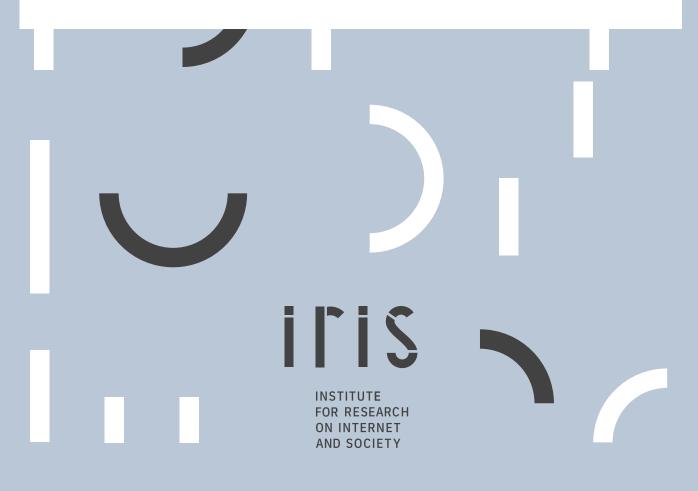# Brazilian Legal Framework for Artificial Intelligence

Contributions to the Federal Senate's Jurists Committee

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Presentation

This document brings together the contributions of the Institute for Research on Internet and Society (IRIS)[1] to the Committee of Jurists on Artificial Intelligence from the Brazilian Senate, in the submitting process of written contributions to the Brazilian Congress to the Draft Bill 21/2020. It presents observations on the proposals regarding principles and objectives, transparency and explainability, definitions, jurisdictional scope, civil liability, human supervision and review, risk management and enforcement mechanisms, and regulatory design regarding artificial intelligence. With these comments, we seek to contribute to the public debate, which is why the text is also available on the institute's website, and translated. We also welcome the efforts for an AI framework in a multistakeholder and collaborative process, which should guide the matter in Brazil.

1. Principles and objectives

In the current version of the Draft Bill 21/2020, the articles 3 and 5 deal with principles and objectives for the use of artificial intelligence (AI). The role of these rules is fundamental for the future application of the law, as they will guide the performance of individuals and legal entities involved in the development of AI in the country.

Currently, the principles regarding more sensitive themes, such as non-discrimination and neutrality, have notably little normative force and are not followed by non-compliance consequences. In these two topics, the project merely determined the need to mitigate the possibility of using AI for discriminatory, illicit or abusive purposes (art. 5, III); and to recommend the search for neutrality, by suggesting "that the agents acting in the chain of development and operation of artificial intelligence systems seek to identify and mitigate biases contrary to the provisions of current legislation"(article 5, IV - free translation).

This version leaves important and dangerous gaps. Moreover, it goes against the constitutional text and international treaties recently ratified by Brazil, as is the case of the Inter-American Convention against Racism, Racial Discimination and Related Forms of Intolerance.[2] Considering these commitments and the Brazilian reality, the regulation of AI should not leave any spot, even if implicitly, for providers of artificial intelligence systems not to have the duty to avoid its use for discriminatory, illicit or abusive purposes. Otherwise, it may not only allow violations of fundamental rights, but also imply the absence of accountability in these cases.

In a context that aims to fight discrimination, the Draft Bill also ignores the latent debate on algorithmic racism, which has gained space with each new "isolated" case in

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1   Authors: Gustavo Rodrigues, Fernanda Rodrigues, Paulo Rená, Luiza Brandão, Victor Vieira e Juliana Roman. Translation to English: Luiza Brandão. IRIS is a non-profit private association dedicated to research and knowledge building about the internet, technology, and its impacts on society. More information available at: <https://www.irisbh.com.br>.

2   OAS. **Inter-American Convention against Racism, Racial Discimination and Related Forms of Intolerance.** Guatemala. Available at: https://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism.asp. Access on: 11 July 2022.

the media,[3] involving discrimination against black people through new technologies.[4] In a diverse, and mixed-race country, where racism crosses different sectors of society, it is essential to adopt measures that effectively combat any manifestation of prejudice. Thus, the inclusion of principles that specifically address anti-racism is essential to ensure that agents working in the development and use of artificial intelligence systems actively commit themselves against the existence of discriminatory biases.

2. Transparency and explainability

Despite providing for the principle of transparency in its article 5, V, the Draft Bill 21/2020 also presents important restrictions on its application, which can make access to information related to AI systems difficult. According to the current provisions, an individual could only request more information about such systems in the following cases: a) interaction with AI systems, such as chatbots; b) to identity the individual or legal entity operating an AI system; and c) to know general criteria that guide the functioning of an AI system, respecting commercial and industrial secrets, "when there is a potential for a relevant risk to fundamental rights".

Reducing the principle of transparency to only the three hypotheses presented in the current Draft Bill 21/2020 is contrary to what is provided for in the Brazilian General Data Protection Law (LGPD).[5] The LGPD article 20 guarantees the data subject the possibility of requesting both the review of automated decisions and the provision of "clear and adequate information regarding the criteria and procedures used for the automated decision", respecting commercial and industrial secrets, whenever their interests are reached.

According to the United Nations Educational, Scientific and Cultural Organization (UNESCO) report about ethics and AI,[6] individuals must have access not only to the data involved in automated decisions, but also to the reasons for the result that affects their rights and freedoms. People should also be able to challenge decisions for the purpose of reviewing and correcting the decision. Making this information clearer is a right not only for the individual concerned, but it also provides more security and reliability regarding that system for society. In the same sense, the European Commission on building trust in AI systems[7] points to transparency as intrinsically

3   NOTÍCIA PRETA. **Sistema de reconhecimento facial do Ceará inclui foto de Michael B. Jordan como suspeito de chacina.** 07/01/2022. Available at: https://noticiapreta.com.br/sistema-de-reconhecimento-facial-do-ceara-inclui-foto-de-michael-b-jordan-como-suspeito. Access on: 09 May 2022.

4   NETO, José Vitor P. **Tecnologia e racismo estrutural:** sobre o racismo algorítmico. Aqualtune. Available at: https://aqualtunelab.com.br/publicacoes/tecnologia-e-racismo-estrutural-sobre-o-racismo-algoritmico. Access on: 09 May 2022.

5   BRAZIL. **Lei 13.709, de 14 de agosto de 2018**. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on: 09 May 2022.

6   UNESCO. **Report of the Social And Human Sciences Commission (SHS)**. Unesco: Paris, 2021. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000379920. Access on: 28 April 2022.

7   EUROPEAN COMMISSION. **Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions**: Building Trust in Human-Centric Artificial Intelligence. Brussels, 08 April 2019. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0168&from=BG. Access on: 26 July 2022.

linked to the traceability of decisions taken by the system. Therefore, it recommends the inclusion, for transparency, of both data on the entire chain employed, as well as mechanisms for explaining these decisions.

The legislation already in force in the Brazilian legal system for personal data protection, then, is in accordance with international recommendations of best practices for the administration of artificial intelligence systems. Because of that, the non-comprehensive legal provisions of the Draft Bill 21/2020 regarding the operability standards of AI systems represent a regression of the national regulatory framework in terms of guaranteeing the rights of these technologies' users.

3.Definition

The text approved by the Chamber's plenary for the Draft Bill 21/20 is limited to offering, in its article 2, a single definition, which is regarding the concept of artificial intelligence system:

> [...] the system based on computational process that, from a set of objectives defined by humans, can, through the processing of data and information, learn to perceive and interpret the external environment, as well as to interact with it, making predictions, recommendations, classifications or decisions, and using techniques such as, but not limited to: I – machine learning systems, including supervised, unsupervised, and reinforcement learning; II – systems based on knowledge or logic; III – statistical approaches, Bayesian inference, research, and optimization methods.[8]

Recognizing the heterogeneity that characterizes artificial intelligence is a presupposition for a regulation aligned with the state of the art of the technical-scientific debate on the subject. The multitude of possible applications for AI systems, sometimes described as "a rapidly evolving family of technologies",[9] justifies an illustrative listing of the techniques that identify them instead of an exhaustive one. Similarly, the exclusion of automation processes incapable of learning and interacting with the external environment, as presented in the sole paragraph of the current article 2 of the Draft Bill, is correct, as the articulation between rational capacity and environmental perception is usually necessary for the characterization of an AI system.[10]

Despite pertinent elements, the definition presented in the Draft Bill 21/2020 is illustrative of a broader problem in the legal design: the absence of more robust parameters of rights and duties to implement the principles and objectives set out in the project.

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8   BRAZIL. Chamber of Deputies. **Draft Bill 21, de 2020.** Available on: https://www.camara.leg.br/propostas-legislativas/2236340. Access at: 09 May 2022. Free translation.

9   EUROPEAN COMMISSION. **Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.** Brussels, 21 April 2021. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206. Acesso at: 26 July 2022.

10   EUROPEAN COMISSION. **A definition of Artificial Intelligence:** main capabilities and scientific disciplines. Bruxelas, 08 abr. 2019. Available at: https://digital-strategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines. Access on: 26 April 2022.

The comparison with the Artificial Intelligence Act[11] illustrates the gravity of this silence. The European proposal contains 44 definitions: different actors involved in the life cycle of the system ("supplier", "importer", "operator", "user", etc.), the stages of the cycle ("placing on the market", "making available on the market", "putting into service", "intended purpose") and data categories ("training data", "validation data", "testing data").

A careful conceptualization makes the regulatory draft compatible with the environmental risks to social rights and freedom and with the foundations associated with artificial intelligence. In the Brazilian case, the definitions must be significantly increased through a general revision of the text approved in the Chamber of Deputies. It is necessary to develop new concepts in convergence with more effective mechanisms for exercising rights, risk management duties concerning the entire life cycle of the system, and enforcement mechanisms.

4. Jurisdictional scope

As with other topics, legislating on artificial intelligence has geopolitical consequences, which is reflected in the scope of regulatory proposals. They, in turn, can affect transnational operations,[12] which enable technologies based on big data. The transnational challenges intensified by social digitization, including applications of artificial intelligence, must be considered when defining the scope of application of standards for AI.

As approved by the Chamber of Deputies, Draft Bill 21/20 does not include definitions of scope for its own application and, therefore, misses the opportunity to include Brazil in the building of criteria for the exercise of state power over technologies, which are often global[13]. It is limited to "fundamentals and principles for the development and application of artificial intelligence **in Brazil**" (Article 1 – emphasis added) without considering the current dynamics that challenge the effectiveness of institutional designs. In this sense, it does not observe the Brazilian Strategy for Artificial Intelligence (EBIA), which acknowledges that the impacts of AI "transcend national borders".[14]

Different criteria for the application of AI regulation can be considered, just specific mechanisms have been created for important Brazilian laws, such as the Internet Civil Rights Framework and the General Data Protection Law. Some examples

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11   BRAZIL. **Draft Bill 21/2020.** cit.

12   BRANDÃO, Luiza. **Fluxo transnacional de dados**: estruturas, políticas e o direito nas vertentes da governança. 2020. 129 f. Dissertação (Mestrado) - Curso de Pós-Graduação em Direito, Universidade Federal de Minas Gerais, Belo Horizonte, 2020. Available at: https://repositorio.ufmg.br/handle/1843/33716. Access on: 28 April de 2022.

13   I&JPN - Internet & Jurisdiction Policy Network. **Internet & Jurisdiction Global Status Report 2019**. Available at: https://www.internetjurisdiction.net/uploads/pdfs/Internet-Jurisdiction-Global-Status-Report-2019-Key-Findings_web.pdf. Access on:28 de abr de 2022.

14   MCTI, **Estratégia Brasileira para Inteligência Artificial.** 2021 Available at: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ia_estrategia_diagramacao_4-979_2021.pdf. Access on:28 April 2022. p. 27.

can be found in proposal 2021/0106 for the European AI regulation.[15] According to its article 2, the regulation applies to AI systems' suppliers, regardless of their headquarters or constitution; users on European territory; and to suppliers and users, even if in other countries, but whose activities have felt effects in the Union. These criteria follow a trend highlighted by the European Parliament in regulating personal data protection. The strategy is still challenging, especially in terms of effectiveness, feasibility of inspection and authorities' reach in increasingly transnational contexts.

The application scope limited to the national territory does not consider the global context. To this end, the Draft Bill must strive for more specific criteria, which follow precise definitions of AI, as well as effective tools for inspection and application of its regulations. In this way, the law provides greater legal certainty for several sectors, with emphasis on the state and law enforcement authorities.

5.Civil liability

The provisions for the liability regime in the Draft Bill 21/2020 are at once inconsistent and harmful. They outline guidelines for other future legal rules, advocating their own rule of direct and fault-based liability, to be mitigated by the eventual adoption of "reasonable efforts" and "best market practices".

The Draft Bill refers to the rules of other legal norms (Consumer Defense Code, General Personal Data Protection Law), but does not specify in which instance each approach will be applied, nor what is the standard regime for attributing the duty to compensate for any damages caused by facts involving artificial intelligence. If it makes no sense to impose liability on the machine, since it is legally framed a thing in its artificiality, the important issue is to clearly define the limits of application of joint or subsidiary strict liability for legal entities – companies, public and private institutions, according to their role in production or service provision chains; and the exceptional situations of liability of individuals – such as employees, researchers, programmers and users. In such cases, it should require proof of individual fault, even if the procedural burden of proof is reversed due to the aptitude for the evidence production.

The legal system already provides for the strict liability attribution, in order to promptly guarantee the compensatory damages to the victim, with the subsequent option of exercising the right of return, when fault and even the redistribution of the financial burden to the members of the chain of production or services provision can be assessed. This logic could easily be adapted to the complexity of the artificial intelligence world. The suggestion of some granularity between providers, for example, sounds interesting, as long as there is coherence and consistency in the rule. The wording of a bill should bring more (not less) legal certainty, and should allow for predictability, even more so in a scenario that is already marshy. It will be difficult to define whether or not there has been indemnifiable moral damage, as has occurred in situations of leakage or access restriction of personal data, according to the General Personal Data Protection Law.

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15   EUROPEAN COMMISSION. **Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.** Brussels, 21 April 2021. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206. Acesso at: 26 July 2022.

The attribution of liability for the eventual compensation, or who is responsible for promoting effective prevention and assuming the many risks, must be the object of a categorical legal rule, even if staggered. When using artificial intelligence, there are risks of eventually making mistakes. In this case, one must be held responsible for violating the rights of other people, whose legal safety cannot be disregarded with impunity. It is not democratic, or even rational, from an economic point of view, to release companies from this burden, because that would mean imposing said burden on individuals. Especially in a country as socially unequal as Brazil, the people who will bear this burden are the same people who are already vulnerable. The country cannot afford to, once again, put the weight of innovation on already oppressed people, towards an ever-deepening abyss of injustice and inequality.

6.Human supervision and revision

An effective regulatory framework for risk management relating to AI with the potential to impact fundamental rights requires the establishment of human oversight throughout the entire system lifecycle. Such parameters are necessary to achieve the principles and objectives of transparency, beneficial purpose and safety, and prevention. In particular, it is imperative that the development and use of such systems are conditioned on the possibility of individuals to understand their capabilities and limitations, monitor and interrupt their operation, interpret their results and reverse the decisions taken. These requirements must condition eventual commercial availability or putting into service so that AI systems preserve human rights, trust and enable effective democratic control over their operation.

Among the normative gaps in the Draft Bill 21/20, the absence of a right to review stands out. In the data protection field, the General Personal Data Protection Law (article 20) assures data subjects the right to review of fully automated decisions that affect their interests, including those that define some aspect of their profile. However, limiting the exercise of this right to decisions made solely on the basis of automated processing has been the object of criticism from the technical-scientific community and from civil society. In a policy paper from *Transparency Brazil* in collaboration with several civil society organizations, including IRIS, it was found that, although the use of automated tools to support government decision-making is frequent and significant in the country, it is not possible to say, in general, that decisions are entirelyly automated. For this reason, the document recommends an expansive interpretation of the condition 'fully', since a restrictive and literal interpretation "creates a scenario in which the right to review can almost never be claimed".[16]

Since similar concerns involve applications of artificial intelligence that carry risks to fundamental rights, the inclusion of a right to review automated decisions in the legal design is necessary to protect the subjects affected by such systems. The exercise of this right must waive the aforementioned condition for the material effectiveness of the provision, especially in relation to the public sector, given the progressive use of AI in the sector. Bearing in mind that one of the purposes of the right to review is to provide those affected by the system with a reassessment that considers contextual and subjective aspects whose consideration by the system may have been inadequate, it is necessary that this review be carried out by human person(s).

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16   SAKAI, Juliana. GALDINO, Manoel. BURG, Tamara. Recomendações de governança - uso de inteligência artificial pelo poder público. **Transparência Brasil**, 2021. Available on: https://www.transparencia.org. br/projetos/transparencia-algoritmica. Access at: 29 April 2022. p.20

7.Risk management

In addition to the principles, objectives and foundations set out in the text, the current Draft Bill 21/20 does not establish any explicit binding limitations on the development and technological applications of artificial intelligence with potential harm to human rights. This gap makes it difficult to implement several ethical and guide parameters set out both in the approved text and in international instruments, such as the G20 principles for human-centered AI,[17] the documents of the European Commission's High Level Expert Group on AI[18], and the Toronto Declaration[19]. The centrality of the human being, the beneficial purpose, safety and prevention, equity and anti-racism are incompatible with the absence of limits to the use of systems whose risks are excessive.

The proposed European regulation, for example, dedicates an entire title to banning AI practices whose risk is considered unacceptable. This includes making it commercially available, putting into service and using systems with the potential for: covert manipulation of people's behavior; exploration of vulnerabilities of specific social groups - such as children and people with disabilities; and social scoring of the population for general purposes.

The European Union proposal also considers that the use of biometric identification remotely in real time, in public spaces, for the purpose of maintaining order, such as facial recognition, should be avoided as much as possible, with very limited exceptions. This issue must be highlighted, given the accelerated implementation of facial recognition in public spaces in Brazil, especially for public safety purposes. It is a technology known to have discriminatory and abusive biases against minority groups, especially black people. For this reason, its banishment within the scope of public security is increasingly debated as a necessary measure due to the incompatibility with fundamental guarantees[20].

8.Enforcement mechanisms and regulatory design

The regulatory design proposed by the Draft Bill 21/20 does not provide for any inspection mechanisms to guarantee the concrete effectiveness of its principles and

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17   G20. **G20 Ministerial Statement on Trade and Digital Economy.** Tsukuba: G20, 2019. Available at: https://www.meti.go.jp/press/2019/06/20190610010/20190610010-1.pdf. Access on: 26 April 2022.

18   EUROPEAN COMMISSION. **High-level expert group on artificial intelligence.** Brussels: European Commission. Available at: https://digital-strategy.ec.europa.eu/en/node/73/printable/pdf. Access on: 26 April 2022.

19   AMNESTY INTERNATIONAL ACCESS NOW. **The Toronto Declaration:** Protecting the right to equality and non-discrimination in machine learning systems. Toronto: RightsCon, 2018. Available at: https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf. Access on: 26 April 2022.

20   SILVA, Tarcízio. **Reconhecimento facial deve ser banido.** Veja dez razões. 16 de maio de 2021. Available at: https://tarciziosilva.com.br/blog/reconhecimento-facial-deve-ser-banido-aqui-estao-dez-razoes/. Access on: 09 May 2022.

objectives. The version approved by the Chamber (Article 4, caput, item VII) is limited to affirming the "stimulation of self-regulation, through the adoption of codes of conduct and good practices guides, observing the principles provided for in article 5, and global best practices"[21] among the foundations of the development and application of artificial intelligence in Brazil. Although such instruments might contribute to the effectiveness of the legislationwhen articulated with cogent control mechanisms, their non-binding nature can discourage compliance if applied in isolation. This is because non-compliance will not entail more serious consequences for the regulated agents.

In this context, it is necessary to examine binding governance mechanisms capable of favoring an effective prevention and mitigation of the risks that artificial intelligence systems pose to rights. Among these mechanisms, it is worth highlighting the role of impact reports, which are oversight resources already established, for instance, in the Brazilian regulatory framework in the environmental (National Environmental Policy, article 9, caput, item III; article 8, caput, item II[22]; CONAMA Resolution number 001/1986, articles 2, caput, and 9, caput[23]) and in personal data protection (General Personal Data Protection Law, article 5, caput, item XVII; article 10, paragraph 3; article 38, caput[24]) fields. Such tools are used to evaluate the repercussions of undertakings or actions with a risk or significant impact on legal assets to be protected by regulators' action, such as the quality of the environment and the rights of personal data holders.

In the case of the artificial intelligence impact report, it is essential to understand not only the risks related to the technology development, but also in relation to its use and operation. Canadá already has in force the Algorithmic Impact Assessment (AIA) in order to evaluate and mitigate the impacts involved in automated decisions systems.[25] In the European Union, the impact assessment of AI also helps to design, use and audit these systems, including input and output data, within the proposed ethical and legal limits.[26] Thus, it is essential to include this instrument in the Draft Bill 21/20, to make it possible to preventively inspect the actions of agents involved in AI's process.

Likewise, the current proposal of elaborating a regulatory impact analysis is also important for the AI scenario, considering the possibility of greater participation of civil society in the regulation processes. However, it must be noted that the use of these assessments should not result in an obstacle to the legal regulation on the matter, nor to the responsibility of the market to create mechanisms to avoid possible damages caused by artificial intelligence systems.

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21   NoT: free translation.

22   BRAZIL. **Lei 6.938, de 31 de agosto de 1981.** Available at: http://www.planalto.gov.br/ccivil_03/leis/l6938.htm. Access on: 09 May 2022.

23   BRAZIL. **Resolução CONAMA n° 001/1986.** Available at: http://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF. Access on: 09 May 2022.

24   BRAZIL. **Lei 13.709, de 14 de agosto de 2018**. cit.

25   CANADA GOVERNMENT. **Algorithmic Impact Assessment.** Available at: https://canada-ca.github.io/aia-eia-js/. Access on: 27 April 2022.

26   EUROPEAN COMMISION. **AI Impact Assessment & Code of Conduct.** Available at: https://futurium.ec.europa.eu/en/european-ai-alliance/best-practices/ai-impact-assessment-code-conduct. Access on 27 April 2022.

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