Brazil

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Introduction

In 2021 the growth in the use of artificial intelligence (AI) has been consolidated on several fronts, including important advances in pattern recognition and information extraction from unstructured texts, image processing with relevant applications in medicine and anti-money laundering resources and the automation of legal compliance. However, the promises of broad progress in autonomous vehicles as well as the expectation that AI would be a powerful ally against Covid-19 have yet to materialise.[80]

The use of AI to filter content on social networks has raised ethical questions on transparency, boosting a legislative initiative in Brazil with the approval in the Brazilian Chamber of Deputies of the Bill 2630/2020, the so-called 'Fake News Act'. Such imposition reflects the true distinctive element of 2021, which shall be remembered as the year of the 'regulatory turn' of AI. The 'soft-law' era in AI regulation, along with its abstract ethical principles, has come to an end. An era of 'hard law' arrives to ensure reliability in AI systems, establishing procedural obligations reflecting best practices in system development, such as impact and risk analysis, governance over data, transparency and tests on accuracy.[81]

In September 2021 the Brazilian Chamber of Deputies approved PL 21/2020 as the Legal Framework for Artificial Intelligence. Contrary to the international hard law shift, the Brazilian initiative still compiles abstract ethical principles without establishing binding obligations for public and private sectors, except for a couple feeble recommendations of impact and risk analysis.[82] The Bill is now being scrutinised by the Senate and is expected to be amended in 2022 to ensure the effective development of reliable AI as a consequence of the insertion of a minimum set of binding governance standards for high-risk systems.[83]

The improvement of legal parameters for AI applications becomes more pressing as the sector progresses in Brazil, affecting the lives of millions and raising questions about how the law should regulate new technologies.[84] A survey by IBM

80 See https://politica.estadao.com.br/blogs/fausto-macedo/a-inteligencia-artificial-em-2021-o-ano-da-virada-regulatoria accessed 29 March 2022

81 *Ibid*.

82 *Ibid*.

83 See https://www.conjur.com.br/2021-set-02/opiniao-diretrizes-aperfeicoamento-marco-ia-brasil accessed 29 March 2022

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

in partnership with Morning Consult points out that, in Brazil, 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 AI 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 Brazil's judiciary bodies.[86] This chapter provides an overview of the regulatory framework regarding the use of AI applications in Brazil, as well as their use by public institutions which execute the legal system and by companies, associations, and individuals which provide legal services in this jurisdiction.

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

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

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

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 recent years, several of Brazil's 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 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 2021, 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 AI, some of them are specifically dedicated to this type of application, as smart technology providers for the public sector or as data analysis and jurimetrics providers.[89]

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

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

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

88 AB2L, see https://ab2l.org.br/radar-lawtechs accessed 28 April 2022.

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

In Brazil, several public institutions have been investing in the development of AI with the primary objective of speeding up their procedures. About half of Brazil's courts have AI projects in operation or under development.[90] In 2021 there were 64 AI 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 digitisation trend is increasingly necessary for managing the efficiency of the courts, considering that Brazil is unique in terms of judicialisation with a very expressive number of lawsuits: around 78 million, according to a survey carried out by the CNJ.[91]

The robot Victor, for example, has streamlined the running of the Supreme Court of Brazil (Supremo Tribunal Federal or STF). The machine is capable of completing a job in five seconds which would previously have been done by employees in approximately 30 minutes, helping 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 STF has achieved a huge gain in efficiency in carrying out the admissibility judgment, resulting in a reduction of 80 per cent of these appeals. AI also favours the standardisation of the STF's case law, systematising understandings.

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

4. 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 use. Outdated formulas in legal practices result in slowness, bureaucratisation and injustices, making the advantages of applying AI technologies to law obvious. There are, nevertheless, important risks in the implementing this the new model, for example, regarding the protection of personal data, which requires public debate on this paradigm shift.

On 6 April 2021, 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 such a national strategy.[92]

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

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

The EBIA was developed in three stages. The first 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 AI tools and the presentation of proposals to mitigate any negative effects arising from this use. The second consisted of research into 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, with the application of AI in areas such as health, urban mobility and public safety. The third stage was carried out through a public consultation which received over 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, which are 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.

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: preparing workers for the transformation of the labour market, with the replacement of jobs through automation and for the emergence of new positions, professional qualifications and re-qualifications;

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 – promoting the use of AI in different sectors of the economy to improve the efficiency of Brazilian companies;

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

6. Public safety – encouraging the non-discriminatory use of AI in areas 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.

93 *Ibid*.

In addition, the EBIA has six initial strategic objectives which can be divided 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 R&D;

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.

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 importance. However, it lacks concreteness and a more detailed action plan. There are no clear budget guidelines for implementing its recommendations, nor has there been 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 such tools in Brazil.[94]

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

Three months after the EBIA was published, the Brazilian Chamber of Deputies took its first step towards a Bill (PL) that creates the Legal Framework for Artificial Intelligence. In September 2021, the House approved PL 21/2020, the objective of which is to determine the principles, rights, duties and governance instruments for the development of AI technology in Brazil.

The draft which is now to be considered by the Senate provides for some noteworthy rules. One of which is the attribution of responsibility for damages to 'artificial intelligence agents', who are either the developers (programmers) or those responsible for monitoring the software's implementation. It is a controversial option, considering that it may inhibit the implementation of AI systems. PL 21/2020 contains uncontroversial positions too, such as the compulsory documentation of steps and decisions in the software development cycle and related prior impact analysis, effective for prevention of liability for

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

damages. Nonetheless, the creation of certification procedures to establish quality and certification marks for AI applications was not foreseen.[95]

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 and/or developer. Even though the involved parties use maximum diligence, the results arising from the use of AI 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 AI applications in the country.

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

Article 20 of the General Data Protection Law (LGPD, Law No. 13.709/2018)[96] attempts to address this issue, providing for the right of holders to request the review of automated decisions of personal data when these affect their interests. This includes the mapping of personal, professional, customer and credit profiles, as well as any aspects of the person's personality.[97]

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 AI applications' choices are defined over detectable properties based on the data, machine learning systems do not consider normative justifications for decision making,[98] which brings about technical struggle to comply with the principles of the 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?

Case law understandings and common views on the subject are yet to be suitably established in Brazil.

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95 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.

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

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

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

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 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 appropriate processing of judicial data.[99]

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

In 2018, the Brazilian National Bar Association (OAB) announced the creation of the Artificial Intelligence Coordination to regulate the use of AI in the legal profession. At the time, there was an institutional concern with the launch of AI tools for legal assistance in cases without the involvement of lawyers through 'virtual robots'. The main objective of the initiative was to coordinate between legal professionals and technological development, rejecting 'opportunists' who would subordinate the role of lawyers to 'a marginal role through the disorderly and unruly massification' of AI tools.[100] 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 currently offers OABJuris, an AI application made available free of charge to registered professionals. The tool helps attorneys across the country to find the most appropriate case law, to have stable information about recent decisions of the courts and to make safer decisions about whether to appeal or not.[101]

99 *Ibid*.

100 See https://www.migalhas.com.br/quentes/282968/oab-cria-grupo-para-regular-inteligencia-artificial accessed 20 July 2021.

101 See https://buscajuris.com.br/ accessed 20 July 2021