RIVISTA ITALIANA DI INFORMATICA E DIRITTO
PERIODICO INTERNAZIONALE DEL CNR-IGSG

ISSN 2704-7318 • n. 2/2024 • DOI 10.32091/RIID0194 • articolo non sottoposto a peer review • pubblicato in anteprima il 13 dic. 2024

Vincenzo Calderonio

The state of the art of the Brazilian Bill on Artificial Intelligence with a focus on civil responsibility

Brazil is developing a regulatory framework for artificial intelligence (AI), which began in 2019 with a public consultation and culminated in Bill PL No. 2338/2023, under discussion in Parliament. This note outlines the state of the art, focusing particularly on the issue of civil responsibility.

Artificial Intelligence (AI) – Brazil – Regulation – Fundamental rights – Civil responsibility

Lo stato dell'arte del progetto di legge brasiliano sull'Intelligenza Artificiale con un focus sulla responsabilità civile

Il Brasile sta sviluppando un quadro normativo per l'intelligenza artificiale (IA), iniziato nel 2019 con una consultazione pubblica e culminato nel progetto di legge PL No. 2338/2023, in discussione in Parlamento. Questa nota presenta lo stato dell'arte, soffermandosi in particolare sul tema della responsabilità civile.

Intelligenza Artificiale (IA) – Brasile – Regolamentazione – Diritti fondamentali – Responsabilità civile

The Author is PhD candidate at the Department of Computer Science, University of Pisa and Institute of Legal Informatics and Judicial Systems of the National Research Council of Italy

Part of the research has been carried out at the *Centro de Tecnologia e Sociedade, Fundação Getulio Vargas* in Rio de Janeiro, Brasil

1. Introduction

Brazil, like many other countries, is building its path toward artificial intelligence regulation.

It all started in December 2019 with a public consultation initiated by the Brazilian Minister of Science, Technology and Innovation to develop a strategy for artificial intelligence development. Shortly after, the Bill No. 21/2020 drafting rules for artificial intelligence was presented at the Chamber of Deputies[1].

Initially, the Bill only contained 10 articles, outlining the fundamental architecture of the proposal. The Chamber of Deputies accepted it in September 2021, advancing it to the Senate. On that occasion, much criticism arose due to the proposal's narrow scope compared to the EU Artificial Intelligence Act and its inability to create a wider horizon for the development of artificial intelligence systems in Brazil.

That criticism led to the new *projeto de lei* (PL) No. 2338/2023, which deploys a framework of 45 articles outlining normative provisions on the protection of fundamental rights (Chapter 2), risk categorization (Chapter 3), governance (Chapter 4) and civil responsibility (Chapter 5).

This is the proposal which was recently under examination in the Senate[2], where a Temporary Internal Commission of senators was formed in 2022 for the discussion with an original deadline of 8 August 2023 later extended to December 2024. On December 5th the Commission approved the PL No. 2338/2023 that shifted to the Plenary where the Senate approved with modification the proposal on December 10th.

At this point the proposal will return to the Chamber of Deputies where another approval of the amended text will be needed for advancing it to the final stage.

In any case, Brazil will likely promulgate its first law on AI soon.

2. Comparison with the AI Act

Some general considerations can be made on the state of the art of PL No. 2338/2023 noticing how it has been influenced by the risk-based architecture of the EU AI Act and how, for certain aspects, it differs from it, reflecting also the difference of the two legal systems: Brazil, a federative system where the Parliament have full legislative competence and on the other side the European Union, an atypical legal system in development where the European Parliament have to divide its legislative power with the Parliaments of the Member States.

The Brazilian Bill adopts the EU approach by categorizing AI systems based on the risk that they pose for society, resulting in a tripartition of the AI system categorization into excessive, high and low levels of risk, mirroring the architecture of the AI Act[3].

This choice came along with the definitions of AI system as a "computer system, with different degrees of autonomy" and provider as "a natural

1. Information regarding the *iter* of the legislative proposal, the Brazilian national strategy and an unofficial translation of the proposal can be found in Belli–Curzi–Gaspar 2023.
2. See an updated version of the proposal.
3. Some scholars may say that a *Brussels effect* occurred. For an analysis of the phenomenon see Siegmann-Anderljung 2022.

person or legal entity, of public or private nature, who develops an artificial intelligence system, directly or by order, aiming at placing it on the market" with clear reference to the AI Act semantical framework and the OECD principles of 2019.

However, apart from the fundamental architecture that somehow adopts the AI Act paradigm, major differences can be spotted.

A significant distinction is Brazil's explicit inclusion of a section on fundamental rights, absent in the EU AI Act. While the AI Act protects fundamental rights in relation to economic interests, Brazil's Bill places a direct emphasis on individual rights, introducing with article 6 of PL No. 2338/2023 provisions such as the right to explanation, the right to challenge AI system decisions and the right to human determination and human participation in decisions of artificial intelligence systems.

Indeed, fundamental rights are still protected in the AI Act, however, they're protected in relation to economic interests, since the main assumption of the AI Act is that AI systems are regulated as products and most of the obligations that the AI Act pose are on the provider of the system.

This difference reflects also the aforementioned different institutional assets of the two countries, where in Europe the narrower scope of the legislation, focused only on the internal market regulation, is imposed by the partition of competence between the Union and the Member States ruled by the norms of the Treaty of Functioning of the EU.

Whereas most of those provisions are still present within the EU General Data Protection Regulation scope, in part expressly provided for such as Article 22 on automated decision-making and in part implicitly derived from the doctrine such as the right to an explanation[4], it has been correctly argued that these norms apply solely in the case of personal data protection[5]. Brazil's explicit remedies for individuals mark a broader recognition of AI's societal impacts, which extend beyond the EU GDPR scope on personal data protection and the AI Act obligations for AI system design.

The Brazilian PL No. 2338/2023 expressly provides for remedies actionable by individuals such as Article 6(1), (2) and (3) on the right to contest decisions and to request human intervention, meaning that individuals will have new rights actionable for legal protection in courts.

Unfortunately, it should be noted that the AI Act does not expressly provide for remedies directly actionable by individuals, which are marginally treated by Chapter IX Section 4 on remedies, but instead creates a framework for market regulation obligations that mostly apply to businesses and providers of AI systems.

3. Civil responsibility framework

This normative difference is amplified by the provisions present in the Brazilian AI Bill on civil responsibility, which are instead absent in the EU framework, where a revision of the Product Liability Directive has been promulgated but without any introduction of norms on AI responsibility, which have instead been proposed in the context of the criticised AI Liability Directive[6] whose future is currently uncertain.

Those choices confirm a European tendency to regulate these new technologies within the traditional framework of market regulation, missing the opportunity perhaps caught by Brazil to recognize a new normative paradigm in those technologies which establish a new type of relationship between people, rights and possible harms.

Still, a *Brussels effect* can be observed in the civil responsibility rules of the former Brazilian AI Bill, heavily influenced by the European Parliament Resolution of 20 October 2020. Even if those provisions changed in the latest version of the law that mixes part of the regime of the EU Parliament Resolution with an original system for the definition of the responsibility regime in concrete cases.

Indeed PL No. 2338/2023, after recalling the applicability of traditional norms for responsibility of the Código de Defesa do Consumidor and Código Civil, introduce in the *paragrafo único* of Article 36 a system for the definition in concrete of the regime of responsibility for AI.

This system is based on two criteria: the level of autonomy of the AI system correlated with its level of risk and the nature of the agent involved in the damage caused with AI.

4. Selbst-Powles 2018.
5. Almada 2019.
6. Hacker 2024.

As a corollary, Article 37 empowers judges to reverse the burden of proof in cases of legal incapacity of the victim or when the excessive complexity of the AI system creates a *probatio diabolica*.

Delegating to the judiciary the authority to determine the applicable responsibility regime on a case-by-case basis appears to be an appropriate approach, adapting to a situation where, depending on the feature of the system and its relationship with individuals and their rights, different responsibility regimes could possibly apply to different applications of this technology.

A general clause delegating to judicial power the competence for responsibility avoids any potential error in the *ex-ante* allocation of a responsibility regime, leaving open the possibility of adopting the fault-based regime or the objective regime depending on the circumstances of the concrete case.

This choice reflects the fact that often it is not possible to state *ex-ante* if a certain system is a high or low risk, because the level of risk depends on the interaction of that system with society and this interaction should be verified in the actual case, meaning that a certain AI system could be qualified as high-risk in certain cases and low-risk in others depending on the interaction that it has with the environment and the fundamental rights implied in that particular interaction[7].

The choice appears effective and resolves the problem of AI responsibility by asking the judicial system to qualify the AI system *ex-post* in trials and applying the consequent responsibility regime depending on that qualification.

4. Conclusion

In current times, where the civil responsibility regime for artificial intelligence in Europe is a debate fiercely disputed, a non-ideological approach such as the Brazilian one may be a good example that can lead to an effective solution of the problem by a case-by-case approach with an *ex-post* qualification of the fact made by the judicial system, avoiding the creation of additional certification bodies and ideological division between fault-based and objective responsibility.

However, this is only a sketch of the state of the art of the Brazilian Bill on artificial intelligence whose future will depend on the continuation of the legislative *iter* and future choices that will be made, shaping the future of AI regulation in Brazil and its global implications.

On this very last point, a recent modification of the proposal has been advanced in the Senate with Senator Eduardo Gomes as a relator, before the Plenary approval of December 10th, where some relevant modifications of the Bill have been introduced.

Notably, the Brazilian Senate purposefully adopted amendments with the scope of promoting the development of AI systems and applying a regulatory logic based more on *ex-post* considerations rather than *ex-ante*, differentiating itself from the European approach criticized by Draghi's Report on the Competitiveness of the Union, explicitly cited in the *complementação de voto* presented in the Senate.

This resulted in a modification of the regime for the preliminary risk assessment (Article 12), changing it from mandatory to optional. This modification was accompanied by the introduction of a general clause in Article 6 that adapts the protection of fundamental rights to the state of the art of technological development.

Lastly, some relevant modifications have been introduced concerning the Sistema Nacional de Regulação e Governança de Inteligência Artificial (SIA), which will be the competent authority for the enforcement, with powers to investigate high-risk AI systems in case of suspected violation of norms, including the power of accessing the documentation and the training data of the related AI system, whose authority became residual in this last modification.

These amendments raised concerns among scholars involved in the debate who talked of a weakening of the rights-based approach of PL No. 2338/2023, which shifted more to economic considerations of law.

Despite this criticism, the Brazilian AI Bill today may still be considered a new framework, grounded in the AI Act paradigm, which goes

7. For relevant considerations on civil responsibility for AI coming from Brazilian literature see Spadaccini de Teffé–Medon 2020 and Maganhoto Doneda–Schertel Mendes–Pereira de Souza–Gomes de Andrade 2018.

beyond its limits and that may represent a right-based regulation with individuals at its core, making Brazil a very interesting testing ground for the intersection between artificial intelligence and its social implications.

References

M. Almada (2019), *Human intervention in automated decision-making: Toward the construction of contestable systems*, in "ICAIL '19: Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law", ACM, 2019

L. Belli, Y. Curzi, W.B. Gaspar (2023), *AI regulation in Brazil: Advancements, flows, and need to learn from the data protection experience*, in "Computer Law & Security Review", vol. 48, 2023

P. Hacker (2024), *Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence: Complementary impact assessment*, EPRS - European Parliamentary Research Service, 2024

D.C. Maganhoto Doneda, L. Schertel Mendes, C.A. Pereira de Souza, N.N. Gomes de Andrade (2018), *Considerações iniciais sobre inteligência artificial, ética e autonomia pessoal*, in "Pensar. Revista de Ciências Jurídicas", vol. 23, 2018, n. 4

A. Selbst, J. Powles (2018), *Meaningful Information and the Right to Explanation*, in "Proceedings of the 1st Conference on Fairness, Accountability and Transparency", 2018

C. Siegmann, M. Anderljung (2022), *The Brussels effect and artificial intelligence: How EU regulation will impact the global AI market*, arXiv preprint, 2022

C. Spadaccini de Teffé, F. Medon (2020), *Responsabilidade civil e regulação de novas tecnologias: questões acerca da utilização de inteligência artificial na tomada de decisões empresariais*, in "Revista Estudos Institucionais", vol. 6, 2020, n. 1