that will open the way to deployment of trustworthy AI systems.
4. Empower people with the skills for AI and support workers for a fair transition.
5. Cooperate across borders and sectors to progress on responsible stewardship of trustworthy AI.

In June 2019, the Group of 20 (G20) (of which the UK is a member) adopted human-centred AI Principles that build on and complement the OECD initiatives.⁷⁹

The UK Government was one of the early developers of a national response. The Office for Artificial Intelligence is a joint government unit forming part of the Department for Business, Energy and Industrial Strategy and the Department for Digital, Culture, Media and Sport, and is responsible for overseeing the responsible and innovative uptake of AI technologies for the benefit of everyone in the UK.⁸⁰ This includes:

⁷⁹ See www.mofa.go.jp/files/000486596.pdf.

⁸⁰ See www.gov.uk/government/organisations/office-for-artificial-intelligence/about.

- society: making sure AI works for people – ethics, governance and future of work;
- demand and uptake: supporting adoption across sectors, including via ‘Missions’; and
- foundations: ensuring the best environments for building and deploying AI – skills, data, investment and leadership.

Additionally, the Centre for Data Ethics and Innovation is a government-level advisory body that considers AI advances.⁸¹ For example, in September 2019, it published three papers addressing particular areas of public concern in AI ethics: deepfakes and audio-visual information; smart speakers and voice assistants; and AI and personal insurance.⁸²

Also, in 2019, the UK Government committed approximately £2m to help develop law technology opportunities in order to drive innovation and help the UK legal sector grow.⁸³

However, none of this is a regulatory solution. In a book published in 2019 called *AI, Machine Learning and Big Data*,⁸⁴ the authors of the chapter on the regulation of AI and Big Data in the UK expressed the following thoughts: ‘As the seat of the first industrial revolution, the UK has a long history of designing regulatory solutions to the challenges posed by technological change. However, regulation has often lagged behind – sometimes very far behind – new technology. AI is proving no exception to this historical trend.’

The authors concluded that there was no consensus on whether AI required its own regulator or specific statutory regime, and concluded that there was ‘currently no overall coherent approach to the regulatory challenges posed by the rapid development of AI applications’.

In summary, therefore, there is an awareness of the need for oversight of AI development, but no current plans for regulation, either at a national or sector level.

5. What is the role of the national bar organisations or other official professional institutions?

In the absence of national law or regulation, it is necessary to consider the role of the SRA in regulating the use of AI by those individuals and firms that it authorises and regulates. There is also the need to acknowledge that there are many non-lawyers and unauthorised businesses using AI to provide certain legal services, but these are not subject to SRA oversight.

⁸¹ See www.gov.uk/government/organisations/centre-for-data-ethics-and-innovation.

⁸² See www.gov.uk/government/publications/cdei-publishes-its-first-series-of-three-snapshot-papers-ethical-issues-in-ai.

⁸³ See www.gov.uk/government/news/legal-services-and-lawtech-bolstered-with-2-million-of-government-funding.

⁸⁴ Berkowitz M and Thompson J (Eds), *AI, Machine Learning and Big D* (Global Legal Group Ltd, 26 June 2019).

Solicitors are subject to individual regulation by the SRA, regardless of where or how they practise. All law firms (and all their owners and all employees) that are authorised by the SRA are similarly subject to regulatory oversight. Solicitors who are employed in unauthorised businesses (eg, those employed by commercial and other organisations as in-house counsel) are subject to regulatory oversight but the SRA's regulatory reach does not extend to their employer.

The various principles and rules to which individuals and law firms are subject are contained in the SRA Standards and Regulations.⁸⁵ These were drafted on the premise that certain outcomes must be achieved by individuals and firms, and these achievements will demonstrate that clients have received ethical legal services and the public interest purpose of regulation has been met.

The SRA also describes itself as a risk-based regulator, which means that it prioritises concerns that pose the highest risk both to clients and impede the public interest in having trust and confidence in the legal profession. Current risk priorities, as described in the SRA Risk Outlook,⁸⁶ include considerations such as information and cybersecurity, integrity and ethics, and standards of service.

In the previously mentioned SRA publication 'Technology and Legal Services', the SRA made its position clear: 'Our regulation is based on the outcomes that firms achieve, not the tools that they use to achieve them'. In other words, the SRA assesses individuals and firms against personal and entity-based duties, and does not impose restrictions on how required behaviours are achieved. The individuals and entities must meet regulatory standards, and the SRA has supervisory and enforcement powers that will be used, if necessary.

This publication highlighted some of the ethical and risk-based issues from the use of AI, including:

- the use of chatbots to provide legal advice may not be able to identify all the individuals that the system is advising on behalf of the solicitor or the law firm and lead to conflicts of interest;
- some documents prepared by AI might involve the system carrying out reserved legal activities with the questions that would trigger in respect of legal restrictions on the provision of these activities, for example, certain conveyancing and probate activities can only be performed by qualified persons, including solicitors;
- the use of AI technology to process personal data requires the consideration of data protection legislation and the information that must be provided to data subjects; and

⁸⁵ See www.sra.org.uk.

⁸⁶ See www.sra.org.uk/risk/outlook/risk-outlook-2019-2020.

- bias in AI systems creating complications in respect of equality, diversity and inclusivity duties imposed on solicitors and others in law firms by the application of the law and also because of regulatory duties in the SRA Standards and Regulations.

This means that while AI, and innovative technologies more widely, can be used, and this use is encouraged by the SRA, the following should be understood:

- Nothing about the use of AI should undermine or compromise an individual's or firm's ethical, regulatory or legal duties.
- Firms must implement effective governance systems to oversee the ethical and legal use of AI.
- The lack of the correct response that is attributed to AI faults will nevertheless be of regulatory interest.
- The risks of using AI must be acknowledged, managed and mitigated. Topical issues include information security and data protection, and the threat of data breaches caused by cyberattacks. Breaches must be considered and, depending on seriousness, possibly reported to both the SRA and the UK's Information Commissioner's Office.

France

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1. What is the understanding or definition of AI in your jurisdiction?

The definitions of artificial intelligence (AI) proposed within the French legal landscape always refer to human intelligence. The French Data Protection Authority (Commission nationale de l'informatique et des libertés or CNIL) defined AI as 'the science of making machines do what man would do with a certain intelligence'.⁸⁷ In a 2017 annual study, the French Conseil d'Etat defined AI as 'the science whose aim is to make a machine perform tasks that traditionally require human or animal intelligence'.⁸⁸ In a report on the open data of court decisions submitted to the Minister of Justice in 2017, AI is defined as 'the set of theories and techniques whose purpose is to make a machine that simulates human intelligence perform tasks'.⁸⁹

The Commission d'enrichissement de la langue française, whose primary purpose is to fill gaps in vocabulary and to designate in French the concepts and realities that appear under foreign names, defined AI as the 'theoretical and practical interdisciplinary field whose purpose is the understanding of mechanisms of cognition and reflection, and their imitation by a hardware and software device, for the purpose of assisting or substituting human activities'.⁹⁰ The definitions of this commission are published in the Official Journal of the French Republic, and are then of obligatory use in the administrations and institutions of the state and serve as a reference.

However, any comparison between AI and human intelligence, which is a purely anthropocentric approach, seems completely misleading. AI will never be human! On the contrary, some authors point out the risk of AI becoming inhumane, controlling our civil liberties. The questions raised by the relationship between AI and humans, its ability to capture our emotions, anticipate or direct our desires,

87 Translated from the definition in French: '*la science qui consiste à faire faire aux machines ce que l'homme ferait moyennant une certaine intelligence*'; CNIL, *How can humans keep the upper hand? Report on the ethical matters raised by algorithms and artificial intelligence* (2017).

88 Translated from the definition in French: '*science dont le but est de faire accomplir par une machine des tâches qui requièrent traditionnellement l'intelligence humaine ou animale*'; Conseil d'Etat Annual Study (2017).

89 Translated from the definition in French: '*l'ensemble des théories et techniques dont le but est de faire accomplir des tâches par une machine qui simule l'intelligence humaine*'; Report on the open data of court decisions submitted to the Minister of Justice in 2017.

90 Translated from the definition in French: '*champ interdisciplinaire théorique et pratique qui a pour objet la compréhension de mécanismes de la cognition et de la réflexion, et leur imitation par un dispositif matériel et logiciel, à des fins d'assistance ou de substitution à des activités humaines*'; published in the Official Journal of the French Republic.

or decipher parts of our personality or health, raise a growing body of ethical questions, from its autonomy to its status or the establishment of responsibility.

As many digital professionals point out, the term AI was first built – and still is today – on a marketing approach in order to designate the most advanced and ever-changing area of information processing techniques.⁹¹ Some experts even denounce the confusing term, which relates less to a form of real intelligence than to fast, evolved or advanced algorithms.⁹²

Moreover, we must bear in mind that the technologies used by AI in the legal sector are mainly expert systems that can be summarised as ‘first AI generation’ (eg, contract management software).

The current interest for AI is renewed by the emergence of two technologies: machine learning and natural language processing, which are currently under-used or too disappointing in their application to law, especially among French legal tech.

AI must therefore be understood within a technological ecosystem that feeds on data exploitable by high-performance algorithms, outside of any fantasy or anthropocentric perspective generated by certain propaganda of innovation.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Legal professionals are beginning to adopt AI tools in their practice, mostly for the execution of repetitive and time-consuming tasks.

The interest in AI increased when, in 2017, IBM launched ROSS, AI software capable of researching case law and faster than an associate lawyer. Currently, the American law firm, Latham & Watkins based in Paris, is in a testing phase with ROSS, to be followed by smaller structures.

But ROSS’s great popularity should not be confused with the reality of its performance, which remains limited today for at least three sets of reasons:⁹³

- ROSS is not a finished product: currently, it only specialises in United States bankruptcy law and US intellectual property law, which limits its use under French law;
- reversals in decisions, particularly from the French Court of Cassation, will remain difficult to anticipate for an algorithm based on backward-looking data; and

91 See <https://pierrelevyblog.com/2018/09/06/lintelligence-artificielle-va-t-elle-prendre-le-pouvoir> accessed 6 July 2020.

92 See www.lemonde.fr/idees/article/2019/11/24/l-intelligence-artificielle-est-bien-aujourd-hui-une-escroquerie_6020312_3232.html accessed 6 July 2020.

93 Emmanuel Barthe, *L’intelligence artificielle et le Droit*, see www.cairn.info/revue-i2d-information-donnees-et-documents-2017-2-page-23.htm accessed 6 July 2020.

- the implementation period in French law is about seven years due to the development and availability of usable court decisions.

More specifically, AI in law is characterised by the combined use of Big Data, machine learning, probability calculations, natural language processing and expert systems (formalisation of the expertise of specialists, notably through hierarchical trees). In French law, apart from ROSS, only a limited number of applications meet this AI qualification.⁹⁴

The first area in which the greatest progress in legal AI has been made is contract and clause review. Softlaw specialises in the audit of contracts for M&A in order to detect questionable clauses.

Hyperlex developed an online contract management and analysis solution that allows its clients to classify their contracts, and find specific clauses or specific data (dates and amounts) with an automatic alert system. The company has the particularity of using all available AI technologies, including image pattern recognition, and intervenes with the Paris Chamber of Notaries to automatically tag notarial documents.⁹⁵

Still in the field of document analysis, the bank JP Morgan launched Contract Intelligence ('COIN') in 2017, a bot that is able to review complex legal contracts faster and more efficiently than lawyers. According to the bank, since its launch, the bot has helped save more than 360,000 man-hours. Société Générale is developing a scoring engine to detect customers likely to leave the bank. According to Société Générale, it has quadrupled the number of detected customers likely to leave since its launch.

In the field of predictive justice, Predictice and Case Law Analytics are decision support tools for legal professionals and insurers. They provide access to case law via a natural language search engine. An algorithm then calculates the probabilities of resolving a lawsuit, the amount of potential compensation and identifies the most influential legal arguments or facts in previous decisions handed down by the courts.

RegMind uses AI to provide automatic regulatory monitoring and follow-up in banking and financial law.

Many other legal techs exist, but their degree of technological innovation does not enable them to enter the AI category. Examples include YouSign (electronic signature), Youstice (online dispute resolution) or AirHelp (compensation assistance in case of delayed or cancelled flights).

94 Indeed, AI is limited in the legal sector by an undeniable obstacle, which is the lack of usable data. This issue will be addressed in question 4 below.

95 See www.lemondedudroit.fr/professions/241-notaire/68509-victoria-intelligence-artificielle-notaires.html accessed 6 July 2020.

3. If yes, are these AI tools different regarding

- **independent law firms;**
- **international law firms; and**
- **in-house counsel;**

and what are these differences?

There are a large number of software packages claiming to develop AI, but few of them are actually based on the latest machine learning and natural language technologies.

There should be no difference in the use of these tools and software by these different structures, except that international law firms are more likely to use them because of their larger resources and the level of implementation of these tools in the US.

4. What is the current or planned regulatory approach on AI in general?

In March 2018, the French President presented his vision and strategy⁹⁶ to make France a leader in the field of AI. As a result, the Villani report titled *AI for Humanity*,⁹⁷ intended to lay the foundations of an ambitious French strategy, which has truly been the stimulus for a national discussion on the impact of AI, including the issue of the regulations that should be implemented.

A consensus seems to emerge from various reports and studies tending to conclude that, at this stage in the evolution of AI, there is no pressing need to rethink the current legislative and regulatory framework. Current legal mechanisms and regimes, coupled with contractual flexibility, currently enable economic actors and consumers to cope with technological change with a satisfactory level of legal safety.

However, there are exceptions to this approach, and special regulation may be necessary at a French and European level, for example, to support data openness, to regulate the activity of platforms or to accompany the development of specific innovation.

Autonomous vehicles that are currently in the testing phase are leading the government to support the development of testing in an open environment. The President announced in March 2018 that, by 2022, a regulatory framework allowing the circulation of autonomous vehicles will be put in place and that an exceptional legal framework on liability for intelligent objects will be necessary.⁹⁸

Moreover, the view that the development of AI should be regulated is widely shared because of its significant impact on the everyday life of citizens. The implementation of soft law measures should encourage the actors to respect the principles of

96 See www.elysee.fr/emmanuel-macron/2018/03/29/frances-new-national-strategy-for-artificial-intelligence-speech-of-emmanuel-macron.en accessed 6 July 2020.

97 See www.aiforhumanity.fr/en accessed 6 July 2020.

98 See n 26 above.

transparency and fairness of algorithmic processing. Indeed, AI technologies must be explainable if they are to be socially acceptable, and this is why their development cannot be carried out without certain ethical considerations.

At a national level, various reports and studies encourage the development of an initiative among AI stakeholders for the establishment of general guidelines in this area. The CNIL has thus issued a report following a public debate on the theme *Algorithms in the Age of AI*, which has made it possible to identify two founding principles for AI at the service of humans:

- the principle of fairness applied to all sorts of algorithms, and ensuring that the users' interests prevail in any case; and
- the principle of continued attention and vigilance in response to the unpredictable nature (inherent in machine learning) and the excessive reliance on technological objects.

These principles begin to take shape through six policy recommendations intended for both public authorities and civil society (companies, citizens, etc):⁹⁹

1. fostering education of all players involved in algorithmic systems (designers, professionals and citizens);
2. making algorithmic systems comprehensible by strengthening existing rights and by rethinking mediation with users;
3. improving algorithmic system design at the service of freedom to prevent the 'black box' effect;
4. creating a national platform in order to audit algorithms;
5. increasing incentives for research on ethical AI and launching a major participative national cause around general interest research projects; and
6. strengthening ethics in companies (eg, by creating ethics committees, by spreading good practices in each sector or by revising code of ethics).

As another illustration of this desire to favour soft law for the time being, Etalab (a government body responsible for coordinating the open data policy for public data) has published a guide for administrations and public organisations that design, develop and operate algorithmic processing.¹⁰⁰

These guidelines set out four criteria that must be met for a decision based on an algorithm to be considered fair:

⁹⁹ See www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de accessed 6 July 2020.

¹⁰⁰ See <https://guides.etalab.gouv.fr/accueil.html> accessed 6 July 2020.

1. transparency;
2. intelligibility: the procedure must be described;
3. loyalty: the procedure described must actually be used completely and faithfully; and
4. equal treatment: no individual should be treated more favourably (or unfavourably).

The European Commission has undertaken to provide a framework for the development of AI across Europe in order to facilitate the development of a technology that is both efficient and respectful of European laws, principles and values. Therefore, the European Commission established a High-Level Expert Group that published guidelines on trustworthy AI in April 2019, in which seven key requirements were identified:¹⁰¹

- human agency and oversight;
- technical robustness and safety;
- privacy and data governance;
- transparency;
- diversity, non-discrimination and fairness;
- societal and environmental wellbeing; and
- accountability.

These guidelines also contain an assessment list for practical use by companies. The High-Level Expert Group revised its guidelines in light of this feedback, and finalised this work in June 2020.

In February 2020, the European Commission launched the European Data Strategy, in which it published its White Paper 'On Artificial Intelligence – A European approach to excellence and trust'.¹⁰² It states that a clear European regulatory framework would build trust in AI among consumers and business, and therefore speed up the uptake of the technology. The European Commission concluded that, in addition to possible adjustments to existing legislation, new legislation specifically on AI may be needed in order to make the European Union legal framework fit for current and anticipated technological and commercial developments.

¹⁰¹ See https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419 accessed 6 July 2020.

¹⁰² See https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf accessed 6 July 2020.

A genuine European AI ecosystem is thus taking shape, with the French strategy being in line from the outset with the strategy pursued on the scale of the European continent.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

There are currently no specific regulations on the general use of AI or machine learning systems. However, current regulations apply in certain aspects to the use of AI.

First, Act No78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties, as well as the European Regulation No 2016/679, known as the General Data Protection Regulation (GDPR), apply to the use of AI in a general way insofar as it processes personal data.

Second, the French Data Protection Act formally controls algorithmic decisions by a principle of prohibition. It provides that no court decision or any decision of any kind producing legal effects in respect of a person or significantly affecting him or her may be taken on the basis of the automated processing of personal data intended to foresee or evaluate certain personal aspects relating to the data subject.¹⁰³ The GDPR also provides for the prohibition of automated individual decisions.¹⁰⁴

However, there are some fairly broad exceptions to this principle in French law. The Digital Republic Act No 2016-1321 of 7 October 2016 authorised the administration to make decisions regarding a person on the basis of an algorithm on the condition that it includes an explicit mention of the interested party information.¹⁰⁵ In addition, the source code of the algorithms used by the administration has been included among the documents that any citizen has the right to request access to.¹⁰⁶

Another exception exists in the area of intelligence agencies. Act No 2015-912 of 24 July 2015 allows the services concerned to use an algorithm aimed at detecting low signals of a terrorist threat by the massive processing of connection data without the need for personal identification.¹⁰⁷

6. Is free data access an issue in relation with AI?

As discussed above in question 2, the development of AI is limited in the area of law by the lack of openly usable data. The reason why AI could have a massive impact

¹⁰³ Article 120 of the Act No 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties.

¹⁰⁴ Article 22 of the GDPR.

¹⁰⁵ Article L.311-3-1 of the French code des relations entre le public et l'administration.

¹⁰⁶ Article L.300-2 of the French code des relations entre le public et l'administration.

¹⁰⁷ Article L.851-3 of the French code de la sécurité intérieure.

for lawyers is that no human can read millions of pages per second as AI can. No human can accumulate a memory equivalent to that of an AI. But the AI must have something to read or analyse, and it is not a condition easy to meet in France.

The first explanation is due to the French legal tradition concerning how court decisions are made. In fact, unlike their Anglo-Saxon counterparts and their dissenting opinions, French judges do not reflect in their decisions the debates and positions taken by each of the judges. The decisions of French judges, particularly those of the French Court of Cassation and the Conseil d'Etat, are thus shorter and sometimes only implicitly indicate the real motivations for the decision.

However, that limit may well be lifted in the future. The new methods of editing the decisions of the Constitutional Court, the Conseil d'Etat and, more recently, the French Court of Cassation now include an enriched motivation for the most important decisions (eg, reversal of jurisprudence), which includes the precedents, so the decision is placed in a common pattern. According to some authors, this could well allow algorithms to better read and analyse these decisions. Finally, French legal publishers who have the *doctrine* (the data that links court decisions together and allows them to be understood) do not yet include machine learning in their work. But they are working on it and will soon be able to provide additional data to the AI.

The second explanation for the lack of openly usable data is related to material limitations. First, the data must be available in a format that is usable for AI. However, many court decisions are not delivered in a format that the AI can read (paper format, poor quality scan, etc). Second, the conciliation of open data of court decisions with privacy requires these decisions to be anonymised. However, the justice system does not have sufficient human and technical means to anonymise thousands of court decisions.

In addition, a draft decree on making the decisions of judicial and administrative courts available to the public has been under discussion for three years. This text is the subject of a sharp debate, with many legal professionals denouncing a risk of exploitation and cross-referencing of sensitive personal data contained in court decisions with the resulting risk of forum shopping or lawyer shopping. A difficult balance must be found between the open data of court decisions, the requirement of anonymisation of sensitive data, and the human and technical means to achieve it.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To the best of the authors' knowledge, no decision has been made to date regarding the use of AI.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

No regulations specific to the use of AI in services rendered by lawyers appear to be in place at this time. The discussion is at a more global level.

However, questions are being raised about the possibility of seeing robots one day handing down court decisions. This particularly concerns alternative dispute resolution methods that have recently been deployed in electronic form because – once online – the resolution method could be based on self-learning algorithms that could gradually result in a form of artificial justice.

9. What is the role of the national bar organisations or other official professional institutions?

The Conseil National des Barreaux¹⁰⁸ (CNB) plays a role at several levels in the understanding of AI by legal actors.

The CNB primarily contributes to the debate by organising conferences on the subject of AI and formulating proposals.

Above all, it plays an advocacy role for the legal profession regarding the risks of AI use. In particular, the CNB has adopted a position on open data for court decisions: in November 2018, the general assembly of the CNB formulated some proposals aimed at ensuring equal access to court decisions between lawyers and magistrates, but also equal access for lawyers to court decisions in order to prevent unfair competition between large and small law firms.

Moreover, the Premier President of the Court of Cassation and the President of the CNB signed a joint declaration on 25 March 2018.¹⁰⁹ It contains the following proposals:

- to give the Court of Cassation the responsibility of collecting and circulating the decisions of the judiciary and making available to the public a single database of judicial decisions of the judiciary;
- to involve the Court of Cassation, the first-degree and appeals jurisdictions, and the CNB in the regulation and control of the use of the database of court decisions; and
- to create a public entity in charge of the regulation and control of the algorithms used for the processing of the database of court decisions and the reuse of the information contained therein.

¹⁰⁸ French Bar Association.

¹⁰⁹ Revue pratique de la prospective et de l'innovation n°2, Octobre 2019, p 10.

In 2019, the Court of Cassation, in collaboration with the Ministry of Justice, hosted two data scientists whose mission was to identify data to be pseudonymised in court decisions before making them publicly available. Today, the project is being continued within the Court of Cassation. It has demonstrated the effectiveness of machine learning on pseudonymisation, and opens the way for other data science projects (eg, the search for discrepancies in jurisprudence). The Court of Cassation appears to be now at the forefront at EU level of the automated pseudonymisation of court decisions.¹¹⁰

¹¹⁰ See <https://fichiers.eig-forever.org/posters/eig3/openjustice.pdf> accessed 6 July 2020.

Germany

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1. What is the understanding or definition of AI in your jurisdiction?

The term artificial intelligence (AI) (*Künstliche Intelligenz* or KI) is used to refer to software that is able to detect and solve complex problems. In contrast to 'non-intelligent systems', an AI can open up solutions for itself and develop solutions that do not have to be taught in advance. It is able to learn by itself through a large amount of data (reasoning and machine learning).

Sometimes a distinction is made between 'weak' and 'strong' AI. Strong AI assumes that AI systems have the same or even greater intellectual abilities than humans. Weak AI concentrates on the solution of concrete application problems based on scientific methods. This is referred to as 'intelligent' systems that are capable of self-optimisation.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

There are many possible applications of AI to provide legal services. In addition to tools for the administration of law firms, AI supports, in particular, activities such as the processing and evaluation of legal documents, judgments and contracts, and the platform-based verification of claims.

Some companies in Germany are currently working on software that will automatically analyse judgments. The software is intended to make statements for the future based on judgments already made. How could a court decide? What could the reasoning be based on? Does judge 'A' possibly have special features in his/her decisions or does judge 'B' always decide in a particularly strict or lenient manner? It could also be used to examine when a decision is particularly often or particularly rarely overturned by a higher court. One of these tools, 'law stats', independently evaluates revisions using quantitative risk analysis. It is therefore less a legal service than machine learning from statistical data. However, it improves lawyers' work by setting them free from repetitive work.

Another example of an AI tool was developed by the Berlin startup 'Leverton'. The tool from Leverton is used for fully automated contract analysis. Its automated abstraction process eliminates error-prone, manual data entry while also helping to identify and eliminate data discrepancies. The software extracts key data from

the document and links each extracted data point to the source information. This simplifies the work of lawyers considerably. For example, a 100-page rental agreement can be checked in seconds, and data can be extracted, such as termination modalities of the rental parties. The startup offers solutions for compliance, invoice reconciliation, lease abstraction, legal AI for due diligence, regulatory compliance and tax compliance. According to its own statements, Levertor's software is used by companies such as Deutsche Bank and EnBW, among others.

3. If yes, are these AI tools different regarding

- independent law firms;**
 - international law firms; and**
 - in-house counsel;**
- and what are these differences?**

Most law firms currently use software to manage their cases or to search online databases. Most common are the online database 'Juris', which mainly contains judgments, and 'BeckOnline', which offers access to legal literature on a large scale and also includes publicised judgments. However, these databases or software cannot be considered AI. In any case, these databases are commonly used by in-house counsel as well as law firms – regardless of size. The same is to be expected for AI applications.

In the future, the use of AI will be useful for independent law firms, international law firms and in-house counsel. With AI, legal work can be done faster and easier; time-consuming research or analysis of judgments is no longer necessary. For this reason, the use of AI makes sense for both smaller and larger law firms. International law firms can save costs because they need fewer employees or can use their staff differently. Smaller law firms can take on larger projects with the help of AI.

There are therefore few differences in the use of AI tools between international law firms, independent law firms and in-house counsels.

4. What is the current or planned regulatory approach on AI in general?

Lawyers

Legal services are strictly regulated in Germany. Software that not only collects statistical data but also provides legal services itself must therefore comply with specific legal conditions. In principle, the German law for legal services (Rechtsdienstleistungsgesetz or RDG) does not allow the fully automated provision of legal services; however, to provide legal services, using AI is possible.

According to current case law, debt collection companies can also use software solutions to check legal issues, as long as they are related to the claim (for more information, see question 7).

Using AI just to assist lawyers is in accordance with German law, as long as the legal service is provided by the lawyer him/herself. However, lawyers can save themselves research work, which can slow down their professional activity.

For a legally secure use, it is always important that the legal service is still provided by the lawyer him/herself and that the AI only acts as an 'assistant' to the lawyer and not as the lawyer him/herself.

Courts

It is clear that, according to the German constitution, a judge may not be replaced by AI. However, it is already less clear whether the judge should be allowed to use AI in his/her decision-making. The use of AI seems conceivable, especially in lower courts with less complex facts and legal issues. However, this is only a theoretical problem and only discussed in the literature as there is still a lack of functional software

General

In November 2018, the Federal Government of Germany launched its AI strategy. The strategy presents the progress made in terms of AI in Germany, the goals to achieve in the future and a concrete plan of policy actions to realise them. The range of policy initiatives outlined in the strategy aims to achieve the following goals:

- increasing and consolidating Germany's future competitiveness by making Germany and Europe a leading centre in AI;
- guaranteeing the responsible development and deployment of AI that serves the good of society; and
- integrating AI in society in ethical, legal, cultural and institutional terms in the context of a broad societal dialogue and active political measures.

For the implementation of the strategy, the Federal Government of Germany intends to provide around €3bn for the period 2019–2025.

Starting with the AI strategy, the Federal Government of Germany launched initiatives to tackle specific issues with AI, for example, information management, data ownership, free flow of data and standardisation.

Reforms of the legislation target many domains, including codifying the rights of the labour force, consolidating competitiveness of the industry and developing rules with respect to data usage and protection. Among the initiatives are:

- the launch of a Commission on Competition Law 4.0, serving as a political platform for a debate on how to further develop competition and copyright law;
- the launch of the Opportunities for Qualifications Act, a legislation providing reskilling opportunities and support to employees whose jobs are at risk due to AI technologies;
- the adoption of the Skilled Labour Immigration Act, legislation to facilitate the migration of skilled workers to Germany;
- the formation of a Workforce Data Protection Act to codify data protection regulation and privacy (ie, safeguard the control on personal data), compliant with EU law, especially the General Data Protection Regulation (GDPR);
- review and, if necessary, adaptation of the legislation concerning the use of non-personal data as well as copyright; and
- implementation of the Cybersecurity Directive: this Directive, properly known as the Directive on security of network and information systems (NIS), requires Member States to adopt a national cybersecurity strategy.

The Federal Government of Germany advocates using an ‘ethics by, in and for design’ approach throughout all the development stages and use of AI-based applications. It highly recommends engaging in dialogue with other leading regions to reach an agreement on joint guidelines and ethical standards on AI. Hence, the strategy foresees work on a legal and ethical framework aligned with European guidelines and taking into account the recommendations of the national Data Ethics Commission:

- guidelines for developing and using AI systems in compliance with data protection rules;
- ethical requirements to ensure transparency, verifiability and predictability of AI systems (eg, ethical guidelines for self-driving cars); and
- initiative to enforce a better coordination of ethical values at European level.

Besides ethical guidelines and legislative reforms, standards form an essential aspect of an adequate and effective regulatory framework. Standards shall act as

a seal of excellence in ensuring high-quality products and services. With respect to standardisation, the Federal Government of Germany proposes following support initiatives:

- funding for the development of data standards and formats to encourage European Union-wide collaborations;
- funding for experts, particularly from small and medium-sized enterprises (SMEs) and startups in order to support their participation in international standardisation processes; and
- develop a roadmap on AI standardisation to review existing standards regarding whether they are AI-compatible.

None of this has yet led to legislation.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

Currently, AI is not yet explicitly regulated in many areas of law. There are special regulations on the liability of AI in road traffic law. In 2017, the legislator amended the Road Traffic Act to explicitly allow autonomous driving. The owner of the vehicle, as well as the driver of the vehicle, are both liable if the AI causes damage.

In other fields of law, in the absence of special statutory regulations, only the general statutory regulations developed for human liability apply. That means that general statutory regulations on contracts and torts apply to liabilities arising from losses, with all their features and differences, in terms of liability allocation, burden of proof and statutes of limitations, arising therefrom.

The question of whether the producer of software can also be held liable for the misconduct of an AI remains unresolved. In Germany, a distinction is made between contractual and tortious liability. In the contractual area, the manufacturer can largely avoid liability risks. As a result, a company using AI often has to bear the cost of damages itself and has no recourse to liability. In tort law, liability is hardly more favourable for companies that want to use AI. The manufacturer is only liable if it has violated its duty of safety on the road or knew that it was selling defective software.

Since the use of AI usually requires a large amount of data, data protection is also often an important area to be regulated. In Europe, the GDPR exists for this purpose, which does not contain any specific regulations on the use of AI, but compliance with it is nevertheless an important prerequisite.

The Data Protection Supervisory Authorities of the German Federal and State Governments (the 'DPA') specified the data protection requirements for AI. In particular, their restrictive interpretation of the principals of purpose restriction and data minimisation will

pose significant challenges for companies. The adopted Hambach Declaration on Artificial Intelligence (Hambacher Erklärung zur Künstlichen Intelligenz) stipulates seven data protection requirements, which must already be complied with today based on current data protection laws:

1. AI must not turn human beings into objects;
2. AI may only be used for constitutionally legitimate purposes and may not abrogate the requirement of purpose limitation;
3. AI must be transparent, comprehensible and explainable;
4. AI must avoid discrimination;
5. the principle of data minimisation applies to AI; and
6. AI needs responsibility.

The DPA concludes with arguing that AI development requires regulation.

6. Is free data access an issue in relation with AI?

The strict requirements of the European GDPR must be taken into account when processing personal data. This is especially true when the trend is towards 'legal outsourcing' and data processing does not remain with the processor.

Furthermore, free data access is essential for AI. An AI is superior to humans in that it can read and understand thousands of documents full of judgments or legal literature in a second. It can thus recognise and analyse key points of important judgments better and faster than any human. But this only works if the AI can train with a lot of data beforehand (machine learning).

With respect to legal information, in Germany, court decisions are not always made publicly available on the internet. Although there are always rulings of the highest courts (Federal Constitutional Court and Federal Supreme Court) that are accessible on the internet, there is rarely free access to rulings of lower courts. All in all, Germany lacks a freely accessible database containing all judgments. Although there are fee-based databases, such as 'Juris', these are limited. For an AI to work most efficiently, it would need access to a central database containing all judgments and all legal literature.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

The German courts have, in some cases, dealt with the use of legal tech and AI. Predominantly, the question was raised regarding whether legal services may be provided by automated software at all.

In Germany, the provision of legal services is regulated by the RDG. This law stipulates that legal services may only be provided by lawyers. Collection agencies are also regulated by the RDG. However, they are generally only allowed to collect receivables for their customers but not provide legal advice.

The German Federal Supreme Court recently dealt with the case of *wenigermiete.de* ('lessrent.de' in English). *Wenigermiete.de* is a website that enables tenants of apartments to calculate whether the rent they pay is reasonable or higher than the German law allows (statutory rent cap/rental price brake).

The advantage for the tenant is that it can calculate directly on the website whether it pays too much, and if so, by how much. In addition, the tenant only has to pay *wenigermiete.de* a success commission, so no risks arise for the tenant.

The company that operates the website *wenigermiete.de*, however, is not a law firm but only a collection agency.

The German Federal Supreme Court ruled on the question of whether the provision of such services by legal tech companies constitutes an illegal legal service, that is, whether the activity is so advisory that it should have been performed by a lawyer rather than by a software plus collection agency. The court decided that, even in the provision of mere collection services, a comprehensive and full consideration of the legal situation is possible as long as it is necessary for the collection agency to enforce the claim. According to the Federal Supreme Court, the purpose of the RDG is to promote and permit the use of new forms and technologies. An automated provision of legal services is also covered by this, as long as it remains within the scope of the RDG.

The judgment opens up many new possibilities for the use of AI for legal services. In particular, it allows enforcement in cases where consumers want to assert a right but are not prepared to bear the costs and risks. A contingency fee cannot be agreed upon in Germany with a lawyer; however, it is possible with a collection agency (legal tech companies like *Wenigermiete.de*).

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

As already explained in question 7, the Federal Court of Justice decided that the RDG should also aim to use new technologies for the provision of legal services. This would enable, for example, debt collection companies to provide legal services with the help of an AI that had previously only been provided by lawyers.

However, the core area of legal services is still left to lawyers. It is therefore always necessary that legal services, which include legal representation in court and so on, are provided by lawyers.

The ruling of the Federal Court of Justice, however, opens up the possibility of providing simpler legal services not by lawyers but by other companies, such as debt collection agencies.

9. What is the role of the national bar organisations or other official professional institutions?

The bar association will have the primary task of critically monitoring progress. The main purpose is to protect the high quality and reliability of legal services. In addition, the bar association will also try to protect the legal profession in the best possible way and not allow competition from unqualified or defective AI.

For example, the bar association has already taken legal action against providers who wanted to offer 'legal documents in lawyers' quality' through 'SmartLaw software'. This service using 'SmartLaw software' was prohibited by the court. The provider advertised that the software could generate adapted contracts for little money, which were of the same quality as a contract prepared by a lawyer. However, this generator did not achieve the high quality of legal advice.

This demonstrates the main task of the bar association with regard to AI will be to review new developments and ensure the high quality of human legal advice.

Hong Kong (Special Administrative Region)

Hin Han Shum, Squire Patton Boggs, Hong Kong

1. What is the understanding or definition of AI in your jurisdiction?

The Hong Kong Special Administrative Region ('Hong Kong') enjoys a special one-country, two-systems arrangement with the People's Republic of China. Hong Kong is a common law jurisdiction, where the law is formed not only by statute but also case law. The Rule of Law serves as a keystone to this legal system. There is a robust and independent judiciary, and cases from other common law jurisdictions are considered persuasive, though not binding. Former foreign judges of the judiciary in common law jurisdictions outside of Hong Kong are also invited to sit at the Court of Final Appeal.

There is no statutory definition of artificial intelligence (AI) under Hong Kong laws. Despite not having an official statutory definition or specific legislation in relation to AI, there is a generally accepted understanding that AI means emerging technological programs/robots that use, inter alia, algorithms, Big Data learning and machine learning to perform tasks traditionally performed by humans. Types of AI tools include natural language processing, programmed data collection and data analytics, and chatbots.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

In Hong Kong legal practice, it is common to use external service providers, such as companies that have adopted natural language processing and machine learning programs, to conduct translation work, and or companies that provide electronic discovery and due diligence services, to complete these tasks more efficiently.

Many law firms also have contract template generating programs and document management systems that allow for the categorisation of documents, which assist with data segregation requirements under certain regulations. Some law firms utilise chatbots to facilitate initial instruction and provide preliminary answers as to black letter law. The Law Society of Hong Kong has also been exploring the use of chatbots for its enquiry handling operations.¹¹¹

As a result of the general adjournment period of the courts due to Covid-19, in the Guidance Note for Remote Hearings for Civil Business in the High Court published

¹¹¹ See <http://hk-lawyer.org/content/chatbots> accessed 6 July 2020.

by the Hong Kong Judiciary on 2 April 2020,¹¹² and on 8 June 2020,¹¹³ the court also endorsed alternative ways, other than physical court appearance, to continue court proceedings. The guidelines apply on a ‘technology neutral basis’ to the possible use of various types of electronic means in phases, and it may be possible for further and more enhanced technological tools, such as AI, to be used in the future.

An online dispute resolution platform, electronic Business Related Arbitration & Mediation system (eBRAM),¹¹⁴ which makes use of AI tools, has been established and is due to be open for use by lawyers or parties in person for certain cases.¹¹⁵

The Hong Kong International Arbitration Centre, a leading dispute resolution organisation situated in Hong Kong, which enables arbitration, mediation, adjudication and domain name dispute resolution, also offers users integrated virtual hearing services.¹¹⁶

3. If yes, are these AI tools different regarding

- independent law firms;**
 - international law firms; and**
 - in-house counsel;**
- and what are these differences?**

Rolling out AI tools is quite costly. Not only are there the expenses of engaging subcontractors to prepare the programs or preparing them in-house, time and resources also have to be invested in monitoring, maintaining and troubleshooting the systems. Training personnel is also necessary to ensure the AI tools are used properly.

That is why it is more common for international law firms in Hong Kong to have more advanced or a greater variety of AI tools (eg chatbot frequently asked questions (FAQs), contract template generating tools, e-discovery, e-due diligence and document management platforms) compared with independent/local law firms.

In-house counsel may have even fewer resources than law firms as they serve more of a back-office function and may have less budget to spend. However, they have the option of engaging external counsel to assist with their work, and can make use of independent/local law firms and international law firms depending on the task, and thereby can benefit from the AI tools that those firms use.

112 See www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf accessed 6 July 2020.

113 See https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase2_20200608.pdf accessed 16 September 2020.

114 See <http://ebram.org/> accessed 6 July 2020.

115 See question 9 for more details.

116 See www.hkiac.org/content/virtual-hearings accessed 6 July 2020.

4. What is the current or planned regulatory approach on AI in general?

There is no current Hong Kong legislation specifically focusing on AI. Many of the Ordinances in existence are also technology neutral (eg, the Personal Data (Privacy) Ordinance (Cap 486) (the 'PDPO')).

However, there have been several guidelines issued by regulators whose organisations are applicable to AI. For example, the Hong Kong Monetary Authority, the Securities and Futures Commission and the Privacy Commissioner of the Personal Data (PCPD) have all issued guidelines that relate to AI or the internet of things. Regulators can consider whether the circumstances relating to a breach of guidelines would evidence a breach of the relevant ordinances.

The PCPD has been advocating the adoption of data ethics to balance out the data economy and technological developments with the need to protect personal data. The Ethical Accountability Framework for Hong Kong, China, which is a report prepared for the Office of the PCPD, also discusses AI tools and how AI is changing the scene for data processing activities. The PCPD noted that the current regulatory regime may not adequately address the data protection risks that arise from advanced data processing activities, which is why it considered the concept of data ethics as the way forward.

The General Data Protection Regulation (GDPR) has extraterritorial jurisdiction, and is applicable for Hong Kong businesses under certain circumstances. Where it applies, the provisions relating to, inter alia, 'automated processing' and so on apply in Hong Kong and should be complied with if Hong Kong companies or firms utilise such technologies and/or AI tools.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

The PCPD co-sponsored the Declaration on Ethics and Data Protection, which was passed in October 2018 at the 40th International Conference on Data Protection and Privacy Commissioners held in Brussels. The declaration provided for six guiding principles to preserve human rights in the development of AI. The principles are as follows:

1. fairness;
2. continued attention and vigilance;
3. transparency and intelligibility;
4. ethics by design;
5. empowerment of every individual; and
6. reducing and mitigating biases or discrimination.¹¹⁷

¹¹⁷ See www.pcpd.org.hk/english/news_events/media_statements/files/Paper_GroovingPrivacyEvolutionwithDataEthics_Feb2019.pdf accessed 6 July 2020.

The PCPD was also involved in preparing 'Data Stewardship Accountability, Data Impact Assessments and Oversight Models – Detailed Support for an Ethical Accountability Framework' guidance. Organisations can consider the guidance on how to act ethically and apply equitable principles 'particularly in advanced data processing activities, such as AI and machine learning, and the application of knowledge to enable data-driver innovation to reach its full potential'.¹¹⁸ Organisations are to understand and evaluate how their activities positively or negatively impact the parties, act as data stewards rather than data custodians, and consider whether the outcomes of their AI and machine learning processing activities are legal, fair and just. Although this guidance is not a regulation or requiring mandatory compliance, the document serves as a framework for law firms and other businesses to consider how their data is collected and used in light of the technology they may utilise. The approach taken by the PCPD here is to promote awareness of the concept of data stewardship and accountability where AI and machine learning is used, and to promote organisational policies and change of culture and conduct to achieve this.

6. Is free data access an issue in relation with AI?

For AI tools to run smoothly, it is important to have a large and/or accurate set of data inputted so that machine learning can be conducted properly. Data bias or inaccurate data will greatly affect the function of the AI tools.

There is a large amount of data that relates to personal information. Under the PDPO, data is to be collected (to the extent necessary and not excessively) and used only for the purposes for which it is collected (pursuant to the consent provided). If the purpose for using the personal data in a data analytics or machine learning scenario was not communicated to the data subject (ie, the person who the personal information pertains to), that may amount to a breach of the law.

Therefore, a balance has to be struck between the use and development of AI tools using these types of data, and the protection of personal data and privacy. Please also see the data stewardship and data ethics principles that were discussed in questions 4 and 5.

Furthermore, Hong Kong law firms and companies need to comply with the GDPR where they, inter alia, collect, hold or process personal data of European Union residents. Provisions relating to the personal information being collected (using various methods, including AI tools such as 'automated decision-making') and its use will also be subject to similar considerations outlined above in relation to the PDPO.

¹¹⁸ See www.pcpd.org.hk/misc/files/Ethical_Accountability_Framework_Detailed_Support.pdf accessed 6 July 2020.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To the author's best knowledge, there are no published court cases relating to the provision of legal services using AI. However, Hong Kong also looks to other common law cases as reference, and this serves as persuasive, but not binding, authority.

In the Court of First Instance defamation case *Dr Yeung Sau Shing Albert v Google Inc (No 2) (2014)* HKEC 1782, a question arose as to whether Google had in fact published the alleged defamatory content or if it was a passive facilitator of information by way of its artificial intelligence based auto-complete and search engine systems. Though the Court considered that it is arguable that through the automated algorithmic processes (which collects and collates information from search requests and web content to present them to users as auto-complete and predictive keyword searches), Google would not be a mere passive facilitator and may be considered a publisher, the Court left the discussion open for the Court of Appeal on that point due to the differing foreign case law and the significance and inter-lay of this technology and defamation law.

There have been cases where the Courts have sanctioned the use of alternative technological means to further court cases.

A recent Hong Kong decision in *Cyberworks Audio Video Technology Ltd (In Compulsory Liquidation) v Mei Ah (HK) Co Ltd* [2020] HKCFI 347, *Cyberworks Audio Video Technology Ltd (In Compulsory Liquidation) v Silver Kent Technology Ltd* [2020] HKCFI 347 and *Cyberworks Audio Video Technology Ltd (In Compulsory Liquidation) v Silver Kent Technology Ltd* [2020] HKCFI 347 (the 'Cyberworks case') has explored the use of technology to conduct court hearings. Traditionally, attendance at Hong Kong courts required the physical attendance of the parties and/or their lawyers. With the general court closure (except those of an urgent and essential nature, and certain criminal matters) commencing 29 January 2020 and continuing at the time of the hearing of that case caused by Covid-19 (the 'General Adjournment Period' or GAP), many proceedings had to be adjourned. The *Cyberworks* case, which was ruled on 21 February 2020 (decision published on 28 February 2020), resulted in an unprecedented confirmation of the legality of telephone hearings relating to High Court proceedings under the Hong Kong legal framework. This ruling demonstrates that the court will consider the enhanced use of technology tools to move forward to enable justice to be done.

Subsequent to the *Cyberworks* case, on 2 April 2020, the Hong Kong Judiciary (the 'Judiciary') also published a Guidance Note for Remote Hearings for Civil Business in the High Court to provide an alternative way to continue court proceedings rather than physically appearing in court. This is the first of its kind. The Judiciary noted that, at the current time, trials are not suitable for remote hearings. The guidelines apply on a 'technology neutral basis' to the possible use of various types of electronic means in phases.

The first phase to remote hearings by videoconferencing facilities (VCF) in civil cases in the Court of Appeal and the Court of First Instance of the High Court was during the GAP. As at 8 April 2020, two cases were heard, with one taking place at the Court of Appeal and the other at the Court of First Instance. On 8 June 2020, the Hong Kong Judiciary published a Guidance Note for remote hearings for civil business in the Civil Courts.¹¹⁹ This note is to be read in conjunction with the Guidance Notice issued on 2 April 2020, and sets out the phase 2 developments for alternative modes of court hearing disposal. It provides for expanded videoconferencing facilities and telephone remote hearing practice to be applicable to the Court of Appeal of the High Court, the Court of First Instance of the High Court, the Competition Tribunal, the District Court and the Family Court.

More VCF hearings are expected in the near future. As at the time of writing this piece, the judiciary has not yet published details on the additional phases.

In the case of Hong Kong Court of First Instance of *Hwang Joon Sang And Future Cell Plus Co, Ltd v Golden Electronics Inc, Worldbest Global Supplier Inc, Harmony Electronics Inc, Quantum Electronics Inc, Jin Miao International Limited, Vivien Chung Ying-Yin, Magic Electronics Inc, BC Century Technology Limited, Chen Nien Fang, Chen Yi Kuei, China Dynamic Limited, Chiu Wei Fen, Chou Lin Chiao, Glory Dynamic Limited, Hsu Wei Lun, Hu Hong Bin, Imperial Dragon Limited, Lin Chih Cheng, Liu Mei Ting, Magic Crystal Limited, Niu Hsiu Chen, Su Chao Ming, Su Kuang Hong, Su Pei I, Tsai Pao Tsai, Wang Chao Cheng, Wang Hui Min, and Chou Pei Fen* (2020) HKCFI 1084, the Hong Kong Courts allowed for a novel mode of ordinary service of court documents. In that case, the Court held that any document, not being an originating process or one requiring personal service, may be served by providing access to an online data room with authorisation by the court. This decision can be made by courts pursuant to Order 65(1)(d) of the Rules of the High Court, where the court can, on a case by case basis, consider alternative methods of service in various situations.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

Hong Kong lawyers are to abide by the Hong Kong Solicitors' Guide to Professional Conduct. Although solicitors may use information communication technology available at the time of the use, Chapter 1.07 of the Hong Kong Solicitors' Guide sets out that, even with such use, solicitors are still responsible and bound by the duties relating to professional conduct.¹²⁰ In other words, lawyers can use AI tools where they see fit (eg, document management tools, electronic discovery and

¹¹⁹ See https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase2_20200608.pdf accessed 16 September 2020.

¹²⁰ *The Hong Kong Solicitors' Guide to Professional Conduct* (The Law Society of Hong Kong, 2020) (vol 1).

template generating tools), but they must ensure that they comply with the Hong Kong Solicitors' Guide to Professional Conduct, practice directions and applicable laws governing their legal practice.

9. What is the role of the national bar organisations or other official professional institutions?

For several years now, the Hong Kong Government has been promoting 'LawTech', which is the concept of law and technology. Its aim is to make use of technology in providing legal services to the public.

On 8 April 2020, as part of the measures to ease the economic and commercial challenges posed by Covid-19, the Hong Kong Government announced the establishment of the LawTech Fund and the Covid-19 Online Dispute Resolution (ODR) Scheme.

The LawTech Fund aims to assist small and medium-sized law firms (where there are five or fewer solicitors) and some small barristers' chambers in procuring and upgrading information technology systems (eg, hardware, servers, computer equipment, software, databases, networks, cloud-based services and other information technological tools), and funding their staff for LawTech training courses. A joint committee established by the Law Society of Hong Kong and the Hong Kong Bar Association will process and assess the applications for the fund, as well as arrange the disbursement of the funding. Eligible firms and chambers can receive a reimbursement of up to HK\$50,000. The fund is envisaged to benefit over 60 per cent of law firms and over 50 per cent of barristers' chambers in Hong Kong (ie, a total of around 700 firms/chambers).¹²¹

The ORD Scheme was established in anticipation of the disputes arising from or relating to Covid-19.¹²² It will use the dispute resolution platform eBRAM,¹²³ which makes use of AI tools. eBRAM allows for various dispute resolution services, such as negotiation, mediation and arbitration, to be conducted online. Lawyers can participate in the process along with clients who cannot physically meet face-to-face for those proceedings/sessions, and allows for continuity of lawyer dispute resolution services despite the effects of Covid-19 and/or travel-related delays, and enables a more speedy and cost-effective way to resolve disputes.

The Law Society of Hong Kong also arranges and hosts many conferences open to both local and international participants, and for the past several years, such conferences have contained at least one session on AI and legal practice. One of the more prominent conferences was the ABC to Building a Smart Belt and Road: Law and Artificial Intelligence, Blockchain and Cloud, which took place on Friday

121 See www.info.gov.hk/gia/general/202004/27/P2020042700514.htm accessed 6 July 2020.

122 See www.news.gov.hk/eng/2020/04/20200413/20200413_110404_476.html accessed 6 July 2020.

123 See www.doj.gov.hk/eng/public/blog/20190807_blog1.html accessed 6 July 2020.

28 September 2018, with sessions focusing on AI tools.¹²⁴ Such conferences explore the various opportunities, risks and liabilities that are involved in AI and legal practice.

Risk management courses relating to, inter alia, cybersecurity, data privacy and the cloud, are also provided by the Hong Kong Academy of Law, which is a subsidiary entity under the Law Society of Hong Kong. These courses aim to educate practitioners as to the risks and ways to manage those risks where technologies are used in firms, and attendees are awarded continual professional education points. To renew a solicitors' practicing certificate in Hong Kong, generally, 15 points is required on an annual basis.

Hackathons have also been organised by the Law Society of Hong on using AI to solve problems and providing better access to justice. The themes for the hackathons that have been conducted so far have been to encourage cross-disciplinary innovation and collaboration in relation to various legal issues that people may encounter on a day-to-day basis.¹²⁵

¹²⁴ See www.hklawsoc-beltandroad.com/en/index accessed 6 July 2020.

¹²⁵ See www.hk-lawyer.org/content/belt-road-justice-challenge-cultivating-innovation-hackathon accessed 6 July 2020.

India

Sajai Singh, J Sagar Associates, Bengaluru

1. What is the understanding or definition of AI in your jurisdiction?

The concept of artificial intelligence (AI) and the way it is understood in India is fluid, and still expanding. According to Invest India, India's official agency for investment promotion and facilitation, AI is an attempt to automate a process that would otherwise require human intelligence.¹²⁶ The Ministry of Commerce and Industry, Government of India, constituted a Task Force on Artificial Intelligence (the 'Commerce Ministry Report').¹²⁷ The said report relies on the work of Professor John McCarthy to define the term AI, and defines it as the science and engineering of making intelligent machines, with intelligence being the computational part of the ability to achieve goals in the world. AI uses computers to understand human intelligence.

Niti Aayog, the policy 'think tank' of the Government of India, providing directional and policy inputs, also explains AI in the discussion paper titled 'National Strategy for Artificial Intelligence' (the 'Discussion Paper').¹²⁸ According to the Discussion Paper, AI refers to the ability to perform cognitive tasks, like thinking, perceiving, learning, problem solving and decision-making; a technology that could mimic human intelligence.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Resistance in the legal fraternity

While AI has successfully managed to infiltrate most businesses, such as healthcare, education and agriculture, the use of AI in the legal sector is in a fairly nascent stage. India has been the hub of innovation and while the acquisition of technology has not been a challenge, Indian law firms have definitely shown reluctance in making AI part of their daily routine.

The lack of general awareness in lawyers about what they can achieve through AI has been a challenge in India. Further, language continues to be a major impediment

¹²⁶ See www.investindia.gov.in/team-india-blogs/growing-interest-artificial-intelligence-india accessed 6 July 2020.

¹²⁷ See https://dipp.gov.in/sites/default/files/Report_of_Task_Force_on_ArtificialIntelligence_20March2018_2.pdf accessed 6 July 2020.

¹²⁸ See https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf accessed 6 July 2020.

for these AI solutions, which have failed to penetrate the litigation circle. In a country like India, there are many languages spoken. In fact, while the medium of communication in upper courts, such as the High Courts and Supreme Court, is English, vernacular languages continue to be commonly used in lower courts. The lawyers practicing in those courts are proficient in their vernacular language and thus, any tool that they may need will have to be in the language they are comfortable in.

Despite resistance, there is a segment of law firms (and individual lawyers) in India that continues to experiment in the AI space to see what may increase efficiency and allow lawyers to reduce the amount of their workload.

Availability and penetration of AI tools in the Indian legal market

Kira, which was developed by a Canada-based technology company, Kira Systems, has now been introduced to India. Kira uses AI to identify, analyse, and extract clauses and other information from contracts and other types of legal documents. There are machine learning models for a range of requirements across practice areas. The tool is also capable of identifying different clauses across a large volume of legal contracts, with a high degree of accuracy.

For litigators, there are AI solutions available in the market to accomplish tasks such as managing and tracking cases listed in courts. Companies such as 'LegalMind'¹²⁹ offer 'AI powered search'. The company also offers solutions such as 'Litigation Analytics' and 'Brief Analyser'. As the name suggests, Litigation Analytics enables users to analyse trends and patterns across judgments and tries to 'predict' the behaviour of courts, judges and so on. It is a strategy building tool that is now being used in the market. Further, 'Brief Analyser' helps lawyers to summarise judgments without missing out on any details. The tool 'understands' the important elements of a judgment, such as arguments, facts and issues raised, and provides the user with a comprehensive summary. There is no formal data to confirm the extent and reach of these tools.

Compliance

The compliance function is one area where the use of automation and AI has increased. Companies are trying to acquire tools that will keep their costs low. When it comes to compliance, the proposed AI tool needs to ascertain: (1) what needs to be complied with; (2) what process is involved; and (3) whether the process is robust. With the Government of India moving towards digitisation, where most filings may be done online, these compliance tools are certainly reducing the workload of compliance professionals. 'Simpliance' is one such tool

¹²⁹ See <https://legalmind.tech> accessed 6 July 2020.

that can help a company to set up a compliance framework vis-à-vis labour laws across more than 120 laws and 8,700 compliances using an algorithm.

AI-enabled forensic tools for litigation

Companies, particularly those rendering financial services, are reducing dependency on humans, to a great extent, and are relying on AI to detect issues such as acquirer fraud, reducing credit risk and delinquency, fighting financial crime, and preventing waste and abuse of resources. These AI tools are often used as a preventive measure and are now being used to garner evidence in contentious matters.

3. If yes, are these AI tools different regarding

- **independent law firms;**
- **international law firms; and**
- **in-house counsel;**
- **and what are these differences?**

As mentioned above, there are different types of AI-based tools available on the market, offering a wide range of support. As such, these tools are either supporting lawyers in day-to-day management, or directly offering services to customers. While there are specific products made for dispute resolution and corporate practice, there is barely any difference in the kind of AI tools available for independent law firms, international law firms and in-house counsel.

4. What is the current or planned regulatory approach on AI in general?

Role of Niti Aayog in defining the approach

The Government of India is working towards evolving an AI-friendly regime. While there is no regulatory approach clearly laid out, the Niti Aayog Discussion Paper sets the tone for the adoption and use of AI in different verticals. The Discussion Paper identifies the large incremental value that AI is capable of adding to a wide range of sectors. The Discussion Paper focuses on a few sectors that could benefit the most from AI; these sectors include healthcare, agriculture, education, infrastructure/smart city, and smart mobility and transport.

The Discussion Paper does highlight the barriers that have to be addressed before the use of AI may be scaled. These challenges include: (1) lack of expertise in research and application of AI; (2) absence of intelligent data (for inputs); (3) high resource cost and low awareness for adoption of AI; (4) privacy and security-

related issues; and (v) absence of a collaborative approach in connection with the adoption and application of AI.¹³⁰

Niti Aayog also released an approach paper to set up India's first AI-specific cloud computing infrastructure called the AI Research, Analytics and Knowledge Assimilation Platform ('AIRAWAT'). The Government of India intends to manage challenges in relation to the lack of access to computing resources via AIRAWAT. This is another attempt by the Government of India to demonstrate its inclination to scale the AI ecosystem in India.

Regulators' approach to AI

Various regulators in India have also recognised the value of the use of AI and robotics to reduce inefficiency. In 2017, the Reserve Bank of India (RBI) (the central bank responsible for the regulation of foreign exchange, currency, payment systems etc), released the report *Working Group on Fintech and Digital Banking*. The report highlighted the need to identify what machines can do better than humans and vice versa, and develop a complementary role and responsibilities for each.¹³¹ RBI has consistently promoted the use of technology and, in fact, in 2019, released the report *Enabling Framework for Regulatory Sandbox*. This report opened the gates for several technology players to live test their new products or services in a controlled or test regulatory environment. Similar sandboxes have been introduced by other regulators, such as the Insurance Regulatory and Development Authority of India, the insurance regulator and Security Exchange Board of India (SEBI), the securities market watchdog. SEBI has also put in place a project to augment its use of AI in pattern recognition and other use cases to track offences like insider trading. This certainly is an encouraging trend.

Ministries approach to AI

The Commerce Ministry report acknowledged that AI is a game changer and an important factor for economic development, and also pointed out that there is a need to develop a framework for smooth functioning. Apart from being used in the commercial sector, AI has also seen extensive use in the defence sector. DAKSH (equipment for explosive device identification and handling), NETRA (unmanned aerial vehicles for surveillance), CSROV (a battery-operated tracked vehicle with a telescopic arm) and UXOR (bomb handling robot) are some of the applications of AI in the defence sector.¹³²

130 See <https://niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf> accessed 6 July 2020.

131 See <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/WGFR68AA1890D7334D8F8F72CC2399A27F4A.PDF> accessed 6 July 2020.

132 See <https://drdo.gov.in/robotics> accessed 6 July 2020.

The Ministry of Electronics and IT has constituted several committees for developing a framework for AI.¹³³ It has been proposed that the Open National Artificial Intelligence Resource Platform will become the hub for knowledge integration and dissemination in AI. Liability in the case of damage done by an AI tool is another question that is being analysed. The increasing use and reliance on AI by ministries is a strong indicator that India may adopt an AI-friendly regulatory framework.

Standardisation

The Bureau of Indian Standards, a body formed to formulate, recognise and promote standardisation across sectors and products, has released a Standards National Action Plan and has identified AI as one of the key standardisation areas.

Private parties

Technology giants, such as Google and Walmart, continue to acquire startups for their AI tools. The support from big companies has certainly resulted in several startups coming up with AI products that can be used to solve various real-life issues across sectors.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

Current sets of regulations

There are certain laws that may apply to AI tools, but there is a need to develop a more comprehensive set of laws. AI applications are not expressly protected under any form of statutorily recognised intellectual property. While one may argue that AI may be protected under the copyright regime, or the patent law, the Indian enforcement authorities are not regularly faced with such questions, and thus enforcing rights in relation to AI tools may be a challenge. Questions, such as whether collusion through AI tools are anti-competitive or not, are matters that regulators need to evaluate. The level of sophistication and technological expertise required to analyse questions like this is not something that Indian regulators are dealing with on a regular basis. While there is a positive trend and increasing acceptance of AI, the laws are not sufficient to deal with several challenges that come with AI.

India's privacy laws will undergo a sea change. The current set of laws only regulates limited types of data. However, there is a bill pending in Parliament

¹³³ See <https://meity.gov.in/artificial-intelligence-committees-reports> accessed 6 July 2020.

that may change the scope of data protection and privacy laws completely. In its current form, the bill does not discuss the interplay of AI and privacy.

Commerce Ministry report

The Commerce Ministry report identifying the need for AI also pinpoints the issues that would need to be regulated. The said report observed that it is important to ensure that AI systems have explainable behaviour and are engineered for safety and security. There should be clear legal provisions put in place to identify liability in the case of non-compliance or violation. The said report leaves the question of the rights and responsibilities of autonomous AI entities open. Lastly, the said report also calls for setting up appropriate standards to be put in place for AI-enabled entities.

6. Is free data access an issue in relation with AI?

Using, processing or generally dealing in personal data is regulated in India. Users of AI tools would need to ensure that the extant privacy laws are followed at all times. Accordingly, what may or may not be shared and used is a function of whether the provider of information consents to such use or disclosure.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

Not yet; there are no court decisions on the above premise.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

The use of AI in the legal profession is not regulated in India.

9. What is the role of the national bar organisations or other official professional institutions?

The Indian Bar Association is not currently involved in the promotion of AI in the legal profession.

Italy

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1. What is the understanding or definition of AI in your jurisdiction?

By using the wording artificial intelligence (AI) (*intelligenza artificiale*), reference is made to software and hardware systems capable of achieving complex goals, operating in physical or virtual dimensions, perceiving the surrounding environment, acquiring – understanding – inferred data through knowledge continuously acquired (reasoning and machine learning), adopting decisions and choosing solutions in given or extemporary situations. AI is defined as a ‘dual’ technology, as it can apply to both civilian and military scopes.¹³⁴

AI is a technology ecosystem based on highly performing calculations, mobile broadband technologies, nanotechnologies and the so-called internet of things (IoT). In a few years, the development of these sectors will allow a more synergic interaction among them, mainly due to blockchain, cloud computing and mostly, the operativity of 5G frequency bands.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

We are at the beginning of this new trend; however, there is already some AI software used by lawyers in their practices. They are mostly meant to simplify lawyers’ work, setting them free from repetitive work, which can slow down their professional activity.

This software can assist lawyers in statutory regulations and court case searches, as well as with the revision of contracts.

As an example, ROSS can help lawyers in research. It is software based on AI that aims to simplify the work of lawyers. ROSS is capable of simplifying the search of statutory regulations and court cases. It is based on ‘Watson’, IBM software capable of understanding human language, and can be used by law firms to simplify and render faster any legal searching activity, which young lawyers usually perform.¹³⁵

Besides performing searches on single cases, ROSS is capable of developing logical connections and proposing ad hoc solutions to help lawyers to interpret a

¹³⁴ See www.mise.gov.it/index.php/it/intelligenza-artificiale-call accessed 6 July 2020.

¹³⁵ See <https://rossintelligence.com> accessed 6 July 2020.

specific case and to act accordingly. Several Italian law firms, particularly in Milan, have begun to use it.

A second example of AI software for law firms is Kira, a software expert on contracts.¹³⁶ Kira is devoted to cutting down time spent on analysing hundreds of pages of contracts. Kira automatically finds, extracts and reviews significant contract information in minutes.

This software is meant to enhance visibility in contracts, making it easy to get a quick picture of contract terms. Kira rapidly responds to a change in law, anti-bribery review or force majeure event. According to its provider, Kira can jump between summary text and the original scanned page.

Kira analyses contracts, extracts their most relevant sections and highlights their material provisions. Kira is also capable of analysing documents based on the inclusion or absence of specific provisions, and can extend search and analysis to contracts drafted in different languages.

An interesting bot used for legal data privacy protection is that commercialised by LT42.¹³⁷ This Italian software offers the possibility for companies to be appointed as data protection officers (DPO) to comply with the European Union General Data Protection Regulation Directive No 679/2016 (GDPR) on privacy. LT42 offers support that can be provided both through its online platform and through a customised consulting service, as well as constant monitoring to comply with the norms established by the EU. A team of experts retains control of the software on privacy, legal issues and technology.

Contract Intelligence (COIN), is another bot able to substitute 360,000 annual working hours performed by lawyers. So far, it has been tested by JP Morgan.¹³⁸ COIN runs on a machine learning system that is powered by a private cloud network that the bank uses. Apart from shortening the time it takes to review documents, COIN has also helped JP Morgan to decrease its number of loan-servicing mistakes. According to the program's designers, these mistakes stemmed from human error in interpreting 12,000 new wholesale contracts every year.

Another example is 'DoNotPay', AI software meant to appeal parking tickets, cancel any service or subscription, and sue in small claim courts, for example, for delayed or cancelled flights. It's a mobile phone app and the company running this business claims that 'the DoNotPay app is the home of the world's first robot lawyer. Fight corporations, beat bureaucracy and sue anyone at the press of a button'.¹³⁹

136 See <https://kirasystems.com> accessed 6 July 2020.

137 See www.lt42.it accessed 6 July 2020.

138 See www.icertis.com/resource/what-is-contract-intelligence accessed 6 July 2020.

139 See <https://donotpay.com> accessed 6 July 2020.

In Italy, AI software called 'Flightright' provided by a German company called Flightright GmbH is frequently used by travellers.¹⁴⁰ It is an air passenger claims management software that offers assistance and advisory services. The software offers passengers assistance and advisory services to obtain compensation from airlines when a flight is delayed or there is a failure. Flightright's free checks tell customers whether they are entitled to compensation if they simply type in the flight details – whether there was a delay, cancellation, rebooking or a missed connection.

3. If yes, are these AI tools different regarding
• independent law firms;
• international law firms; and
• in-house counsel;
and what are these differences?

Based on the above, there is a wide variety of AI-based software already available on the market. Some applications are used to support lawyers in their work, whereas others directly offer legal services to their customers. Most of this software and applications have been developed outside Italy, and they are meant for an international clientele, so independent law firms, law firms operating in several countries and in-house counsel can all avail of their services.

4. What is the current or planned regulatory approach on AI in general?

AI is deemed, by both the Italian Government and the EU, to be one of the key technologies for a new industrial revolution guided through the transition to digital. Italy has undertaken to implement a national strategy on AI within the framework of the European Coordinated Plan on Artificial Intelligence, which constitutes the domestic contribution to synergic action among EU Member States.¹⁴¹

The domestic strategy comprises nine targets and seven sectors.

The national strategy for AI comprises an initial chapter, called Vision and Targets, and a series of brief chapters explaining the nine targets the strategy is aiming at:

1. improving investment, public and private, on AI and related technologies;
2. enhancing R&D in the field of AI;
3. supporting the adoption of digital technologies based on AI;
4. increasing educational efforts at different levels to enable AI to support the workforce;

¹⁴⁰ See www.flightright.com accessed 6 July 2020.

¹⁴¹ See <https://ia.italia.it/assets/whitepaper.pdf> accessed 6 July 2020.

5. exploiting the data economy, real fuel for AI, particularly in the public sector;
6. consolidating the legal and ethical frameworks that regulate AI development;
7. promoting awareness and trust of AI among citizens;
8. improving the public administration sector and making public policies more efficient; and
9. favouring European and international cooperation for accountable and inclusive AI.

The following seven key sectors have been given the utmost priority in the allocation of resources: manufacturing industry, agrofood, tourism and culture, infrastructure and energy networks, healthcare and social security, smart cities and mobility, and public administration.

Among the measures that shall be adopted are those to increase the number of AI experts in Italy to support academic, industrial training and research in this field and to finance the hiring of professors and researchers in universities and R&D centres, as well as financing masters carried on by businesses alongside universities and programmes of industrial PhDs.

Besides promoting the development of centres operating in the AI field, the government is aiming at realising a national network for the development and wide spread of AI and digital technologies. Material in this context will be the activities of the Competence Centre and the 12 technology clusters, among which is one dedicated to the Intelligent Factory and the Digital Innovation Hub.

There are several possible solutions for improving interoperability and access to public administration data, and the Italian Government is committed to promoting the development of the Data Sharing Agreement, which is a standard contract under which parties undertake with each other to manage data supply and management in accordance with agreed upon rules, as well as to assess, in cooperation with the Antitrust Authority and the Privacy Authority, the implementation of data sharing standards in specific strategic sectors of national interest.

The regulatory and ethical aspects are indeed material to developing AI. The constant interaction between man and intelligent-machine requires an update of the legislative framework to ensure that the AI system engineering is trustworthy. As an example, the current EU Machine Directive does not reflect the changes that have occurred, and a new European directive in that field is needed.

In connection with the ethical aspects, the Italian Government intends to prevent any kind of AI that can increase social differences and is detrimental to some. To that extent, the opportunity to regulate, promote and manage new certifications, which allow the verification that AI systems are aligned with the principles that the European guidelines on ethical AI set forth, is under examination.

Among the public administration sectors that could benefit from the use of AI are countering tax evasion and avoidance, web crimes, combating cyberattacks arising from AI, personal information and sensitive data theft, and fighting against organised crime and terrorism.

The Italian strategic plan represents a contribution to the European Coordinated Plan on AI.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

The legal effects and legal issues connected to the design, manufacturing and use of new technologies, including those connected to AI, must be examined within the context of the current statutory regulations, and be resolved on the basis of existing legal principles. This is because, to date, there are no statutory regulations in force specifically regulating AI systems, the consequences of availing of them or the liabilities from either a civil or criminal law standpoint, arising from losses or felonies depending on or connected to their use.

This means that general statutory regulations on contracts and torts apply to liabilities arising from losses, with all their features and differences, in terms of liability allocation, burden of proof and statutes of limitations, arising therefrom.

By analogy, the general statutory regulations of copyright and intellectual property apply to the invention and development of AI systems and to the output from their use.

Ultimately, the treatment of personal data and privacy rights linked to the use of AI is subject to the GDPR.¹⁴² Notwithstanding, the EU directive does not make express reference to the use of new technologies; its scope is that the treatment and protection of personal data are ensured within the current technology context, especially with reference to the risks that innovation can cause to individual privacy.

The main feature of AI compared to other innovative technologies is embedded in its system, which allows 'self-decisions' through machine learning mechanisms, operating on external inputs and gathered data. From a legal standpoint, self-determination can interrupt the link between the conduct of those who have conceived, designed or manufactured the system and the output that the system generates. This involves an evident legal issue of linking liability to persons due to the autonomous AI conduct.

¹⁴² See <https://eur-lex.europa.eu/eli/reg/2016/679/oj> accessed 6 July 2020.

Based on domestic civil law, there are rules attributing liability for the conduct of another and or standards of strict liability, for example, liability for carrying out dangerous activities, as a provision of the Civil Code, Article 2050, set forth for car driving. Likewise, some EU statutory regulations, for example, EU Directive No 374/85 on liability for defective products, can apply and determine civil law liability. On the contrary, these standards and principles cannot apply to criminal liability due to the principle of legality and because criminal liability is personal. It is not possible that someone is subject to criminal responsibility for the conduct of another; hence, it is difficult to conceive that an individual can be criminally sanctioned for the autonomous, inevitable and unforeseeable conduct of an AI system capable of self-determination.

Brand new domestic statutory regulations – not directly linked to AI – have been introduced recently in the area of new technologies, for instance, blockchain and smart contracts, based on Act No 12-2019, which introduces definitions of ‘technologies based on distributed ledgers’ and ‘smart contracts’.

New statutory regulations on AI are under discussion and they will abide by the EU Ethics Guidelines on AI and its principles as of 8 April 2019 (High-Level Expert Group on AI – Ethics Guidelines for Trustworthy Artificial Intelligence).¹⁴³

The first of these principles provides that there shall always be human control of AI because the aim is to improve human actions and the human’s rights, not to reduce the human’s autonomy. A second principle provides that algorithms shall be safe, trustworthy and resist errors or inconsistencies during the different phases of the AI system life cycle. The third entails that citizens shall be always informed about the use of their personal data and have full control so that it cannot be used against them, and that shall be done by following consistent provisions in respect of the GDPR.

The fourth principle calls for transparency and aims to guarantee the traceability of AI systems. The fifth principle is to guarantee diversity and non-discrimination, with human beings able to modify the algorithms’ decisions, taking into account all the needed factors. In this connection, there shall be procedures to object to algorithms’ decisions to ensure the liability of those managing the systems in the case of loss or damages. Eventually, domestic statutory regulations on AI shall be intended for the benefit of social and environmental welfare.

6. Is free data access an issue in relation with AI?

As mentioned in question 5, the treatment of personal data and privacy rights linked to the use of AI is subject to the GDPR. Therefore, the GDPR statutory provisions apply to the use of free data, providing restrictions in order to ensure individual privacy.

¹⁴³ See <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> accessed 6 July 2020.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To date, there are no court decisions on AI.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

Currently, there are no planned, discussed or implemented sectorial statutory regulations in Italy on the use of the AI in the legal profession or services that are traditionally rendered by lawyers. Although not directly related to the use of AI, the Agency for Italian Digitalisation (Agenzia per l'Italia Digitale or AGID) issued Resolution No 116/2019 of 10 May 2019, setting up a Working Group for the implementation of guidelines and technical standards relating to technologies based on distributed ledgers and smart contracts.¹⁴⁴ This action was carried on pursuant to the provision of Article 8ter of Law Decree No 135 of 14 December 2018 titled 'Urgent provisions to support and simplify for companies and the public administration', which was ratified through Act No 12 of 11 February 2019.¹⁴⁵ This Act introduces the legal definitions of 'technologies based on distributed ledgers' and 'smart contract'.

According to such statutory regulation, technologies based on distributed ledgers are those 'technologies and digital protocols, which involve the use of a shared ledger and are: 1) distributed; 2) reply; 3) simultaneously accessible; 4) structurally decentralised on cryptographic basis; and 5) capable to allow data recording, validation, upgrade and storage, both encrypted and not, which can be verified by each participant and which cannot be not modified or altered'.

A smart contract, instead, is defined as a 'computer program operating on technologies based on distributed ledgers and its execution automatically binds two or more parties on the basis or provisions pre-set by the same parties. Smart contracts satisfy the legal standard of written form through digital identification of the concerned parties', through a technical procedure matching the requirements AGID sets forth.

The recording of a digital document through the use of technologies based on distributed ledgers has the same legal effects as electronic time stamps in the provision of Article 41 of Regulation (EU) No 910/2014 of the European Parliament

¹⁴⁴ See www.agid.gov.it/it/sicurezza/cert-pa accessed 6 July 2020.

¹⁴⁵ See www.gazzettaufficiale.it/eli/id/2018/12/14/18G00163/sg accessed 6 July 2020.

and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market.¹⁴⁶

In this context, the guidelines on technical standards that are about to be issued by AGID are material for ensuring the legal effects of electronic time stamps.

9. What is the role of the national bar organisations or other official professional institutions?

The Italian Bar Associations will play a material role in providing ethical rules and guidelines for the use of AI by the legal profession. Civil proceedings have been digitalised over the last decade, and the way of working for lawyers, judges and court clerks has changed dramatically.

The first step has been the digitalisation of court case registers, which are currently digital databases, and lawyers can access them to file written pleadings and court judgments via the so-called Portale Servizi Telematici (PST) from personal computers, access points and tools there connected (eg, 'Service1' and 'Consolle Avvocato').¹⁴⁷

That has allowed a more efficient update of court claims files through databases, which enable real-time data sharing. Among the most relevant features, the PCT (ie, 'Processo Civile Telematico') has allowed the build-up of a digital archive of court decisions on a national scale.

Such an archive is being developed on a voluntary basis by judges, who filed their relevant decisions, based on their own assessment and by following the guidelines of court chambers. This archive-database enables judges to assess how a specific case was entertained and resolved by his/her colleagues and includes judgments of the courts of appeal. This leads to more uniform judgments on similar lawsuits within the same tribunals and gives lawyers the opportunity to better assess claims to advise clients.

There is an ongoing discussion on the use of tools on these databases, which would allow lawyers to have an automated risk assessment of a potential lawsuit, including the use of AI, to that extent.

As mentioned, several Legal Tech providers are currently offering office automation in some cases through AI tools that automatically select legal documents, for instance, ROSS Intelligence and LT42.

From a technical standpoint, a material aspect of machine learning is the availability of adequate datasets during the several development phases, such as

¹⁴⁶ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN> accessed 6 July 2020.

¹⁴⁷ See www.accessogiustizia.it/pa/pct.jsp accessed 6 July 2020.

training, cross-validation and testing. There is a direct relationship between the database dimension and the accuracy of the resulting models.

Among the benefits of implementing AI for legal practitioners is the improvement of knowledge and productivity; however, an open issue remains regarding determining the liability of those engineering, managing or using software that leads to wrong automated decisions. Software decisions are, in any case, still revised by individual professionals.

In Italy, the judge tool *Consolle del Magistrato* provides judges with access to a digital case file, and there is automated filling of the headings of documents, hearing minutes and orders of judgments on the basis of pre-set templates. Nevertheless, the document content, such as fact finding, reasoning and holdings, are entirely controlled by judges; hence, beyond the scope of this article.

Coming instead to the aforementioned digital archive of court decisions, the national bar associations shall discuss whether an AI machine learning system could support legal practitioners and judges in the issuance of decisions, provided the tool is capable of selecting relevant court precedents that fit the specific lawsuit. Such a tool could be implemented into the current PCT system at a centralised/ministerial level through a centralised national database or district court database.

Additionally, the national bar associations are called to examine the ethical aspects of implementing these tools into the legal profession. In their discussion, the bar associations shall take as reference the work of the European Commission for the Efficiency of Justice (CEPEJ) of the European Council, which, in December 2018, issued the European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment (the 'Charter').¹⁴⁸ The Charter provides a framework of principles that can guide policy-makers, legislators and justice professionals when they grapple with the rapid development of AI in national judicial processes.

The CEPEJ's view as set out in the Charter is that the application of AI in the field of justice can contribute to improving efficiency and quality, and must be implemented in a responsible manner that complies with the fundamental rights guaranteed, in particular, in the European Convention on Human Rights (ECHR) and the Council of Europe Convention on the Protection of Personal Data. For the CEPEJ, it is essential to ensure that AI remains a tool in the service of the general interest and that its use respects individual rights.

The CEPEJ has identified the following core principles to be respected in the field of AI and justice:

¹⁴⁸ See www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment accessed 6 July 2020.

- principle of respect for fundamental rights: ensuring that the design and implementation of AI tools and services are compatible with fundamental rights;
- principle of non-discrimination: specifically preventing the development or intensification of any discrimination between individuals or groups of individuals;
- principle of quality and security: with regard to the processing of judicial decisions and data, using certified sources and intangible data with models conceived in a multidisciplinary manner, in a secure technological environment;
- principle of transparency, impartiality and fairness: making data processing methods accessible and understandable, and authorising external audits;
- principle 'under user control': precluding a prescriptive approach and ensuring that users are informed actors and in control of their choices.

For the CEPEJ, compliance with these principles must be ensured in the processing of judicial decisions and data by algorithms and in the use made of them.

Japan

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1. What is the understanding or definition of AI in your jurisdiction?

General understanding

At least one standard Japanese dictionary defines the term 'Artificial Intelligence (AI)' as: '[a] computer system which is equipped with functions of the human brain such as learning, predicting and judging.'¹ From an academic perspective, however, the term 'AI' has no uniform definition among Japanese researchers.

Legal terminology

Japan currently has no uniform statutory definition of the term 'AI'. However, in the Basic Act on the Advancement of Public and Private Sector Data Utilisation, enacted in December 2016, the term 'artificial intelligence-related technology' is defined as, 'technology for the realisation of intelligent functions, such as learning, inference, and judgement, by artificial means, and use of the relevant functions realised by artificial means.'

2. In your jurisdiction, apart from legal tech tools (ie, law firm or claim management, data platforms etc), are there any actual AI tools or use cases in practice for legal services?

Introduction

Various legal tech services that leverage AI and natural language processing are currently being used Japan's legal sector.

There are generally two categories of services: services provided to lawyers and corporate legal staff to improve operational efficiency, such as contract review, contract management, document review (predictive coding), legal research, and contract translation; and services provided to increase accessibility to justice and law for general consumers, such as do-it-yourself (DIY) and online dispute resolution (ODR).

¹ *Daijien*, 3rd edition, 2006.

The following are core services in Japan provided to lawyers and corporate legal staff.

CONTRACT REVIEW

‘Legal Force’, an AI-based Japanese-language contract review service provided by Legal Force Inc, is used by more than 500 companies and law firms in Japan. Its main functions include an automatic contract review feature, a knowledge management system, and a template database containing provisions from 420 types of contracts.²

The automatic contract review function supports 32 types of contracts, which can be reviewed and edited directly by uploading a Word format contract into Legal Force. The tool determines the content of the contract, clause by clause, and alerts the user of legal risks. Proposed revisions to the flagged clauses are presented according to their risk profile, and the uploaded contract can be modified directly by the user according to these alerts. The system also has the capacity to suggest clauses that are missing from the contract under review. The importance of a clause can be pre-set and the priority of review can be customised to users’ preferences.

The knowledge management function can automatically extract and register vital information, such as the name of the contract and the names of the parties etc, in uploaded contracts. It can also search for similar contracts or in-house templates from the tool’s library. With the comparison function, the system can automatically compare terms between two contracts (for example, the proposed contract and the user’s template) and produce a table of their similarities and differences. This comparison can be conducted even if the order of clauses in each respective contract is different.

There are also other contract review services in Japan, such as *AI-CON* provided by GVA Tech.³

DOCUMENT REVIEW (PREDICTIVE CODING)

‘KIBIT’, an artificial intelligence engine provided by FRONTEO Inc, is a document review and predictive coding service which supports language analysis in Japanese, Korean, Chinese, and English.⁴ KIBIT is used in fraud investigations and e-discovery, and is also routinely used for email auditing. According to our interviews with company representatives, relative to other services, KIBIT provides highly accurate reviews using comparatively less training data. For example, the tool can flag up emails that suggest fraud by analysing a message’s content and context, even if such emails do not explicitly refer to fraud.

² Legal Force website, available at: <https://legalforce-cloud.com>.

³ AI-CONPro website, available at: <https://ai-con-pro.com>.

⁴ FRONTEO website, available at: <https://www.fronteo.com>.

MNTSQ Ltd is developing a document review service to conduct legal due diligence, backed by Nagashima Ohno & Tsunematsu (NO&T),⁵ one of Japan's 'Big Five' law firms. Although not yet available to the public, MNTSQ is currently training its machine learning algorithm with a data set of anonymised contracts.

LEGAL RESEARCH

'Legalscape', provided by Legalscape Inc, unifies and connects legal information (legal literature, judgements, administrative documents, guidelines, public comments, etc) from both online and offline sources. This enable lawyers to conduct comprehensive online legal research through what the company envisions as 'a legal version of Google'.⁶ For example, the system allows its users to search through 532 registered law-related books in full text and displays where the searched keyword appears within each book. Legalscape uses its AI to organise and structure this legal information by adding 'headings' and 'text' tags to each document it searches.

There are other legal research services in Japan, such as 'LEGAL LIBRARY'⁷ and 'LION BOLT'.⁸

CONTRACT TRANSLATION

The Rosetta Corporation's 'T-400', a service that uses machine learning to translate legal documents and contracts automatically, has already been adopted by many law firms and companies in Japan.⁹

3. If yes, are these AI tools different regarding independent law firms, international law firms, and in-house counsel? What are these differences?

Our research indicates that large independent Japanese law firms have introduced document review, legal research and contract translation services into their practices, but have yet to adopt contract review services.

Our research also indicates that an increasing number of major Japanese companies have adopted contract review and translation services. Contract review services are perceived as particularly useful, especially among non-lawyers in corporate legal departments.

5 MNTSQ, website, available at: <https://www.mntsqs.co.jp>.

6 Legalscape website, available at: <https://www.legalscape.co.jp>.

7 LEGAL LIBRARY website, available at: <https://legal-library.jp>.

8 Sapiens website, available at: <https://sapiens-inc.jp>.

9 Rozetta AI Auto-Translation, available at: <https://www.rozetta.jp/department/?id=sec01>.

Although international law firms have introduced contract translation services developed by Japanese companies into their practices, they do not appear to have adopted other domestically developed legal tech services.

4. What is the current or planned regulatory approach on AI in general?

Vision for ‘Society 5.0’

The Japanese government has launched the vision of ‘Society 5.0’, defined as:

‘[a] human-centred society that balances economic advancement with the resolution of social problems by a system that highly integrates cyberspace and physical space.’¹⁰ Society 5.0 was proposed by the government in the 5th Science and Technology Basic Plan ‘as a future society that Japan should aspire to, which follows the hunting society (Society 1.0), agricultural society (Society 2.0), industrial society (Society 3.0), and information society (Society 4.0).’

According to the Cabinet Office website, in Society 5.0, people, things, and systems are all connected in cyberspace. Accordingly, AI analyses all of this data and feeds optimised results and solutions back into physical space, thereby bringing new value to industry and society in ways not previously possible. As seen above, AI will play a significant role in Society 5.0.

Japan aims to become the first country to achieve a human-centred society (Society 5.0) in which anyone can enjoy a life full of vigour. It intends to accomplish this goal by incorporating advanced technologies in a diverse range of industries and social activities, fostering innovation to create new value.

Principles and guidelines relating to AI

Based on its ‘human-centred’ policy, the Japanese government has established the Council for Social Principles of Human-Centric AI and adopted the ‘Social Principles of Human-Centric AI’.¹¹ The charter consists of:

- three basic philosophies – dignity, diversity and inclusion, and sustainability;
- seven principles – (1) human-centric, (2) education/literacy, (3) privacy protection, (4) ensuring security, (5) fair competition, (6) fairness, accountability and transparency, and (7) innovation; and

¹⁰ Cabinet Office, Government of Japan, definition of *Society 5.0*, available at: https://www8.cao.go.jp/cstp/english/society5_0/index.html.

¹¹ ‘Social Principles of Human-Centric AI’, Council for Science, Technology and Innovation, Japan Cabinet Office, 2019, available at: <https://www8.cao.go.jp/cstp/english/humancentricai.pdf>.

- two additional documents, the AI R&D Guidelines for International Discussions¹² consisting of nine principles, and the AI Utilisation Guidelines¹³ consisting of ten principles, along with their respective commentaries were also released as practical references.

It should be noted that such Japanese principles for AI have given effect to the Recommendation of the Council on Artificial Intelligence, adopted by OECD Board.

As seen above, the rules related to AI have been made as 'soft-law' in Japan. According to our research, there is currently no legislative plan to regulate AI as 'hard law'.

5. What are the current or planned regulations on the general use of AI or machine learning systems?

Introduction

There are currently no statutes or regulations that specifically regulate AI in Japan. As a result, existing legislation is generally applied to AI or machine learning systems. However, in some areas, existing legislation has been updated to meet the new challenges arising from AI-related issues. Given this context, in this chapter, we focus on introducing new or updated legislation in three key areas, namely: autonomous driving issues; copyright; and Big Data protection. Privacy and personal data protection is further explored in Question 6 below.

AUTONOMOUS DRIVING ISSUES

A typical example of an AI-equipped technology approaching practical use in Japan is a car with an autonomous driving function.

In Japan, there are six classifications (Level 0 to Level 5) which categorise automatic driving according to J3016 (September 2016) by SAE International and its Japanese reference translation, JASO TP 18004.

In Level 3 automated vehicles for example, there will be a 'fallback-ready user' who is prepared to respond to traffic, road, or hazardous conditions. This user does not need to control the vehicle directly in normal conditions while the autonomous driving system is operating. However, this fallback user will be responsible for responding appropriately to the system's intervention requests. In contrast, personnel within Level 4 or 5 driverless vehicles are no longer considered drivers, but passengers, with no role in vehicle operation.

12 'Draft AI R&D Guidelines for International Discussions', The Conference toward AI Network Society, 28 July 2017, available at: https://www.soumu.go.jp/main_content/000507517.pdf.

13 See https://www.soumu.go.jp/main_content/000658284.pdf.

The Road Traffic Act and the Road Transport Vehicle Act, both which were amended in 2019, provide a new definition for 'automatic navigation system'. The term is now defined as a device that has 'functions to replace the entire ability of the driver of the vehicle to recognise, predict, judge, and operate the vehicle', ie, automatic driving function using AI technology. In vehicles equipped with an 'automatic driving device', drivers are now exempt from rules that preclude them from talking on mobile phones or looking at electronic displays, such as navigation systems (Article 71-4-2, paragraph two of the Road Traffic Act). This amendment allows level 3 autonomous-driving cars to use public roads.¹⁴

In Japan, negligence of an actor is required to impose tort liability. With respect to tort liability in the event of a traffic accident, a Level 3 designation does not relieve the user of an automated vehicle entirely of the duty to drive and operate the vehicle while it is driving autonomously. However, drivers are not required to take direct control of the vehicle and the duty of care necessary while driving is reduced. As a result, drivers may not be found negligent for an accident involving a Level 3 vehicle. At Level 4 and above, the user of an automated vehicle is, in principle, allowed to trust the proper operation of the system and does not owe a duty of care while the system is in use. Therefore, in principle, the user is not negligent for any accident while using the system. However, failure to perform the required inspection and maintenance of the car's software before driving may constitute negligence. In addition, if the autonomous-driving car repeatedly behaves abnormally and the user continues to use the system, the user may be considered negligent. Furthermore, if the user should have suspected the system to be defective or the user's assumption of trust in the system has diminished, negligence may also be imposed.

In Japan, the Compulsory Insurance System has been established in accordance with the Act on Securing Compensation for Automobile Accidents. The owners and other operators of cars are made to bear de facto strict liability for traffic accidents in order to provide prompt and reliable compensation for damage.

The Ministry of Land, Infrastructure, Transport and Tourism's Study Group on Liability for Damages in Automated Driving has studied the liability for damages under the Act for accidents involving vehicles equipped with up to Level 4 autonomous driving capabilities. Its report, which was published in March 2018, covers a transitional period until around 2025.¹⁵ The report concluded that at least until the transitional period, strict liability should continue to be imposed on the owners or operators of autonomous vehicles involved in accidents. The liability of the manufacturers of autonomous-driving vehicles is also being discussed among academics and lawyers.

14 'Autonomous Driving', National Police Agency, available at: <https://www.npa.go.jp/bureau/traffic/selfdriving/index.html>.

15 Report of the Study group on liability for damages in autonomous driving, 2018, available at: <https://www.mlit.go.jp/common/001226452.pdf>.

Regarding the application of criminal law to accidents while using automated driving systems, there is discussion whether criminal law is applicable to AI itself in cases where errors in the AI's judgement is the causes of the accident.

COPYRIGHT

To develop AI effectively, AI systems need as much training data as possible, and such data sets may contain copyrighted material. Consequently, there is debate as to whether the use of copyrighted works for the purpose of AI analysis should be permitted, and in the case that it is, to what extent. As the basic framework, the Copyright Act of Japan has not recognised a 'fair use' defence against alleged copyright infringement, but the legislation lists certain specific acts, including reproduction for private use or citation, etc, as being exceptions to copyright infringement. In general, the scope and conditions of such exceptions are explicitly prescribed in the Act. However, new exceptions to copyright infringement are now emerging, which were not previously contemplated by the Act. For example, according to the Copyright Act as amended in 2018, unless it unduly harms a copyright holder's interests, copyrighted works may, to the extent necessary, be used in any manner if such use is made for any purpose other than enjoying the expression of the copyrighted works, including for the purpose of information analysis. This exception is applicable even for commercial use, and even for use for the benefits of third parties. Consequently, use of copyrighted works as training data for deep learning or machine learning and the creation of training datasets for circulation among business partners or affiliates does not constitute copyright infringement. Given such broad exceptions to copyright infringement, a Japanese researcher has deemed Japan 'a paradise for machine learning'.

PROTECTING BIG DATA

The use of Big Data plays a significant role in enhancing the capabilities of AI, thereby necessitating the protection of its commercial value. However, under article 206 of the Japanese Civil Code, '[a]n owner has the rights to freely use, obtain profit from and dispose of the Thing owned, subject to the restrictions prescribed by laws and regulations', and under article 85 of the Civil Code, '[t]he term "Things" as used in this Code shall mean tangible things.'

Therefore, no ownership right is conferred in data, as it not considered tangible. Also, due to the absence of creativity, inventiveness, or novelty, Big Data is not generally copyrightable or patentable under current law. Big Data may qualify for protection as a 'trade secret' as defined under the Act against Unfair Competition. However, since Big Data often contains non-confidential information, it often does not qualify as a trade secret. To address this issue, the Act was amended as of July 2019 and added protection for certain elements within Big Data. These protected elements, called 'data for limited provision', are defined as technical or business

information that is: accumulated in a reasonable amount by electronic or magnetic means (ie, an electronic form, a magnetic form or any other form that is impossible to perceive through human senses alone) and managed by electronic or magnetic means as information provided to specific persons on a regular basis. If Big Data qualifies as 'data for limited provision' under the Act, certain types of conduct, such as misuse, misappropriation, or unauthorised disclosure of such data are subject to injunction and compensatory damages.

6. Is free data access an issue in relation to AI?

Protection of privacy

Under established court precedence, an individual enjoys constitutional rights to privacy and to not having their private life unduly disclosed to the public.

Protection on personal data

Certain personal information is protected under the Act on the Protection of Personal Information of Japan. Personal Information is defined as information about a living individual which: can identify the specific individual by name, date of birth or other description contained in such information (including such information as will allow easy reference to other information and will thereby enable the identification of the specific individual); or contains the personal identification number. Under the Act, business operators storing personal information in searchable compiled databases for their business use are required to comply with certain requirements. These include the identification of the purpose of use, restriction on the purpose of use, appropriate acquisition, notification of the purpose of use on acquisition, and management of claims. In addition, such business operators are forbidden from providing a third party with personal information which constitutes a component of their database (defined as personal data), unless they obtains the principal's consent.

In the context of Big Data to be collected or used for AI analysis, unlike GDPR, information such as cookie-obtained information including browsing history, IP address, and location data do not qualify as personal information under the Act since they cannot be used to identify a specific individual. However, an issue arose in 2019 when cookie-obtained information relating to the university students' job-seeking behaviour was analysed by AI and later sold to recruiting companies without the students' consent. Under such circumstances, the Act was amended in 2020, adding the category of 'personal related information', defined as 'the information about a living individual which cannot identify the specific individual by itself.' In case personal related information is to be transferred to a third party, and such information qualifies as personal data which can identify specific individuals in conjunction with other information already possessed by the acquirer,

the transferor must obtain the individual's consent, and the acquirers must confirm that the transferor has received the individual's consent.

AI principles

The 'Principle for Privacy' is contained in both AI R&D Guidelines for International Discussions and AI Utilisation Guidelines mentioned in Question 4 above.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

According to our research, there are no decisions regarding the use of AI in the providing of legal services.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

Based on the premise that the AI currently being developed and operated is so-called weak AI (ie, AI that appears to be doing something similar to the intellectual activities performed by humans on a particular issue), the dominant view is that AI cannot fully supplant the core work of lawyers given the current state of the technology.

As a result, AI tools are considered supplementary tools to support lawyers and there has been no discussion of the full-fledged regulation of AI service providers. Some academics and lawyers with keen interest in legal tech have begun discussing the relationship between the legal tech services currently being offered and the current Article 72 of the Attorney Act, which regulates legal services as a monopoly for lawyers.

9. What is the role of the national bar organisations or other official professional institutions?

The Japan Federation of Bar Associations (JFBA) has the principle of lawyer autonomy in Japan. Therefore, the JFBA, and not the Ministry of Justice, develops regulations and ethical guidelines regarding the use of AI in legal practice. The regulations and guidelines set by the JFBA are followed by all lawyers.

However, while some JFBA committees, such as the Professional Reform Committee, have begun researching AI and its use in the practice of law, AI has yet

to be discussed in earnest. Consequently, the JFBA's official position on the use of AI has not been presented.

Priority is currently being given to discussions about digitising civil trial procedures (e-court, e-filing, and e-case management), rather than introducing AI. Revision of the Code of Civil Procedure is being considered for 2022.

As part of this trend, the Project Team for Open Data of Civil Judgements, established by the Japan Federation of Bar Associations Legal Research Foundation, has been studying the possibility of providing information on civil judgements as electronic data to a wide audience by 2023.¹⁶ Such digitalisation and publication of civil judgements will facilitate the development of AI tools for analysing and predicting judgements.

Article 11 of the Basic Code of Professional Conduct established by the JFBA bans lawyers from using or cooperating with service providers if there are reasonable grounds to suspect that such service providers may breach article 72 of the Attorney Act, which provides lawyers with a monopoly on legal services. Therefore, legal tech service providers in Japan are sensitive to taking on responsibilities or fielding work which may be within the scope of lawyers. On the other hand, Article 7 of the Code states that 'lawyers shall endeavour to study in order to become better educated and to become familiar with laws and legal affairs'. In future, this professional development obligation may be extended to require lawyers to learn about AI tools and use them in their legal practice for the benefit of their clients.

¹⁶ 'Considering open data of civil judgment', Japan Federation of Bar Associations Legal Research Foundation, available at: https://www.jlf.or.jp/wp-content/uploads/2020/08/minjiodpt_siryoku20200327.pdf.

Sweden

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1. What is the understanding or definition of AI in your jurisdiction?

There is currently no statutory definition of the term ‘artificial intelligence’ (AI) in Sweden. Neither is there a clear-cut or generally agreed upon definition of the term.¹⁴⁹ However, some guidance on the understanding of AI in Sweden may be found in government documents and voluntary industry codes.

In a 2018 report on AI in Swedish business and society, Vinnova – the Swedish Government agency for innovation – described AI as follows: ‘In this analysis, artificial intelligence is defined as the ability of a machine to imitate intelligent human behaviour. Artificial intelligence also denotes the area of science and technology that aims to study, understand and develop computers and software with intelligent behaviour’.¹⁵⁰

The definition of AI used in the Vinnova report provides two important insights into what AI is and how it is often understood in Sweden. The first insight is that, at its core, AI is computer software. The second is that AI refers to the area of science and technology related to machines imitating intelligent behaviour, often with human intelligence as a reference point.

In its national approach to AI, the Swedish Government refers to the definition of AI in the Vinnova report.¹⁵¹ The government further adds that ‘AI is a broad field that encompasses many technologies, not least machine learning and deep learning. What distinguishes AI from other automation methods is the ability of AI technology to learn and become smarter over time’.¹⁵²

The Swedish Government’s national approach to AI provides two further insights into how AI is often understood in Sweden. The first insight is that, in most cases when referring to AI, most people refer to machine learning and deep learning technology. Machine learning and deep learning are subsets of AI research and technology. However, these technologies currently hold the most potential for developing complex AI systems and solutions. The second insight is that AI is usually understood to be technology that, on its own, learns and becomes smarter over time. This is done through exposing the AI to more data and by letting it attempt to solve the problems it was programmed to complete.

Finally, many discussions concerning AI in Sweden centre on ethics and trust. The discussions essentially come down to one question: how can we create AI that does the right thing and does not cause harm? What this indicates is that AI is viewed as a powerful, and potentially game-changing, technology, but that it may be dangerous if it ends up in the wrong hands or if it is left to its own devices.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Actual AI tools are used in Sweden in a manner similar to other jurisdictions. Legal AI tools are used by a number of organisations in practice. We can identify two main categories of tools that are currently being used. The first one is tools that are used for document review/due diligence and the second category is proofreading of documents and other similar technologies.

The first category consists of a number of internationally marketed legal services, such as Luminance, Kira and RAVN, which provide support for users in identifying trends and concepts in large sets of documents. The services can be used for due diligence processes and other use cases where the review of documents is required.

The second category, which contains services such as Contract Companion and the Swedish service Donna, includes functions to proofread the style and format of contract documents, often as plug-ins to programs such as Microsoft Word.

Even though it is common that actors in Sweden use some legal AI technology, litigation software based on AI is used to a much more limited extent than in, for instance, the United States. One plausible explanation could be the difference in the common law system in the US and the differences in the nature of litigation processes.

Besides Donna, there are additional examples of AI tools developed in Sweden, both by law firms and independent Legal Tech providers, sometimes in cooperation. In a few cases, there are also examples of the in-house legal development of Legal Tech, one example being a tool for reviewing data processing agreements under the General Data Protection Regulation (GDPR).

3. If yes, are these AI tools different regarding
• independent law firms;
• international law firms; and
• in-house counsels;
and what are these differences?

The main variation between how different actors in Sweden use AI tools is based on their respective capacity in acquiring legal AI services. Large international law firms are, as a main rule, the only actors that are able to develop their own legal AI services, and have done so internationally and implemented such services in Sweden as well.

Several off-the-shelf products are more widely available, for instance, the examples provided under question 2. Such AI products are widely in use by large and medium-sized Swedish law firms (all large and medium-sized law firms asked had invested in AI according to a survey conducted by the Swedish Bar Association's magazine last year).

With smaller actors and law firms, the use of AI technology is more unusual, although there are exceptions and niche use cases where even smaller law firms have developed their own AI technology.

For in-house legal counsel there are a few off-the-shelf products available, as well as a few examples of in-house developments, such as the example provided under question 2. However, the general AI maturity of in-house legal departments seems to be somewhat lower than at large Swedish law firms.

The authors' understanding is that AI technology is limited to certain specific use cases in general among all legal actors in Sweden, and not widely used within the scope of any organisation's core business.

4. What is the current or planned regulatory approach on AI in general?

The current/planned regulatory approach related to AI is still not very clearly defined in Sweden, although work is being done. The Swedish Government has set out several general goals in its national approach to AI. The general ambition is for Sweden to be a leading country in exploiting the benefits of AI, both through strengthened welfare and increased competitiveness.¹⁵³ Sweden has the ambition to become world leading in AI technology, and one ambition is for the legislative tempo to be increased and unnecessary regulatory obstacles that prevent digitalisation to be removed.¹⁵⁴

An area of importance, as indicated by the Swedish Government and other actors, is the creation and adherence to ethical principles for developing and using AI technology, for instance, the guidelines issued by the European Union High-Level Expert Group on Artificial Intelligence (AI HLEG). Furthermore, specific Swedish

¹⁵³ Government of Sweden, *National Approach To Artificial Intelligence* (2018), see www.government.se/491fa7/contentassets/fe2ba005fb49433587574c513a837fac/national-approach-to-artificial-intelligence.pdf accessed 6 July 2020.

¹⁵⁴ Government of Sweden, *Hur Sverige blir bäst i världen på att använda digitaliseringens möjligheter - en skrivelse om politikens inriktning*, Skr. 2017/18:47, 2017, pp 19–20, see www.regeringen.se/rattsliga-dokument/skrivelse/2017/11/skr.-20171847 accessed 6 July 2020.

guidelines have been issued by some stakeholders, for instance, the Swedish IT and telecoms interest organisation (IT & Telekomföretagen).

Another area of importance that has been identified is the question regarding access and ownership of data, as will be further outlined below. Currently, a number of investigations are assessing how data will be more accessible, for instance, to research, including data from public agencies. Central principles for this work will be to ensure the quality of data, protection from faults and manipulation, and to comply with the privacy rights of individuals.

It should also be added that a lot of the planned regulatory approach for AI in Sweden is coordinated within the framework of the EU, led by the European Commission, to increase harmonisation within the EU and also to increase competitiveness in relation to the rest of the world.¹⁵⁵ The Swedish Government has expressed the ambition that Sweden should have a high-level of competence and participate actively in the regulatory discussion regarding AI at the EU level.

In mapping the view on regulation among stakeholders, a concern raised is that it is unclear how current rules apply for the use of AI technology, particularly sector-specific legislation.¹⁵⁶ That could be, for instance, with regard to data protection and the specific rules for healthcare, where there are limitations on the purposes for which personal data can be processed.

To summarise, it is of central priority for the Swedish legislator to assess current legislation from an AI perspective and implement necessary changes. Furthermore, support in the interpretation of legislation is required from courts and public authorities. Access to data, information security and robustness, together with the ethical use of AI, are principles of central importance in the future regulatory approach.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

Introduction

There are currently no AI laws in Sweden. Historically, the legislative approach in Sweden has been to pass technology-agnostic legislation that does not need to

¹⁵⁵ European Commission, *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust* (2020), see <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/excellence-trust-artificial-intelligence> accessed 6 July 2020.

¹⁵⁶ Agency for Digital Government (Myndigheten för digital förvaltning or 'DIGG'), *Främja den offentliga förvaltningens förmåga att använda AI*, I2019/01416/DF, pp 29–30, see www.digg.se/publicerat/publikationer/2020/framja-den-offentliga-forvaltningens-formaga-att-anvanda-ai accessed 6 July 2020.

be changed with every advance in technology. As a result, existing legislation can, in many cases, be applied to AI or machine learning systems. However, existing legislation is, in some cases, ill-suited for dealing with the unique challenges brought by AI. In some cases, existing legislation has been updated to better deal with the challenges brought by AI.

There are four areas of legislation of primary relevance to AI: torts and liability, intellectual property rights, data protection and privacy, and automated decision-making. It is important to note that AI does not have legal capacity in Sweden (ie, electronic personhood), meaning that the natural and legal persons behind the AI carry all relevant rights and responsibilities related to the AI.

Torts and liability

The primary Swedish legislation governing liability in tort (non-contractual liability) is the Tort Liability Act (Skadeståndslagen). The Tort Liability Act is applicable when a party has suffered injury or damage caused by AI caused by another party's negligent or intentional acts. Further, there must be a causal link between the negligent act and the injury or damage.¹⁵⁷ However, because AI cannot be held liable under Swedish law, claims for damages must be directed towards the people behind the AI, for example, the programmer, the user or the person responsible for training the AI. Due to the autonomous nature of AI, as well as the black box problem, it may be difficult to establish negligence and a causal link between the actions of the people behind the AI and the injury or damage.

A tortfeasor may be held liable also on other grounds, primarily strict liability, if there is support for such liability in other legislation. This is the case, for instance, for damages caused by defective products under the Product Liability Act (Produktansvarslagen). In most cases, AI technology falls outside the scope of the Product Liability Act because software is not a product under Swedish law. However, if the AI is embedded in a product, the Product Liability Act may be applicable to the product.

Intellectual property rights

Three main issues are relevant to the protection of intellectual property rights (IPR) related to AI: protection of data and input, protection of the AI itself, and protection of results and AI-generated works. The primary IPR legislation of relevance in relation to AI is the Copyright Act (Upphovsrättslagen). However, other legislation, such as the Patent Act (Patentlagen) and the Trade Secrets

¹⁵⁷ The legal assessment here may be complicated, but it is essentially a requirement of foreseeability.

Act (Lag om företagshemligheter) may, in some cases, also be relevant. Due to the difficulties in protecting IPR-related to AI, companies and organisations may choose to protect them as confidential information and trade secrets.

The main rule in Sweden is that data, such as industrial or transaction data, is not eligible for copyright protection under Swedish law. However, if data is organised into a database, the database as a whole may be eligible for protection under the Copyright Act. Protecting AI technology under the current copyright framework also poses significant challenges. The Copyright Act protects the AI's code and algorithms, but provides no protection for the idea or concept behind the AI – meaning that anyone can create similar AI using a different code or algorithms. Finally, works autonomously created by AI are not eligible for copyright protection under the Copyright Act. However, where humans and AI collaborate in the creative process, AI generated works may be eligible for copyright protection.

Data protection and privacy

The primary legislation governing data protection in Sweden is the GDPR.¹⁵⁸ The GDPR is complemented by the Swedish Data Protection Act (Lag med kompletterande bestämmelser till EU:s dataskyddsförordning) and sector-specific regulations, such as the Patient Data Act (Patientdatalagen). Training and using AI requires large quantities of data. Where that data is personal data, the need to use large quantities of data comes into conflict with the GDPR, and compliance with legislation must be observed.

Automated decision-making

The main legislation that governs automated decision-making under Swedish law is the GDPR. Under GDPR, Article 22, data subjects have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects. GDPR, Article 22, paragraph 2 contains some exceptions to the main rule, including, for instance, that automated decision-making is permitted when it is authorised by EU or Member State law, which also lays down suitable measures to safeguard the rights of data subjects.

Following the reform of the Administrative Procedures Act (Förvaltningslagen), Swedish public authorities are permitted to use automated decision-making when making decisions. The change was made to permit automated decisions, with the ambition to make public authorities compliant with GDPR, Article 22.

Planned legislation and legislative initiatives

¹⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

The majority of legislative initiatives and planned regulations concerning the use of AI and machine learning in Sweden come from the EU. The Swedish Government is currently working on implementing the Digital Single Market (DSM) Directive¹⁵⁹ and the Open Data Directive¹⁶⁰ into Swedish law, which will potentially improve free data access in Sweden (see further question 6).

In 2017, the Swedish Government adopted an ordinance permitting the trial of autonomous vehicles on public roads. A year later, the government released its official government report on autonomous vehicles.¹⁶¹ The report contains, inter alia, discussions on introducing a new definition for the term ‘driver’, regulating the obligations and responsibilities of drivers and owners of autonomous vehicles, as well as discussions on introducing new crimes, such as ‘gross negligence during automated driving on roads’. To date, the report has not resulted in any new legislation.

6. Is free data access an issue in relation with AI?

Yes, free data access is an issue in relation with AI. Training and using AI requires large quantities of data. One of the main issues preventing free access to data is that there is, as a general rule, little to no IPR protection for data, meaning that data is free to use for anybody with access to the data (see question 5). Many companies therefore try to protect the data as confidential information and as a trade secret in order to maintain a competitive advantage.

Most legislative initiatives to improve free data access have come from the EU. These legislative initiatives include the Regulation on a framework for the free flow of non-personal data in the EU,¹⁶² the Open Data Directive, the DSM Directive and Payments Services Directive (PSD2).¹⁶³ The European Commission’s data strategy may provide further insights into planned future legislative initiatives from the EU.¹⁶⁴

Improving access to data in relation to AI is of importance to the Swedish Government. In its national approach to AI, the Swedish Government states that: ‘Access to data is the lifeblood of AI and a crucial part of the infrastructure. ... Appropriate frameworks of principles, norms, standards and rules are therefore

159 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

160 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

161 Swedish Government Official Reports (SOU) 2018:16, *Vägen till självkörande fordon – introduktion*, see www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2018/03/vagen-till-sjalkvkorande-fordon---introduktion accessed 6 July 2020.

162 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

163 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

164 European Commission, *A European strategy for data*, 2020, https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf accessed 6 July 2020.

important prerequisites if Sweden is to realise the benefits of AI in society. Such frameworks must balance fundamental needs for privacy, ethics, trust and social protection with access to the data needed to realise the potential of AI'.¹⁶⁵

As mentioned above, the Swedish Government is currently planning the implementation of the Open Data Directive, which will hopefully improve free access to data in relation to AI. In May 2019, the Swedish Government launched three separate investigations on improving access to public sector data, inter alia, for the purpose of improving access to open data in relation to AI.¹⁶⁶ Once the investigations have been concluded, the Swedish Government will propose a bill on the implementation of the Open Data Directive.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To the best of the authors' knowledge, there are not yet any legal cases in Sweden regarding the provision of legal services or other sectors of relevance related to the use of AI.

It should be added that there are few limitations on how legal services can be provided in Sweden, with actors not admitted to, or acting under the supervision of, the Swedish Bar Association. Actors are generally free to provide legal advice and services, including with the help of technology, with potential legal disputes expected to be ruled by the normal civil law legislation related to contracts and torts.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

As mentioned above, on the whole, there are few regulatory limitations in Sweden with regards to the provision of legal services. What is regulated is, generally, the procedures of court and the lawyers practising under the supervision of the Swedish Bar Association (membership of which, with a few exceptions, is not

¹⁶⁵ Government of Sweden, *National approach to artificial intelligence* (2018), see www.government.se/491fa7/contentassets/fe2ba005fb49433587574c513a837fac/national-approach-to-artificial-intelligence.pdf accessed 6 July 2020.

¹⁶⁶ The Swedish Government's press release (in Swedish) regarding the three investigations, available at www.regeringen.se/pressmeddelanden/2019/05/regeringen-kraftsamlar-kring-artificiell-intelligens-och-opna-data accessed 6 July 2020.

compulsory for the provision of legal services in Sweden). What could be expected is an oversight of the Swedish procedural legislation for courts in conjunction with the possibility to use AI technology in Swedish courts. A governmental inquiry has already been made into public authorities' use of AI for making legally binding decisions and how the legislation should be adapted.¹⁶⁷

9. What is the role of the national bar organisations or other official professional institutions?

The Swedish Bar Association has yet to give recommendations specifically on the use of AI technology. The association has, however, discussed questions regarding AI in its monthly magazine *Advokaten* in issue number 4 from 2019.¹⁶⁸ The association did not make any recommendations in the magazine for lawyers acting under the bar.

Of related significance are the guidelines on how lawyers under the bar can use external IT services,¹⁶⁹ which may have an impact on the use of AI since many Swedish law firms use off-the-shelf products that often are provided as cloud services. A question of importance, for instance, is the storage of confidential information related to clients, where adequate protection must be ensured both from a regulatory and technical perspective. This is especially the case where information is stored in countries other than Sweden, as could be the case when Legal Tech service providers are being used by a lawyer/law firm.

167 Swedish Government Official Reports (SOU) 2018:25 – *Juridik som stöd för förvaltningens digitalisering* www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2018/03/sou-201825 accessed 6 July 2020.

168 See www.advokaten.se/Tidningsnummer/2019/nr-4-2019-argang-85 accessed 6 July 2020.

169 Swedish Bar Association (Advokatsamfundet), *Uppdaterad vägledning om användningen av externa IT-tjänster i advokatverksamhet* (2019) www.advokatsamfundet.se/Nyhetsarkiv/2019/april/uppdaterad-vagledning-om-externa-it-tjanster-vid-advokatverksamhet accessed 6 July 2020.

The People's Republic of China

Lidong PAN, Reiz Law, Shenzhen/Guangzhou

Shuo LU, Reiz Law, Guangzhou

Rong HU, Reiz Law, Guangzhou

1. What is the understanding or definition of AI in your jurisdiction?

Artificial intelligence (AI) is a branch of computer science or intelligent science that involves researching, designing and applying intelligent machines. The main goal of AI is to study the use of machines to imitate and perform certain intellectual functions of the human brain, while the long-term goal is to use automatic machines to imitate human thinking and intellectual activities.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

First, some AI software has been widely used by lawyers in legal practice. For example, 'Fa Xiaotao' is AI software that can assist lawyers in the preliminary search and analysis of a case. Based on the description of the facts of the case, it can analyse and calculate the proportion of winning or losing for similar cases, the number of similar cases involved, the number of similar cases handled in different courts, and the number of similar cases that were successful or unsuccessful and their judgments. 'Fa Xiaotao' uses AI to identify the case, and uses Big Data to retrieve and feedback the above information. To a certain extent, it reduces the pressure of lawyers' analysis and retrieval at the early stage of the case, which helps lawyers to analyse the case more effectively and faster.

Second, some AI software is used in police activities. Typical applications, such as face recognition technology, are widely deployed in densely populated areas, such as airports, stations and squares. They can automatically capture dynamic face images, and compare and verify them with images in public security organ databases. They have played an important role in the investigation activities of public security organs, and have become useful assistants to public security organs pursuing fugitives.

Third, the legal question and answer (Q&A) robot used in court and arbitration commissions. In terms of practical applications, the so-called Q&As are mostly conducted in a fixed mode by clicking the corresponding question, or a relatively professional questioning mode. For some simple cases, the legal Q&A robot helps parties who have not yet commissioned a lawyer to have a simple preliminary understanding of the legal issues related to the case.

In addition, AI software is also used in court proceedings. For example, the ‘mobile micro court’ program, which was built using AI technology, currently used by courts in many provinces. All functions in this program, such as online filing, online court trial, online evidence cross-examination and online delivery, can be done in a web application. It can enable parties and judges to freely discuss and interact in real time with various message types, such as text, expressions, pictures, voice, geographic location and files in an online courtroom, and can also implement message reminder notification after the parties submit evidence and offline.

There is also AI-assisted legislation. At the stage of soliciting legislative opinions using Big Data technology, legislators actively solicit legislative suggestions through Big Data technology to broaden the ways for citizens to reflect. Citizens should also actively express their opinions through the internet and other means to make legislation truly reflect the democratic and scientific nature. The filing and review of established laws can strengthen the supervision of legislative work and improve the quality of legislation. In addition, AI is used to eliminate conflict between different legal norms and adapt to the needs of the socialist legal system.

3. If yes, are these AI tools different regarding
• independent law firms;
• international law firms; and
• in-house counsel
and what are these differences?

Based on the above, AI software has been widely used in Chinese legal practice. In addition to specific software or technology that is only used by judicial institutions (eg, face recognition technology used by public security agencies), other AI software related to law can be provided, including but not limited to independent law firms, international law firms and in-house counsel.

4. What is the current or planned regulatory approach on AI in general?

As far as the current regulatory approach to AI is concerned, China currently provides administrative guidance on AI from the perspective of industrial policy promotion, support and development. The New Generation Artificial Intelligence Development Plan released by the State Council in 2017 highlights this idea.

The Data Security Management Measures (drafting) regulation also regulated the algorithm accordingly. It stipulates that ‘network operators using technologies such as big data and artificial intelligence to automatically synthesize news information, blog posts, posts, comments, and so on through algorithms should indicate the word “synthesis” in a significant way’.

On 28 March 2018, the People’s Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission and Foreign Exchange Bureau jointly issued

the Guiding Opinions on Regulating the Asset Management Business of Financial Institutions (the 'Guiding Opinions'). The Guiding Opinions regulates the application of AI in the financial field, and carries out penetration supervision of the algorithms of intelligent investment advisers in terms of competency requirements, investor suitability and transparent disclosure.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

At present, the legal regulations for AI already have individual provisions in the legislation of e-commerce, data security and intelligent investment consulting.

The E-commerce Law stipulates that an e-commerce operator who sells search results of goods or services to consumers based on their interests, consumption habits and other characteristics should also provide the consumer with options that do not target their personal characteristics, and respect and equally protect the legitimate rights and interests of consumers. This is a legal response to Big Data algorithms.

In criminal law, since AI technology belongs to the high-level part of the application of internet technology, in a realistic situation in which AI criminal law legislation has not yet formed, the conceptual understanding of the pre-emptive method of AI criminal law legislation can be combined with the information network in which the current criminal regulations and computer information system crime are carried out. Taking computer information system crime as an example, computer information systems, as one of the main manifestations of AI infrastructure, are also a focus area of new AI crime.

The basic framework of the Personal Information Protection Law (drafting) takes the approach of empowering information subjects and imposing responsibilities on information controllers and processors. On the one hand, legislation must vigorously promote the development and application of AI technology. On the other hand, it must strengthen forward prevention and restraint guidance to ensure safety and controllability.

6. Is free data access an issue in relation with AI?

Since the Personal Information Protection Law of the People's Republic of China (PRC) and Data Security Law of the PRC are still in the process of being reviewed, China still has no clear legal standards for the definition of personal information and data, and how to protect personal information and data through legal provisions. According to current judicial practice in China, court trials of cases related to personal information and data are mainly based on the Tort Law, Consumer Protection Law, Criminal Law, Copyright Law, Anti-Unfair Competition Law and Information Network Transmission Protection Regulations.

For example, in the case of *Lipeng Pang v China Eastern Airlines and Qunar Company* on infringing personal privacy, the Beijing First Intermediate People's Court made it clear that airlines and online ticketing platforms should be held liable for the leakage of user personal information due to an online ticket purchase. In the case of infringing citizens' personal information by Li Jinbo, Pei Jiahao and Li Guole, that is, using a false loan website to illegally acquire and sell citizen's personal information, Dang Yang People's Court determined that it might affect property safety and it was a serious case that constituted the crime of infringing citizens' personal information. The Shenzhen Intermediate People's Court in the case of unfair competition disputes, such as *Gumi Technology v Yuanguang Technology*, determined that the operator's act of collecting, analysing, editing and integrating Big Data resources with commercial value was protected by the Anti-Unfair Competition Law of the PRC. The unauthorised use of web crawler technology to embezzle Big Data resources and use it to run similar applications constitutes unfair competition. In the case in which the Feilin law firm sued Baidu Wangxun for infringing information networks over communication rights, the Beijing Internet Court determined that the content of the article generated by AI software did not constitute a work, but meanwhile, the court pointed out that its related content could not be used freely. The unauthorised use of the content of the article by Baidu Wangxun constituted copyright infringement.

Therefore, in the context of the current era of Big Data and AI, there are increasing cases of infringement of personal information and data. China has formulated and promulgated the Personal Information Protection Law and Data Security Law, which are of urgent need and meet the needs of the development of the times.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

Throughout current practice, AI used by the court system in the construction of 'smart courts' mainly has the following forms.

The first is the digitisation and datafication of information, that is, the use of technical means to convert non-electronic information, such as voice and paper file text, into reproducible and convertible electronic data, thereby reducing the workload of the judiciary.

The second is the intelligentisation of the case auxiliary system, that is, the use of intelligent means to realise the one-key generation of fixed-format content, such as party information and litigation requests in a judgment document, thereby shortening the time for drafting the document and assisting the judge to improve the quality of the case.

The third is the prediction and supervision of entity referees. Forecasting refers to the AI system's automatic extraction of plot features and intelligent learning of judgment results for a large number of judgment documents, thereby establishing a specific case judgment model. According to the keywords selected by the judge or the facts and plots provided, the statistics of similar cases will be automatically displayed in real time to predict the actual judgment of the case, and more accurate, similar cases will be pushed for the judge's reference.

The fourth is to establish a unified and electronic evidence standard, that is, to summarise the experience through legal Big Data, and embed it in the digital case handling system of the public security, procuratorate and court to regulate judicial behaviour.

Based on the AI technology in the above courts, according to the data published in the 'White Paper on Internet Technology Judicial Application' (2019) issued by the Beijing Internet Court, the total number of legal documents generated by AI technology at the Beijing Internet Court is 117,729, including 4,199 copies of judgments, rulings, mediation and other documents. Therefore, in China's judicial practice, there are already cases where decisions are made through AI technology, and in the future, there will be more courts using AI to assist or automatically generate judgments.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

Currently, there are no planned, discussed or implemented sectorial statutory regulations in China on the use of AI in the legal profession or services that are traditionally rendered by lawyers.

9. What is the role of the national bar organisations or other official professional institutions?

The Ministry of Justice of the PRC is a constituent department of the State Council in charge of judicial administration work within China. It mainly undertakes the following functions:

- formulates guidelines and policies for judicial administration, drafts relevant laws and regulations, formulates departmental regulations, formulates development plans for judicial administration and organises their implementation;
- formulates and organises the implementation of the general knowledge of the popularisation of laws for citizens, guides the legal publicity of various localities and industries, governs the work in accordance with the law and publicises the legal system abroad;

- supervises the work of lawyers and notarisation work, and takes corresponding responsibilities;
- supervises and manages legal aid work nationwide;
- organises the national judicial examination;
- controls the registration and management of judicial appraisers and judicial appraisal agencies nationwide; and
- undertakes other matters assigned by the State Council.

Combined with the New Generation Artificial Intelligence Development Plan released by the State Council mentioned above, the Ministry of Justice will formulate laws and regulations, and ethical standards to promote the development of AI, improve relevant policies to support the development of AI, and establish AI technology standards and intellectual property systems, which will play an important role in promoting the establishment and development of China's AI normative system.

The United States

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1. What is the understanding or definition of AI in your jurisdiction?

There is no single definition or understanding of artificial intelligence (AI) throughout the United States. AI for many is reflected in a spectrum of definitions and understandings, including simple automation and word searches; self-teaching programs, correcting mistakes and improving, and creative responsiveness in terms of making connections; and suggesting lines of research, programmed logic tree responses, affirmative deep learning and initiation. The John S McCain National Defense Authorization Act for Fiscal Year 2019, Pub L 115-232, section 238, 132 Stat 1658 (2018) defined 'AI' as follows for the purposes of certain federal legislation:

- any artificial system that performs tasks under varying and unpredictable circumstance without significant human oversight, or that can learn from experience and improve performance when exposed to datasets;
- an artificial system developed in computer software, physical hardware or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication or physical action;
- an artificial system designed to think or act like a human, including cognitive architectures and neural networks;
- a set of techniques, including machine learning, that is designed to approximate a cognitive task; and
- an artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision-making and acting.¹⁷⁰

It is generally taken that the phrase 'AI' was coined by John McCarthy to mean 'the science and engineering of making intelligent machines'; *Science Daily* notes that the 'modern definition' means 'the study and design of intelligent agents', where an intelligent agent is a system that perceives its environment and takes actions that maximise its chances of success.¹⁷¹ Arthur Samuel coined the phrase 'machine learning' in 1959 to mean 'the ability to learn without being explicitly programmed'. Machine learning is therefore a way to achieve AI. Calum McClelland has distinguished between AI, machine learning and deep learning,

¹⁷⁰ See www.congress.gov/115/bills/hr/5515/BILLS-115hr5515enr.pdf accessed 6 July 2020.

¹⁷¹ See www.sciencedaily.com/terms/artificial_intelligence.htm accessed 6 July 2020.

noting that '[d]eep learning is one of many approaches to machine learning. Deep learning was inspired by the structure and function of the brain, namely the interconnecting of many neurons. Artificial Neural Networks (ANNs) are algorithms that mimic the biological structure of the brain'.¹⁷²

A statutory definition exists within the 'research and development' provisions of the federal service, supply and procurement law:

- '(g) Artificial intelligence defined. In this section, the term "artificial intelligence" includes the following:
- (1) Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
 - (2) An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
 - (3) An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
 - (4) A set of techniques, including machine learning, that is designed to approximate a cognitive task.
 - (5) An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision-making and acting.'¹⁷³

Different states and other agencies may have their own definitions by statute or regulation and definitions may differ depending on the purpose of particular legislation.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms etc), are there already actual AI tools or use cases in practice for legal services?

Limiting the response to legal practice applications (and ignoring certain chess and other gaming AI programs), the following areas of practice have involved AI programs. This is not meant to be an exhaustive or all-inclusive list, but to provide a sampling of the range. No endorsement is made of any particular product.

¹⁷² See <https://medium.com/iotforall/the-difference-between-artificial-intelligence-machine-learning-and-deep-learning-3aa67bff5991>; see also www.leverage.com/blogpost/the-difference-between-artificial-intelligence-machine-learning-and-deep-learning accessed 6 July 2020.

¹⁷³ 10 USCA § 2358.

Prediction studies

- Arditi and Pulket, Predicting the Outcome of Construction Litigation Using an Integrated Artificial Intelligence Model (2009): Using 132 Illinois circuit court cases between 1992 and 2000, a 91.15 per cent prediction rate was obtained with an integrated prediction model (IPM), utilising data consolidation, attribute selection, prediction using hybrid classifiers and assessment.
- Aletras, Tsarapatsanis, Preotiuc-Pietro and Lampos, Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective (2016): Using 584 cases relating to three separate articles of convention, 79 per cent accuracy was achieved using a 'binary classification task where the input of our classifiers is the textual content extracted from a case and the target output is the actual judgment as to whether there has been a violation of an article of the convention of human rights'.

Patent applications

- 'RoboReview™ deploys expert bots to automatically review patent applications and amended claims for novelty, patentability, antecedent basis, claim support, term consistency and more'.¹⁷⁴

Due diligence and contract analysis

- eBrevia: 'eBrevia uses industry-leading artificial intelligence, including machine learning and natural language processing technology, developed in partnership with Columbia University to extract data from contracts, bringing unprecedented accuracy and speed to contract analysis, due diligence, and lease abstraction'.¹⁷⁵
- Luminance: 'reads and understands contracts and other legal documents in any language, finding significant information and anomalies without any instruction'.¹⁷⁶
- Kira Systems: 'automatically converts files into machine readable form, and then uses machine learning models to identify the concepts and clauses you specify'.¹⁷⁷

174 See <https://turbopatent.com/roboreview> accessed 6 July 2020.

175 See <https://ebrevia.com/#homepage> accessed 6 July 2020. eBrevia is now part of DFIN.

176 See www.welcome.ai/tech/legal/luminance-smart-legal-platform accessed 6 July 2020.

177 See <https://kirasystems.com/how-it-works> accessed 6 July 2020.

Research

- ROSS Intelligence: 'With cutting edge NLP technology, pose your research questions like you're talking to another lawyer. Receive pinpoint answers from published & unpublished case law to substantive legal issues in seconds. ROSS is trained to track developments in the law with respect to your legal issues and send notifications with any relevant legal updates.'¹⁷⁸
- Westlaw and Lexis also employ certain aspects of AI in search recommendations.

Currency

- 'Artificial Intelligence Coin, or A.I. Coin, is a transaction-centric digital currency based on the bitcoin software. It allows you to immediately complete digital transactions, because similar to cash, there is no wait for confirmation. Its participants cooperate to efficiently process transactions, and fairly share the mining rewards without expensive proof-of-work effort.'¹⁷⁹

Dispute resolution

- DoNotPay identifies itself as 'the home of the world's first robot lawyer. Fight corporations, beat bureaucracy and sue anyone at the press of a button'. It says the user can 'fight corporations, beat bureaucracy, find hidden money, sue anyone, automatically cancel your free trial'. It features an area where parking tickets can be disputed. It appears to provide forms and suggested questions. Whether or not this would be deemed to be practicing law in an unauthorised fashion if offering suggestions for how to fill in and submit appeals is an open issue.
- Adjusted Winner and Smartsettle are algorithms that come to a solution based on input of ranking and values of various factors.

178 See <https://rossintelligence.com> accessed 6 July 2020.

179 See www.ai-coin.org accessed 6 July 2020.

3. If yes, are these AI tools different regarding

- independent law firms;**
- international law firms; and**
- in-house counsel;**

and what are these differences?

There are jurisdictional issues relating to what constitutes the unauthorised practice of law. In the US, individual lawyers are regulated and have ethical obligations under their respective codes of professional conduct on a state-by-state basis (including territories). The American Bar Association (ABA) has adopted a resolution that encourages online providers of legal documents to adopt the ABA Best Practice Guidelines that contain provisions regarding what such providers should and should not say about their services.

So-called 'disruptor companies' are more commonly used by in-house counsel to save on costs by enabling certain tasks to be done by software instead of newer lawyers, causing concern in some quarters about attorney employment. On the other hand, some argue that lawyers are freed up to do more substantial work. In any event, lawyers remain responsible for the work product that ultimately bears their names.

The use of AI tools by lawyers remains within the province of ethical considerations, and as with any outsourcing or cloud usage, lawyers remain responsible for ensuring compliance with competence (including certain levels of technological competence necessary to perform their tasks), client confidentiality, the role of lawyer as adviser and supervisory responsibilities.

Other differences between outside counsel and in-house counsel include the cost allocation. As with legal research programs or other such items, the question will be whether this is overhead or whether use by a firm of such AI may be passed on to the client.

As for so-called international law firms, at least in the US, individual lawyers remain regulated by their jurisdiction, regardless of their affiliation with multinationally based firms.

4. What is the current or planned regulatory approach on AI in general?

From an ethics perspective, there is at least one view that rules of professional conduct have not kept up with new technology. As reported in *Law360* on 24 April 2018: 'Despite the widespread adoption of AI tools to conduct contract reviews and legal research, among a host of other tasks, there has been no corresponding uptick in guidance from regulatory bodies on how lawyers can ethically use these increasingly sophisticated tools, according to a panel of

corporate legal leaders and legal tech experts at the Association of Corporate Counsel's midyear conference of in-house attorneys...'.¹⁸⁰

At the national level by Executive Order 13589, issued on 11 February 2019, the US President declared that '[c]ontinued American leadership in AI is of paramount importance to maintaining the economic and national security of the United States and to shaping the global evolution of AI in a manner consistent with our Nation's values, policies, and priorities'. Among other things, the Executive Order called for the Director of the Office of Management and Budget, in coordination with the White House Office of Science and Technology Policy (OSTP) and the National Economic Council, as well as consulting with other relevant stakeholders to:

'(i) inform the development of regulatory and non-regulatory approaches by such agencies regarding technologies and industrial sectors that are either empowered or enabled by AI, and that advance American innovation while upholding civil liberties, privacy, and American values; and (ii) consider ways to reduce barriers to the use of AI technologies in order to promote their innovative application while protecting civil liberties, privacy, American values, and United States economic and national security.'¹⁸⁰

Again, regulatory approaches may occur at the national as well as state levels and, regarding the legal profession, within the province of regulatory authorities and the courts.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

In its *Year One Annual Report* issued in February 2020,¹⁸¹ the OSTP noted examples of federal actions removing barriers to AI innovation. These included steps taken by the Department of Transportation addressing automated vehicles, the Federal Aviation Administration addressing regulations concerning unmanned aircraft systems (UAS),¹⁸² approval by the Food and Drug Administration (FDA) of an AI device for the detection of diabetic retinopathy¹⁸³ and a proposed regulatory framework for AI-based software as a medical device.¹⁸⁴ The impact of Covid-19 caused the FDA to readdress its regulatory approach to clinical

180 The Executive Order is available at www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence accessed 6 July 2020.

181 The report is available at www.whitehouse.gov/wp-content/uploads/2020/02/American-AI-Initiative-One-Year-Annual-Report.pdf accessed 6 July 2020.

182 See Presidential Memorandum for the Secretary of Transportation, 25 October 2017 www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-transportation accessed 6 July 2020.

183 See www.fda.gov/news-events/press-announcements/fda-permits-marketing-artificial-intelligence-based-device-detect-certain-diabetes-related-eye accessed 6 July 2020.

184 See www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device accessed 6 July 2020.

decision support software; otherwise, the formation of regulations in this area has been slow but informed.¹⁸⁵

The John S McCain National Defense Authorization Act for Fiscal Year 2019, noted above, required the Secretary of Defense to coordinate the department's efforts 'to develop, mature, and transition artificial intelligence technologies into operational use' with an emphasis on 'operational problems and coordinate activities involving artificial intelligence and artificial intelligence enabled capabilities within the Department'.¹⁸⁶

States have also begun to enact legislation, particularly in the area of automated vehicles.¹⁸⁷

6. Is free data access an issue in relation with AI?

The US has no one uniform law or regulation like GDPR, and in addition to numerous federal laws, there are state laws as well governing privacy considerations.¹⁸⁸ Some are industry specific, such as those dealing with banking or health law.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

At the time of writing, AI as a phrase has appeared in over 200 cases, both reported and unreported, throughout the US, but that does not mean that AI itself was a litigable issue. In one interesting but non-precedential opinion, a pro se inmate sued Google, Apple, Oracle, Facebook, Yahoo, YouTube, Instagram, Amazon, Intel, AT&T, Mobil, Occidental, Shell, Standard Oil, Gulff Oil, Sunoco, Phillips 66, Marathon, Texaco, Pennzoil, and Exxon for antitrust violations, claiming the high-tech and oil companies are in a symbiotic relationship, with the high-tech companies using 'oil to build, construct and power their products', and oil companies 'utilize artificial intelligence to facilitate their accounting, business, treasury and corporate functions'.¹⁸⁹ The case was dismissed due to the plaintiff's lack of antitrust standing.

In a state court case dealing with computer generated animation (GMA) the Supreme Court of Pennsylvania ruled that 'CGA is potentially admissible as

185 See www.mddionline.com/new-developments-fda-regulation-ai accessed 6 July 2020.

186 See www.congress.gov/115/bills/hr5515/BILLS-115hr5515enr.pdf accessed 6 July 2020.

187 See www.loc.gov/law/help/artificial-intelligence/americas.php#us accessed 6 July 2020.

188 See <https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa>; www.varonis.com/blog/us-privacy-laws; <https://fas.org/sgp/crs/misc/R45631.pdf> accessed 6 July 2020.

189 *Demos v Google*, No 19-CV-04433-HSG, 2019 WL 6341318, at *1 (ND Cal 27 November 2019), appeal dismissed sub nom. *Demos v Google, Inc*, No 19-17541, 2020 WL 1441425 (9th Cir 23 January 2020).

demonstrative evidence, as long as the animation is properly authenticated, it is relevant, and its probative value outweighs the danger of unfair prejudice or confusion'.¹⁹⁰

Other issues that are the subject of extensive commentary but no precedential cases as yet involve copyright ownership where the program generates prose or poetry, art or music, or liability where the AI is at fault in autonomous vehicles, among others.

Interestingly, the Ninth Circuit has held that a monkey as a non-human lacked statutory standing under the Copyright Act to sue for infringement of a 'selfie' the monkey took with a camera handed over by a photographer.¹⁹¹ How this will develop in the area of computer artificial intelligence remains to be seen.¹⁹²

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

The rules of professional responsibility governing lawyers address AI indirectly. As noted above, there is some sentiment that new rules are needed. Regardless, ABA Model Rule 1.1, requiring competent representation of clients, is informed by a comment that states: 'To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject'.

ABA Model Rule 1.2 deals with allocation of authority; to the extent that a lawyer will utilise AI and there is a cost, this needs to be discussed with the client. If the client insists on using particular software and the lawyer does not trust that product, and it impedes the lawyer's ability to provide competent representation, the lawyer may need to withdraw. This also implicates ABA Model Rule 1.4, requiring the lawyer to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished'. Whether or not the client may be billed for the use of AI implicates Rule 1.5 and the reasonableness of fees; whether AI is treated as an overhead or cost that may be passed on is an issue. ABA Model Rule 1.6 mandates that the 'lawyer shall make reasonable efforts to prevent the inadvertent or unauthorised disclosure of, or unauthorised access to, information relating to the representation of a client'. The use of AI, particularly

¹⁹⁰ *Com v Serge*, 586 Pa 671, 699, 896 A.2d 1170, 1187 (2006).

¹⁹¹ *Naruto v Slater*, 888 F.3d 418 (9th Circuit 2018)

¹⁹² See <http://cyberlaw.stanford.edu/blog/2018/05/artificial-intelligence-art-who-owns-copyright-0> accessed 16 September 2020.

where cloud storage or other licensing arrangements are involved, implicate who is using it, who sees the raw data and the results, who has access and what steps are taken to protect information.

The lawyer as adviser per Model Rule 2.1 requires the lawyer to take into account various non-legal factors and considerations, such as economics, in rendering advice.

Of particular importance are the lawyer's supervisory obligations, found in ABA Model Rules 5.1 (partners and those with managerial authority) involve reasonable efforts to ensure effective measures to provide reasonable assurance of ethical compliance. Model Rule 5.3 imposes the same standards in engaging non-lawyer assistance. More esoteric issues arise as to whether the use of AI constitutes the practice of law, such that non-lawyers engaging in it are violating ABA Model Rule 5.5.

9. What is the role of the national bar organisations or other official professional institutions?

Generally speaking, and with limited exception, lawyers, not law firms, are regulated in the US. Bar associations and the regulatory authorities are considering the impact of the definition of legal services and the fact that various entities (sometimes called disruptor companies) are performing what may have been called traditionally 'legal services'. To date, those entities are not generally regulated. It is suggested that, bar associations need to take a broad-minded approach, as the access to legal services – the so-called justice gap – is driving reform in certain jurisdictions, including the use of legal forms and non-lawyer ownership.¹⁹³

¹⁹³ See, eg, ABA Resolution 115, Encouraging Regulatory Innovation www.americanbar.org/groups/centers_commissions/center-for-innovation/Resolution115 accessed 6 July 2020.



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