Brazil

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Introduction

The improvement of legal parameters for artificial intelligence applications becomes more pressing as the industry progresses in Brazil, affecting the lives of millions of people and raising questions about how the law should regulate these new technologies.[84] A survey by IBM in partnership with Morning Consult points out that, in the country, chatbots (virtual agents for customer service) represent the most common use of AI applications (42 per cent), followed by call centre automation and research analysis.[85] In these cases, engagement with artificial intelligence systems is more directly perceived by the general population. In other cases, however, AI tools operate behind the scenes, such as the use of automation software by Brazilian judiciary bodies.[86] This chapter is dedicated to providing an overview of the regulatory situation regarding the use of artificial intelligence applications in Brazil, as well as their particular use by Brazilian public institutions that execute the legal system and by companies, associations and individuals that provide legal services in this jurisdiction.

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

Article 2 of PL 21/2020[87] (Bill No 21/2020), opener of the legal framework for the development and use of AI by the government, companies, various entities and individuals, presents the following definition:

'Art. 2. For the purposes of this Law, it is considered:

I – artificial intelligence system: the system based on a computational process that can, for a given set of objectives defined by man, make predictions and recommendations or make decisions that influence real or virtual environments [emphasis added].'

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84 See https://suprema.stf.jus.br/index.php/suprema/article/view/20 accessed 20 July 2021.

85 See https://www1.folha.uol.com.br/mercado/2021/07/brasil -speeds-law-for-artificial-intelligence-say-specialists. shtml accessed 20 July 2021.

86 See https://suprema.stf.jus.br/index.php/suprema/article/view/20 accessed 20 July 2021.

87 See www.camara.leg.br/propostas-legislativas/2236340 accessed 20 July 2021.

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

In recent years, several Brazilian companies, as well as international companies operating in the Brazilian market, have been marketing technological products aimed at the legal sector. Research points to a popularisation of the use of techniques based on machine learning, a factor that is motivated at least in part by the policy of open access to judicial data. The website of the Brazilian Association of Lawtechs and LegalTechs[88] reveals that, in March this year, more than 100 companies in the legal sector offered products or solutions aimed at the legal public in a broad sense. Although not all of these companies make use of artificial intelligence, some of them are explicitly dedicated to this type of application, as smart technology providers for the public sector or as data analysis and jurimetrics providers.[89]

In Brazil, several public institutions have been investing in the development of artificial intelligence with the primary objective of speeding up their procedures. About half of Brazilian courts have AI projects in operation or under development.[90] There are 64 artificial intelligence tools in 47 courts, in addition to the platform operated by the National Council of Justice (CNJ), with applications ranging from the transcription of hearings and drafting suggestions to the judgment of admissibility of appeals and the calculation of the probability of decision reversals. This trend of the digitalisation of justice is increasingly necessary for the management of the efficiency of the courts, considering that Brazil is a unique case in terms of judicialisation with a very expressive number of lawsuits: about 78 million, according to the latter survey carried out by the CNJ.[91]

The robot Victor, for example, streamlined the daily life of the Brazilian Supreme Court (Supremo Tribunal Federal or STF). The machine is capable of doing in five seconds a job that was previously done by employees in about 30 minutes, helping in the resolution of cases through the analysis of requirements of general repercussion for the extraordinary appeals that arrive at the STF. Through this system, the Supreme Court had a gigantic gain in efficiency in carrying out the admissibility judgment, resulting in a reduction of 80 per cent of these appeals. Artificial intelligence also favours the standardisation of the STF's case law, systematising understandings.

Parallel to the movement inside public institutions mentioned above, there are many law firms that have been investing in AI resources to optimise their time, avoiding repetitive tasks and reducing their operating costs through tools that offer automated assistance in litigation, automatic generation of documents and contracts, jurimetrics and analysis and reorganisation of the cases portfolio.

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88   AB2L, https://ab2l.org.br/radar-lawtechs accessed 20 July 2021.

89   See https://suprema.stf.jus.br/index.php/suprema/article/view/20 accessed 20 July 2021.

90   See https ://ciapj.fgv.br/sites/ciapj.fgv.br/files/report_ai_ciapj.pdf accessed 20 July 2021.

91   See https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/09032021 -Artificial-Inteligencia-is-present-in-half-of-Brazilian-courts--aponta-estudo-inedito.aspx accessed 20 July 2021.

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

Such advance in the adoption of technological tools by law firms and other legal sectors has given rise to the need to discuss the ethical limits of this usage. Outdated formulas in legal praxis result in slowness, bureaucratisation and injustices, making the advantages of applying AI technologies to law obvious. On the other hand, there are important risks involved in the implementation of the new model – regarding the protection of personal data, for example – which require a public debate about this paradigm shift.

On 6 April this year, the Brazilian Strategy for Artificial Intelligence (EBIA) was published through Ordinance No 4617 of the Ministry of Science, Technology and Innovation (MCTI). According to Stanford University's 2021 Artificial Intelligence Index, Brazil is the 31st country to outline a national strategy for artificial intelligence.[92]

The EBIA was developed in three stages. The first step was the hiring of a specialised AI consultancy, with the objective of carrying out a study on the potential social and economic impacts of the large-scale use of artificial intelligence tools and the presentation of proposals to mitigate any negative effects arising from this use. The second stage consisted of research on international best practices, covering topics such as general productivity gains, consequences on the labour market, education and professional requalification policies, and incentives for research, development and innovation in the field of AI, with the application of this technology in areas such as health, urban mobility and public safety. The third stage was carried out through a public consultation that had more than 1,000 contributions from civil society.[93] Based on these studies, research and recommendations, the EBIA was established with three transversal axes and six vertical axes.

The three transversal axes – to be considered in all AI applications – are:

1. Legislation, regulation and ethical use: legal, regulatory and ethical parameters for the development of AI;

2. AI governance: governance structure that promotes methods and procedures to ensure compliance with AI principles when developing solutions with this technology; and

3. International aspects: cooperation and integration platforms for exchanging information, experiences, regulations and good practices in conducting AI on the world stage.

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92   See https://mittechreview.com.br/a-estrategia-brasileira-de- intelligence-artificial accessed 20 July 2021.
93   *Ibid.*

The six vertical axes – which define the priority areas for applying AI – are:

1. Education: qualifying and preparing current and future generations for the changes in AI;

2. Workforce and training: prepare workers for the transformation of the labour market, with the replacement of occupations by automation and for the emergence of new positions; professional qualification and requalification;

3. Research, development, innovation and entrepreneurship: promoting public and private investments in R&D to encourage AI innovation in a holistic way – technical, social, legal and ethical aspects;

4. Application in productive sectors: promote the use of AI in different sectors of the economy to improve the efficiency of Brazilian companies;

5. Application in the public sector: promote the ethical use of AI by the public institutions to improve the quality of services provided to society, favouring economy and efficiency; and

6. Public safety: encourage the non-discriminatory use of AI in the area of public safety, respecting the right to privacy and protection of the data subject's image, with supervisory monitoring mechanisms to ensure its ethical use.

In addition, the EBIA has six initial strategic objectives that should be broken down into specific actions:

1. Contribute to the elaboration of ethical principles for the development and use of responsible AI;

2. Promote sustained investments in AI research and development;

3. Remove barriers to innovation in AI;

4. Train professionals for the AI ecosystem;

5. Encourage innovation and development of Brazilian AI in an international environment; and

6. Promote an environment of cooperation between public and private entities, industry and research centres for the development of AI.

The EBIA represents the beginning of a conversation on a topic of enormous relevance. However, it lacks concreteness and a more detailed action plan. There are no clear budget guidelines for putting its determinations into practice, or a risk-based debate on the application of AI technologies. The strategy touches

on ethical aspects in a very superficial way, without offering objective, standard procedures and ground rules for regulating the use of tools in the country.[94]

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

Three months after the publication of the EBIA, the Brazilian Chamber of Deputies took its first step towards a Bill (PL) that creates the Legal Framework for Artificial Intelligence. In early July this year, the House approved the urgency regime for voting PL 21/2020, whose objective is to determine the principles, rights, duties and governance instruments for the development of AI technology in Brazil.[95]

The draft under consideration provides for some noteworthy rules. One of them is the attribution of responsibility for damages to 'artificial intelligence agents', which are either the developers (programmers) or those responsible for monitoring the implementation of the software. It is a controversial option, considering that it may inhibit the activity of implementing AI systems. There are uncontroversial positions though, such as the mandatory documentation of steps and decisions in the software development cycle and related prior impact analysis, effective for prevention of liability for damages. On the other hand, the creation of certification procedures that establish quality and certification marks for AI applications was not foreseen.[96]

Apparently, in view of such a system of liability to be adopted in Brazil, victims of torts caused by AI will be able to pursue damages from the technology manufacturer. Here we see a delicate issue considering the possibility that, when acting autonomously, the AI tools perform acts not originally considered by their manufacturer or developer. Even though the involved parties use maximum diligence, the results arising from the use of artificial intelligence are not fully predictable in the current state of the art. Therefore, there is a need to discuss regulatory alternatives for civil liability regarding unpredictable results of the implementation of artificial intelligence applications in the country.

Is free data access an issue in relation to AI?

Article 20 of the General Data Protection Law (LGPD, Law No 13.709/2018)[97] tries to address this issue, providing for the right of holders to request the review of

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94 See https://www1.folha.uol.com.br/mercado/2021/07/brasil-apressa-lei-para-inteligencia-artificial-dizem-especialistas.shtml accessed 20 July 2021.

95 *Ibid.*

96 See https://politica.estadao.com.br/blogs/gestao-politica-e-sociedade/o-debate-sobre-o-marco-legal-da-inteligencia-artificial-no-brasil accessed 20 July 2021.

97 See www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm accessed 20 July 2021.

automated decisions of personal data when these affect their interests, including the mapping of personal, professional, costumer and credit profiles, as well as any aspects of the person's personality.[98]

Moreover, in Article 20, section 1, the LGPD also determines that the controller of systems that make decisions based solely on the automated processing of personal data must provide information regarding the criteria and procedures used for the automated decision. However, as artificial intelligence applications' choices are defined over detectable properties based on the data, machine learning systems do not consider normative justifications for decision making,[99] which brings about some technical struggle to comply with the law precepts.

Are there already current 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?

Case law understandings and common views on the subject are not yet relevantly established in Brazil.

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 National Council of Justice (CNJ) issued Resolution 332/2020, establishing ethical, transparency and governance requirements that must be observed in the use of intelligent systems in judicial contexts. In view of the importance of access to data for the development of machine learning, the CNJ also established, through Resolution 334/2020, the Advisory Committee on Open Data and Data Protection within the scope of the Brazilian Judiciary. The Committee's objective is to assist the CNJ in the construction of data access policies that balance the demands of transparency and technological development, on the one hand, and, on the other, the need to protect the data of individuals mentioned in the context of court documents, establishing standards and technical and administrative measures for the proper processing of judicial data.[100]

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98   See https://mittechreview.com.br/a-estrategia-brasileira-de-inteligencia-artificial accessed 20 July 2021.

99   See https://suprema.stf.jus.br/index.php/suprema/article/view/ 20 accessed 20 July 2021.

100 *Ibid.*

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

In 2018, the Brazilian National Bar Association (OAB) announced the creation of the Artificial Intelligence Coordination initiative to regulate the use of AI in the legal professions in the country. At the time, there was an institutional concern with the launch of artificial intelligence tools for legal assistance in cases without the involvement of lawyers through 'virtual robots'. The main objective of the initiative was to draw a harmonious path between legal professionals and technological development, rejecting 'opportunists' who would subordinate the role of attorneys to 'a marginal role through the disorderly and unruly massification' of AI tools.[101] The entity pointed out that the Brazilian Statute of Law provides that the activities of legal consultation are private activities of lawyers duly registered at the National Bar Association.

To contribute to the modernisation of law in Brazil, the Federal Council of the OAB offers the OABJuris, an AI application made available free of charge to professionals regularly registered. The tool helps attorneys across the country to find the most appropriate case law, to have stable information about the recent decisions of the courts and to make safer decisions about whether to appeal or not.[102]

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101 See .www.migalhas.com.br/quentes/282968/oab-cria-grupo-para-regular-inteligencia-artificial accessed 20 July 2021
102 See https://jurisprudencia.oab.org.br/read- more accessed 20 July 2021.