Brussels to Brasilia: Brazil's Distinct Path in AI Regulation

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Abstract: The global rise of Artificial Intelligence (AI) systems across sectors has fueled urgent calls for effective regulation. While legal discussions on AI regulation have largely focused on comparisons between developed economies, this chapter focuses on a Global South jurisdiction, analyzing Brazil's innovative AI regulation proposal (Bill No. 2338/2023). Distinct from a mere adoption of existing models, the Brazilian proposal offers a unique perspective, combining a risk-based approach with a strong emphasis on protecting fundamental rights. A central innovation is the National System for the Regulation and Governance of Artificial Intelligence (SIA). This hybrid, tiered oversight model empowers both sectoral regulators and a central coordinator to ensure responsible AI development, seeking to strike a balance between traditional market-oriented regulation and robust safeguards for human rights.

A. Introduction

The regulation of artificial intelligence (AI) systems has become a focal point for regulators and policymakers across various jurisdictions. In the past twelve months, a notable surge in regulatory initiatives has occurred, exemplified by the Bletchley Declaration following the UK AI Safety Summit,[1] the comprehensive AI governance strategy outlined in Biden's Executive Order,[2] and the G7's statement on the Hiroshima process, endorsing

1 UK Government, 'The Bletchley Declaration by Countries Attending the AI Safety Summit' (2023) <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023> accessed 22 January 2024.

2 The White House, 'Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence' <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/> accessed 22 January 2024.

an AI 'Code of Conduct'.[3] Particularly noteworthy is the EU AI Act, a comprehensive legislative piece agreed upon in December 2023.[4] Common among these proposals are concerns about AI safety, rooted in the notion that inherent risks accompany the development and deployment of AI applications, emphasising the need for transparency and accountability. However, existing proposals diverge in their approach to identifying and prioritising risks, determining appropriate risk management systems, and striking a balance between preventing harms and fostering innovation—fundamental issues at the core of the ongoing regulatory debate.[5]

Analysing the diverse approaches employed by different jurisdictions in regulating AI is crucial for identifying common concerns and nuanced rule choices specific to each context. Legal analyses have primarily centred on single case studies – with a significant focus on the EU AI Act,[6] but also on the AI rules adopted in China[7] – examining the rules proposed and adopted, identifying potential limitations, and proposing avenues for improvement. Legal scholars have also discussed differences in regulatory strategies, examining how state-led command-and-control regulatory strategies con-

3 G7, 'G7 Leaders' Statement on the Hiroshima AI Process' (2023) <https://www.mofa.go.jp/ecm/ec/page5e_000076.html> accessed 22 January 2024.

4 References to the EU AI Act text in this chapter refers to European Parliament 'Corrigendum' of 16 April 2024, which is the latest version of the agreed text. EU AI Act final draft. Available at < https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138-FNL-COR01_EN.pdf> accessed 25 April 2024.

5 Christina Todorova and others, 'The European AI Tango: Balancing Regulation Innovation and Competitiveness', *Proceedings of the 2023 Conference on Human Centered Artificial Intelligence: Education and Practice* (ACM 2023) <https://dl.acm.org/doi/10.1145/3633083.3633161> accessed 23 January 2024; Michael Veale, Kira Matus and Robert Gorwa, 'AI and Global Governance: Modalities, Rationales, Tensions' (2023) 19 Annual Review of Law and Social Science 255.

6 See, for example, Irena Barkane, 'Questioning the EU Proposal for an Artificial Intelligence Act: The Need for Prohibitions and a Stricter Approach to Biometric Surveillance!' (2022) 27 Information Polity 147; Johann Laux, Sandra Wachter and Brent Mittelstadt, 'Trustworthy Artificial Intelligence and the European Union AI Act: On the Conflation of Trustworthiness and Acceptability of Risk' (2024) 18 Regulation & Governance 3; Rostam J Neuwirth, 'Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act (AIA)' (2023) 48 Computer Law & Security Review 105798; Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act — Analysing the Good, the Bad, and the Unclear Elements of the Proposed Approach' (2021) 22 Computer Law Review International 97.

7 See, for example, Huw Roberts and others, 'The Chinese Approach to Artificial Intelligence: An Analysis of Policy, Ethics, and Regulation' (2021) 36 AI & SOCIETY 59; Matt Sheehan, 'China's AI Regulations and How They Get Made' (2023) 24 Horizons.

trast with industry-led initiatives and the emergence of co-regulatory models.[8] While scholars have compared contrasting approaches to AI,[9] there are comparative fewer legal studies that contrast the concrete regulatory choices made by different jurisdictions.[10] Notably, there is limited legal analysis that considers proposals under discussion in countries in the Global South.[11] With the predominant focus on Global North jurisdictions in scholarly and regulatory discussions, there is a genuine risk that emerging frameworks may be skewed by the perspectives of more affluent nations.

This chapter aims to contribute to ongoing debates by scrutinising the Brazilian AI regulation proposal, a comprehensive bill that shares similarities with the EU AI Act but has garnered comparatively less attention. Bill No. 2338/2023, developed by a commission of legal experts, is currently under examination by the Brazilian Congress. This proposal aims to establish principles, rules, and guidelines for regulating the development and application of AI in the country. Contrary to notions of legal transplant or an example of the Brussels Effect,[12] we argue that the Brazilian bill positions

8 Christian Djeffal, Markus B Siewert and Stefan Wurster, 'Role of the State and Responsibility in Governing Artificial Intelligence: A Comparative Analysis of AI Strategies' (2022) 29 Journal of European Public Policy 1799; Kira JM Matus and Michael Veale, 'Certification Systems for Machine Learning: Lessons from Sustainability' (2022) 16 Regulation & Governance 177; Roger Clarke, 'Regulatory Alternatives for AI' (2019) 35 Computer Law & Security Review 398.

9 Djeffal, Siewert and Wurster (n 10); Emmie Hine and Luciano Floridi, 'Artificial Intelligence with American Values and Chinese Characteristics: A Comparative Analysis of American and Chinese Governmental AI Policies' [2022] AI & SOCIETY <https://link.springer.com/10.1007/s00146-022-01499-8> accessed 23 January 2024; Deborah Morgan, 'Anticipatory Regulatory Instruments for AI Systems: A Comparative Study of Regulatory Sandbox Schemes', *Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society* (ACM 2023) <https://dl.acm.org/doi/10.1145/3600211.3604732> accessed 23 January 2024.

10 Jakob Mökander and others, 'The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: What Can They Learn from Each Other?' (2022) 32 Minds and Machines 751; Luca Nannini, Agathe Balayn and Adam Leon Smith, 'Explainability in AI Policies: A Critical Review of Communications, Reports, Regulations, and Standards in the EU, US, and UK', *2023 ACM Conference on Fairness, Accountability, and Transparency* (ACM 2023) <https://dl.acm.org/doi/10.1145/3593013.3594074> accessed 23 January 2024.

11 Marie-Therese Png, 'At the Tensions of South and North: Critical Roles of Global South Stakeholders in AI Governance', *2022 ACM Conference on Fairness, Accountability, and Transparency* (ACM 2022) <https://dl.acm.org/doi/10.1145/3531146.3533200> accessed 23 January 2024.

12 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

the country on par with more developed economies, striving to carve out a distinctive path in AI regulation.

To contextualise this analysis, we begin by exploring the academic debate on policy diffusion and the role played by the EU. We then provide the background and rationale behind the EU AI Act, contrasting it with the ongoing legislative process of the Brazilian bill – where the proposal was originally drafted by a commission of legal experts formed in February 2022, specifically tasked with tailoring the proposal to address Brazil's challenges and opportunities in AI. After its introduction to Congress, the bill was examined by a special committee in the Brazilian Senate. In April 2024, rapporteur Senator Eduardo Gomes introduced a revised version (replacement bill). The subsequent section of the chapter examines the Brazilian revised proposal, focusing on its innovative institutional design. The analysis is structured around five pillars: principles, rights of individuals, risk assessments, obligations, and innovation. This examination aims to highlight the specific choices made within the Brazilian proposal to address critical debates surrounding AI regulation, and where it differs from the EU AI Act. The final section of the chapter then outlines the legislative steps ahead.

B. Drivers of policy diffusion and the Brussels effect

While various jurisdictions globally have grappled with developing AI rules, the EU AI Act distinguishes itself as one of the most comprehensive sets of proposed regulations yet – and one that has been under scrutiny for longer, since 2021. The EU is also regarded as a catalyst for policy diffusion, with its newest legislative initiative seen as seeking to establish a 'global standard' for AI governance [13] with the potential to exert worldwide influence through the Brussels Effect.[14] However, understanding the influence of the Brussels Effect on regulatory proposals – and in particular to how

13 Luca Bertuzzi and Oliver Noyan, 'Commission Yearns for Setting the Global Standard on Artificial Intelligence' *Euroactiv* (15 September 2021) <https://www.euractiv.com/section/digital/news/commission-yearns-for-setting-the-global-standard-on-artificial-intelligence/> accessed 22 January 2024.

14 Charlotte Siegmann and Markus Anderljung, 'The Brussels Effect and Artificial Intelligence: How EU Regulation Will Impact the Global AI Market' (arXiv, 2022) <https://arxiv.org/abs/2208.12645> accessed 22 January 2024.

it affects Global South countries like Brazil – requires examining in more detail the mechanisms of policy diffusion.[15]

The literature on policy diffusion delineates four primary mechanisms through which policies adopted in one jurisdiction spread to others: social construction facilitated by expert epistemic communities and international organisations, coercion involving powerful nation-states and international financial institutions leveraging sanctions or aid, competition where countries vie to attract investment and boost exports through business-friendly policies, and learning as countries draw lessons from their experiences and the policy experiments of their peers.[16] In the context of the European Union's role, Bradford's Brussels Effect provides an additional framework for understanding policy diffusion. This concept posits that the EU, leveraging its substantial market size and regulatory influence, can drive the global adoption of similar rules. Bradford contends that the EU can act as a significant global regulator, advancing its social preferences while ensuring the competitiveness of its companies on the global stage.[17]

An illustrative case study identified by Bradford is in the field of data protection. Around the 2010s, the European Commission explicitly acknowledged that promoting EU data privacy laws was as a benchmark for global standards and advocated for universal principles based on EU norms in various trade agreements.[18] With the enactment of the EU General Data Protection Regulation (GDPR), a comprehensive data protection law with extraterritorial commitments, Bradford argues that market players adapted their global business practices, leading other jurisdictions to develop similar rules to facilitate compliance. For instance, in Brazil, the Brazilian General Data Protection Law (LGPD – Law No. 13709/2018) is considered to have been heavily influenced by EU discussions on data protection and

15 Shu Li, Béatrice Schütte and Suvi Sankari, 'The Ongoing AI-Regulation Debate in the EU and Its Influence on the Emerging Economies: A New Case for the "Brussels Effect"?' in Mark Findlay, Li Min Ong and Wenxi Zhang (eds), *Elgar Companion to Regulating AI and Big Data in Emerging Economies* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/view/book/9781785362408/chapter1.xml> accessed 22 January 2024.

16 Frank Dobbin, Beth Simmons and Geoffrey Garrett, 'The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?' (2007) 33 Annual Review of Sociology 449; Herbert Obinger, Carina Schmitt and Peter Starke, 'Policy Diffusion and Policy Transfer in Comparative Welfare State Research' (2013) 47 Social Policy & Administration 111.

17 Bradford (n 14).

18 ibid.

the text of the GDPR, with several provisions mirrored in both laws.[19] Notably, the diffusion effect is not merely mimicking; it depends not only on the adoption of rules by national policy but also on the market response to those rules. Bradford emphasises that the Brussels Effect arises from a combination of "bestowed market size, political decision-making, and market forces shaping corporate behaviour".[20]

In the domain of artificial intelligence, discussions often invoke the Brussels Effect to speculate on the potential diffusion of the model proposed in the EU AI Act. However, at this stage of policy development, a more accurate assertion is that the EU is contributing to debates, through learning mechanisms, rather than exhibiting a Brussels Effect. Learning processes significantly shape the information political actors have about policy instruments and effectiveness, with evidence showing that other countries' experiences can influence expectations regarding the costs and benefits of a specific policy reform [21]. As the following sections will demonstrate, the case of Brazil's draft legislation strongly supports the argument of policy diffusion through learning rather than the Brussels Effect.

C. Contextual background in the EU and Brazil

In the EU, the impetus for AI regulation can be traced back to 2019 when Ursula von der Leyen, the President of the European Commission, emphasised the need for new rules governing AI. In 2018, the European Commission established the High-Level Expert Group on Artificial Intelligence (AI HLEG) to provide strategic advice on the matter.[22] The AI HLEG offered insights into ethics, policy, and investment, sectoral considerations, and key requirements for AI development. The resultant white paper and the

19 Renan Gadoni Canaan, 'The Effects on Local Innovation Arising from Replicating the GDPR into the Brazilian General Data Protection Law' (2023) 12 Internet Policy Review <https://policyreview.info/articles/analysis/replicating-gdpr-into-brazilian-general-data-protection-law> accessed 22 January 2024.

20 Bradford (n 14).

21 Covadonga Meseguer, 'Policy Learning, Policy Diffusion, and the Making of a New Order' (2005) 598 The ANNALS of the American Academy of Political and Social Science 67; Covadonga Meseguer and Fabrizio Gilardi, 'What Is New in the Study of Policy Diffusion?' (2009) 16 Review of International Political Economy 527.

22 European Commission, 'High-Level Expert Group on Artificial Intelligence' (7 June 2022) <https://digital-strategy.ec.europa.eu/en/policies/expert-group-ai> accessed 22 January 2024.

updated Coordinated Plan on AI outlined a risk-based regulatory approach that was later developed into the formal legislative proposal introduced in April 2021, in the form of the proposed EU AI Act.[23] Since then, the text has been debated by the EU institutions, and a final text was agreed upon at the end of a trialogue on 8 December 2023, with the European Commission, the Council of the European Union, and the European Parliament reaching a political agreement on its wording and on 13 March 2024, the EU Parliament approved the text, and final draft of the text was made public.[24] At the time of writing, the Act was awaiting to be formally endorsed by the Council.

In Brazil, the need for AI regulation has grown in parallel with global discussions, emphasising indigenous perspectives linked to the widespread use of technology in one of the world's most economically unequal nations. Evidence shows that the impact of these technologies exacerbates existing disparities in income, race, gender, and territories.[25] Notably, predictive algorithms and facial recognition systems have led to wrongful arrests, with 90% of individuals arrested through facial recognition in Brazil in 2019 being from the Black population.[26]

Against this backdrop, a Commission of Jurists for the Drafting of the Brazilian AI Bill (CJUSBIA) was established by the Brazilian Senate in February 2022. The CJUSBIA sought to develop a more comprehensive approach than that proposed in previous bills – including Bills No. 5051/2019, No. 21/2020, and No. 872/2021 – which were deemed insufficient in addressing essential aspects of AI regulation. Led by Ricardo Villas Bôas

23 European Commission, 'White Paper on Artificial Intelligence: A European Approach to Excellence and Trust' (2020) <https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en> accessed 22 January 2024; European Commission, 'Coordinated Plan on Artificial Intelligence' (2022) <https://digital-strategy.ec.europa.eu/en/policies/plan-ai> accessed 22 January 2024.

24 European Parliament, 'Artificial Intelligence Act: MEPs Adopt Landmark Law' (13 March 2024) <https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law> accessed 25 April 2024.

25 Ana Bottega and others, 'NPE 18: Quanto Fica Com as Mulheres Negras? Uma Análise Da Distribuição de Renda No Brasil' (Made centro de pesquisa em macroeconomia das desigualdades FEA/USP 2021) <https://madeusp.com.br/publicacoes/artigos/quanto-fica-com-as-mulheres-negras-uma-analise-da-distribuicao-de-renda-no-brasil/> accessed 22 January 2024; Laura Robinson and others, 'Digital Inequalities 2.0: Legacy Inequalities in the Information Age' [2020] First Monday <https://journals.uic.edu/ojs/index.php/fm/article/view/10842> accessed 23 January 2024.

26 Silvia Ramos, *Pele alvo: a bala não erra o negro* (CESec 2023).

Cueva, a Minister from the Superior Court of Justice (STJ), the CJUSBIA conducted public hearings and workshops to explore various topics related to AI regulation – engaging over 50 experts in the process.[27]

Through this consultative process, the commission aimed to gather views from different actors and develop a multisectoral perspective on AI regulation.[28] The discussions encompassed essential aspects such as defining the object of a future AI regulation, establishing foundational principles, incorporating socio-economic considerations, evaluating sectoral experiences, devising risk evaluation methodologies, preventing biases and discrimination, ensuring AI reliability, determining rights and duties, establishing civil liability regimes, devising institutional arrangements for enforcement, and formulating regulatory instruments for innovation. Apart from the public hearings, the CJUSBIA received 102 written contributions and organised an international seminar, involving perspectives from foreign experts.[29] The CJUSBIA then published a report and a draft regulatory proposal that formed the basis for Bill No. 2338/2023, presented to the Brazilian Senate in May 2023.[30]

In the Senate, a special committee examined the Bill alongside other legislative proposals on AI regulation and amendments from senators. The committee held public hearings, considering the perspectives of various stakeholders. This input informed the report by Rapporteur Senator Eduardo Gomes and the development of a revised bill, which was introduced in early 2024.[31] On December 20, 2024, the bill was approved by the Senate. The text must now be voted by the Chamber of Deputies.

The following section examines the structure and innovations of this revised text, now the central proposal for AI regulation in Brazil. It will

27 Brasil, 'Comissão de Juristas Responsável Por Subsidiar Elaboração de Substitutivo Sobre Inteligência Artificial No Brasil' (Brazilian Senate 2022) <https://legis.senado.leg.br/comissoes/comissao?codcol=2504>.

28 ibid.

29 ibid.

30 STJ, 'Projeto que Regula IA é Apresentado ao Senado Após Trabalho da Comissão Liderada Pelo Ministro Cueva' *Superior Tribunal de Justica* (Brasília, 2023) <https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/2023/04052023-Projeto-que-regula-IA-e-apresentado-ao-Senado-apos-trabalho-da-comissao-liderada-pelo-ministro-Cueva.aspx>.

31 Agência Senado, 'Relator de Projeto que Regulamenta IA Quer Buscar Texto de Convergência' *Senado Federal* (1 November 2023) <https://www12.senado.leg.br/noticias/materias/2023/11/01/relator-de-projeto-que-regulamenta-ia-quer-buscar-texto-de-convergencia> accessed 22 January 2024.

discuss the bill's distinctive features and how Brazil aims to forge its own path in this domain.

D. The structure of the Brazilian bill

As the result of this process, the Brazilian AI regulation bill No. 2338/2023 adopts a multifaceted approach to AI regulation, combining a risk-based model with a distinctive emphasis on a rights-based framework. A key element is its innovative institutional design, establishing a hybrid, tiered oversight model with enforcement powers shared between sector regulators and a central coordinator. Specifically, the bill proposes a National System for the Regulation and Governance of Artificial Intelligence (SIA – *Sistema Nacional de Regulação e Governança de Inteligência Artificial*).[32] This system would be coordinated by an authority designated by the federal government. The rapporteur suggested the National Data Protection Authority (ANPD – *Autoridade Nacional de Proteção de Dados Pessoais*), could fulfil this role, but it would require strengthening and expansion.[33] The coordination authority would work alongside other Brazilian regulatory bodies, such as the Central Bank, the competition authority (CADE), and regulatory agencies including ANATEL (the telecommunications regulator), ANVISA (the health regulator), among others.

The SIA supervisory system is likely the hallmark of the Brazilian bill and aims to reconcile the existing market-oriented system with the protection of fundamental rights. In Brazil, sector regulators, with their expertise in overseeing specific sectors, are well-placed to intervene within their areas. However, their focus is primarily on market regulation, and they may have less expertise in protecting and enforcing fundamental rights, a key concern for the Brazilian bill. This gap would be addressed by empowering a central coordinator with more expertise in this area, such as the data protection authority.[34] Data protection authorities are naturally geared towards protecting individual rights. Therefore, this hybrid tiered model is seen

32 Art. 40, *Bill No. 2338/2023*.

33 Agência Senado, 'IA: Relator Apresenta Proposta Alinhada com Regulamentos da Europa e dos EUA' *Senado Federal* (24 April 2024) <https://www12.senado.leg.br/noticias/materias/2024/04/24/ia-relator-apresenta-proposta-alinhada-com-regulamentos-da-europa-e-dos-eua> accessed 11 May 2024.

34 If ANPD were assigned as the regulator, it would require significant investments in capacity and autonomy. For a discussion on the limitations of the ANPD in the current setting, see Beatriz Kira, 'Inter-Agency Coordination and Digital Platform

as essential to strike a balance between fostering innovation and safe AI development, while also protecting citizens and their fundamental rights. Crucially, this hybrid approach permeates the entire structure of the bill and informs the logic behind the five pillars we discuss in the next section.

I. The foundations of the proposal: scope, definitions, and principles

The first pillar of the bill encompasses the scope of the regulation, key definitions and fundamental principles that underpin its framework. The proposal aims to create norms for AI systems in Brazil, prioritising the protection of fundamental rights, fostering responsible innovation, and ensuring the implementation of safe and reliable systems. These systems should benefit individuals, the democratic regime, and economic, scientific, and technological development.[35] The bill defines AI systems as: "machine-based system that, with varying degrees of autonomy and for explicit or implicit objectives, infers from input data or information it receives, how to generate outputs, in particular, prediction, recommendation or decision that can influence the virtual or real environment".[36]

The proposal clearly outlines exceptions to the future law, setting forth that it will not apply to AI systems used by an individual for a non-economic private purpose, developed and used exclusively for national defence, testing, development and research activities that are not placed on the market, open and free standards and formats (with the exception of those considered high-risk or falling under the governance standards for foundational models and generative AI, addressed in a separate chapter).[37]

The Brazilian bill establishes a comprehensive set of principles that guide its framework.[38] These principles emphasise a commitment to inclusive

Regulation: Lessons from the Whatsapp Case in Brazil' [2024] International Review of Law, Computers & Technology 1.

35 Art. 1, Bill No. 2338/2023, replacement text introduced by Senator Eduardo Gomes on 24 April 2024 [hereinafter *Bill No. 2338/2023*].

36 Art. 4, I, *Bill No. 2338/2023*. This aligns with the OECD new definition describing an AI system as "machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments". OECD, 'Recommendation of the Council on Artificial Intelligence' <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> accessed 22 January 2024.

37 Art. 1, sole paragraph, *Bill No. 2338/2023*.

38 Art. 2 and art. 3, *Bill No. 2338/2023*.

growth, sustainable development, and the overall well-being of society, including the protection of workers. They emphasise self-determination and the freedom of individuals to make informed choices. Human participation throughout the AI life cycle, coupled with effective supervision, underscores the importance of maintaining a human-centric approach. The principles address issues of non-discrimination, ensuring justice, fairness, and inclusion in AI systems. Transparency, explainability, and auditability are considered integral components of the proposed legislation, given the role they play in fostering trustworthiness and robustness in AI, along with a focus on information security.[39]

Notably, the Brazilian bill includes principles that are designed to protect individuals and grant them legal rights when they are affected by AI systems. Legal due process, contestability, and an adversarial character are highlighted to safeguard individual rights. Traceability of decisions aims at ensuring accountability and attributing liability to suppliers and operators. Additionally, provisions for reporting, accountability, and full damages compensation are set forth. The principles also encompass preventive measures, precautionary actions, and mitigation strategies to address systemic risks arising from intentional or non-intentional uses and unforeseeable effects of AI systems. Lastly, adherence to the principles of non-maleficence and proportionality underscores the importance of aligning AI methods with legitimate and determined purposes.

II. Granting rights to individuals and groups affected by AI systems

In Brazil, the foundation of any regulatory framework is rooted in the incorporation of constitutional rights, and this notion holds true for the proposed AI regulation. The bill places significant emphasis on establishing rights and responsibilities in response to the impact of artificial intelligence systems on individuals' lives, dedicating an entire chapter to this aspect. The bill guarantees three core rights for individuals and groups affected by AI systems:[40]

- *Right to prior information:* Individuals have the right to be informed in advance regarding their interactions with AI systems.

39 Brasil (n 29).
40 Art. 8, *Bill No. 2338/2023.*

- *Right to privacy and data protection:* Individuals are entitled to privacy and protection of personal data in accordance with relevant legislation.
- *Right to non-discrimination and correction of biases:* Individuals are protected against direct, indirect, illegal, or abusive discriminatory biases, and have the right to have biases corrected.

These rights are further strengthened in the context of high-risk AI systems. The overarching goal is to ensure a fair and comprehensive defence mechanisms, akin to an informational due process, for those whose rights and freedoms may be affected by decisions made by automated means. Therefore, individuals affected by high-risk AI systems would have the following additional rights:[41]

- *Right to explanation:* Individuals are entitled to an explanation of decisions, recommendations, or predictions made by AI systems.
- *Right to contest:* Individuals can contest decisions or predictions made by AI systems.
- *Right to human supervision:* The right to human intervention in decision-making processes is guaranteed, considering the context, technological advancements, and associated risks.

The bill grants individuals and groups affected by AI decisions the right to explanation and to request additional information, including:

- *System rationale and logic:* The reasons, logic, and anticipated consequences of decisions for the affected individual.
- *AI system's contribution:* The degree and level of the AI system's contribution to decision-making
- *Processed data details:* Information about processed data, its source, decision-making criteria, and relevant weighting applied.
- *Mechanisms for contestation:* Available processes for contesting decisions.
- *System rationale and logic:* The reasons, logic, and anticipated consequences of decisions for the affected individual.
- *Level of human supervision:* The level of human supervision and the possibility of requesting human intervention

Notably, many of the rights outlined in the proposed AI bill are not entirely new within the Brazilian legal framework. In fact, as observed by the Brazilian Data Protection Authority (ANPD), there is a connection be-

41 Art. 9, *Bill No. 2338/2023.*

tween these proposed rights and those already established in the LGPD.[42] Enacted in 2018, the LGPD governs personal data processing across various contexts, whether physical or digital, public or private.[43] The protection of rights outlined in the proposed AI bill aligns with the LGPD's emphasis on the right of access, as detailed in Article 9. This ensures individuals receive clear and comprehensive information about the processing of their personal data. Similarly, the right to contest and request a review in the proposed bill mirrors the right to review automated decisions outlined in Article 20 of the LGPD. These alignments highlight the importance of integrating AI regulation with existing data protection legislation. Furthermore, the close relationship between proposed AI rights and those overseen by the ANPD suggests the agency might be well-positioned to coordinate the bill's proposed supervisory system – SIA.

III. Levels of risks in AI systems: high-risk, excessive risks and general-purpose AI systems

The Brazilian bill employs a risk-based, asymmetric approach,[44] calibrating the legal obligations in response to the potential risks associated with the application of the technology. Similarly to the approach adopted in the EU AI Act, the Brazilian bill establishes certain general and specific obligations applicable to AI systems in proportion to the degree of risk they present. The highest risk categorisation operates with two distinct classifications that receive differentiated treatment throughout the proposed legislation: AI systems classified as "high risk" and those deemed "excessive risk". It falls upon the system provider, prior to market placement, to conduct a preliminary assessment for risk classification.

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42 ANPD, 'Análise Preliminar Do Projeto de Lei Nº 2338/2023, que dispõe sobre o uso da Inteligência Artificial' (Autoridade Nacional de Proteção de Dados 2023) <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-publica-analise-preliminar-do-projeto-de-lei-no-2338-2023-que-dispoe-sobre-o-uso-da-inteligencia-artificial> accessed 22 January 2024.

43 Miriam Wimmer, 'Foreword: Advancements and Challenges for Latin American AI and Data Governance' (2022) 47 Computer Law & Security Review 105759.

44 Marie-Anne Frison-Roche, 'Asymmetry: Asymmetric Regulation / Asymmetry of Information' (*The Journal of Regulation and Compliance*, 4 March 2024) <https://thejournalofregulation.com/en/article/asymetrie-regulation-asymetrique-asymetrie-dinform/> accessed 4 March 2024.

From a comparative perspective, in the original EU Commission's proposal of the EU AI Act, AI systems were considered high-risk if: i) the AI system is intended to be used as a safety component of a product, or is itself a product, covered by the Union harmonisation legislation listed in Annex II *and* pursuant to that legal framework it is required to undergo a third-party conformity assessment to be placed on the market[45]; ii) the AI system is one of the kind referred to in Annex III (i.e., biometric identification and categorisation of natural persons; management and operation of critical infrastructure; education and vocational training; employment, workers management and access to self-employment; etc.).[46] However, during the trialogue negotiations, the Commission proposal's classification rules for high-risk AI systems were amended significantly. The agreed text introduces a derogation from the general rule that AI systems referred to in Annex III shall be considered high-risk: if systems do not pose a significant risk of harm, to the health, safety or fundamental rights of natural persons, and if they do not perform profiling of natural persons, they shall not be considered high-risk.[47] This approach, however, has inherent complexities. While it strives to strike a delicate balance between industry autonomy and the need for effective oversight in the rapidly evolving AI landscape, assigning risk categories presents inherent challenges.

The Brazilian AI bill acknowledges this challenge and recognises that a one-size-fits-all approach might not work. Instead, it adopts a more flexible system. The legislation provides a base risk classification for different AI applications, encompassing areas like security, critical infrastructure (like water and electricity), education, recruitment, autonomous vehicles, healthcare, and criminal justice, among others.[48] However, it empowers enforcement agencies, working alongside the Supervisory System, to adjust the risk

45 Art. 6(1) AI Act.

46 Art. 6(2) AI Act.

47 Art. 6(2a) AI Act, Draft Agreement. The new derogation contains an assessment of instances where AI systems do not pose significant risks of harm to fundamental goods, that is, when the AI system is intended to: a) perform a narrow procedural task; b) improve the result of a previously completed human activity; c) detect decision-making patterns and is not meant to replace or influence the previously completed human assessment without proper human review; d) perform a preparatory task to an assessment relevant for the purpose of Annex III uses cases.

48 Art. 53, *Bill No. 2338/2023*.

classification based on specific cases. The SIA also retains the authority to update the entire list of AI systems altogether.[49]

Moreover, the Brazilian bill enumerates situations constituting "excessive risks", where the use of technology is prohibited due to the involvement of non-negotiable rights. These scenarios involve the use of AI that could be harmful to security, physical safety, and ultimately, a person's right to self-determination. The bill mentions systems employing subliminal techniques, those exploiting human vulnerabilities, the controversial practice of social scoring that assigns universal rankings for access to goods, services, and public policies, AI used to generate child sexual exploitation material, predicting crime or recidivism risk, and the development of autonomous weapons.[50] Furthermore, continuous, remote, and publicly accessible biometric identification systems, deemed highly perilous in multiple committee contributions, necessitate specific federal legislation adhering to the proposed requirements.[51]

IV. Obligations

The fourth pillar of the proposed bill revolves around AI governance measures, encompassing a range of obligations of due diligence and internal processes to be adopted by agents providing or operating AI systems. General measures include transparency measures about the use of artificial systems in interaction with natural persons and data management obligations to prevent discriminatory bias.[52]

The Brazilian bill imposes stricter requirements on high-risk AI systems. These systems must conduct a risk assessment and maintain a continuously updated record of it, subject to reassessment by the Supervisory System.[53] In addition, high-risk systems are subject to a range of additional governance measures. These include appointing dedicated officer responsible for overseeing compliance with regulations; documentation that outlines the system's operation, design decisions, implementation details, and usage throughout its lifecycle; the use of tools for automatic recording of system

49 Art. 16, *Bill No. 2338/2023*.
50 Art. 13, *Bill No. 2338/2023*.
51 Art. 14, *Bill No. 2338/2023*.
52 Art. 17, *Bill No. 2338/2023*.
53 Art. 12 and art. 22, *Bill No. 2338/2023*.

operations; and conducting performance tests evaluating reliability based on the sector and application type. These tests encompass robustness, accuracy, precision, and coverage. The bill also requires high-risk AI systems to adopt data management measures to mitigate and prevent discriminatory biases, and technical measures must be in place to facilitate the explainability of AI system results.[54]

Additionally, when an AI system generates synthetic content, the content itself, considering the state of the art in technological advancements, should include a clear and reliable identifier. This identifier would facilitate verification of authenticity, provenance, and any modifications or transmissions the content may undergo.[55] This concern with authenticity is particularly important in light of concerns around the risks AI can pose to political processes, and debates around how to mitigate them.[56]

Furthermore, the Brazilian bill imposes additional requirements on public entities that deploy high-risk AI systems. Before implementation, these entities must conduct a public consultation to gather feedback on the system's purpose and potential impacts, particularly on vulnerable populations. Additionally, clear protocols for data access need to be established, along with a registry that logs who accessed the system and for what purpose. The bill further emphasises the protection of the rights of individuals affected by the system, including the right to explanation and review of decisions made by the AI. To promote interoperability and transparency, the use of APIs or other interfaces is encouraged. Finally, public entities must disclose information about the AI systems they use, along with their corresponding risk assessments, on official government websites.[57]

The Brazilian bill recognizes the unique challenges posed by foundational AI models, including Large Language Models (LLMs). Due to the difficulty of pre-identifying their risk levels, these models are subject to a specific regulatory framework. The bill requires developers of general-purpose foundational AI models to fulfil several objectives before market release or use. These include conducting thorough testing and analysis to identify and mitigate "reasonably foreseeable" risks to fundamental rights, the en-

54 Art. 18, *Bill No. 2338/2023*.
55 Art. 19, *Bill No. 2338/2023*.
56 Danielle Allen and E Glen Weyl, 'The Real Dangers of Generative AI' (2024) 35 Journal of Democracy 147; Sarah Kreps and Doug Kriner, 'How AI Threatens Democracy' (2023) 34 Journal of Democracy 122.
57 Art. 21, *Bill No. 2338/2023*.

vironment, democratic processes, and the spread of disinformation, hate speech, and violence. Unmitigable risks must be documented. In addition, these models can only process and incorporate data only in accordance with data governance and data protection laws. Furthermore, they must adhere to sustainability standards that minimise energy consumption and resource use while promoting energy efficiency during model development. Crucially, the bill mandates the registration of all foundational models in a government-regulated database and developers are required to retain model-related documentation for ten years to facilitate oversight by relevant authorities.[58]

V. Fostering innovation

The fifth pillar of the bill focuses on supporting technological innovation and development in AI. This includes mandating public sector investment in R&D (Research and Development) and resource allocation for AI system development.[59] In a unique move to promote cultural creation and innovation, the Brazilian bill integrates copyright protection measures within its framework. This stems from the recognition of two key issues. The first is the critical role of input data and information for AI systems. The second is the potential tension between this use and the rights of content creators whose work feeds these systems, in light of the fact that Brazil's copyright legislation, from 1998, is probably unfit to effectively protect copyright holders in the context of AI systems.

As such, the Brazilian bill strives to strike a balance between fostering innovation and protecting copyright. To achieve this, it requires the provider of AI systems that utilise content protected by copyright to disclose which content was used to train the AI system.[60] The bill acknowledges fair use exceptions for legitimate data processing activities, such as research, journalism, archives, libraries, and educational purposes.[61] In most circumstances, the bill grants copyright holders the right to opt out of having their work used to train AI systems.[62] This empowers creators to control how

58 Art. 29, *Bill No. 2338/2023.*
59 Art. 50, *Bill No. 2338/2023.*
60 Art. 53, *Bill No. 2338/2023.*
61 Art. 54, *Bill No. 2338/2023.*
62 Art. 55, *Bill No. 2338/2023.*

their content is used. Additionally, the bill protects copyright holders from discrimination if they choose to opt out, framing such actions as a violation of Brazilian competition law.[63]

A crucial topic of discussion in the AI and copyright debate is whether the copyright holder should have a right to compensation when their creation is used to train AI systems.[64] The bill does not settle this debate but establishes that the SIA will establish a regulatory sandbox to test solutions on how AI systems could fairly remunerate artists and copyright holders.[65]

E. Conclusion

In conclusion, with the continuous expansion of AI technologies, governments worldwide are actively pursuing regulatory measures to address the varied implications of AI applications across diverse sectors. The Brazilian AI Bill No. 2338/2023 serves as an example of such regulatory efforts, embodying a risk-based and rights-oriented approach. While subject to amendments, the revised text of bill discussed in this chapter enjoys broad support across government, industry, academia, and civil society. This legislative initiative underscores Brazil's endeavour to strike a delicate balance between safeguarding individuals and institutions, promoting innovation, and reaping the advantages of AI, all while taking into account the specific concerns of the Brazilian context.

Notably, the Brazilian bill goes beyond mirroring the EU AI Act. It offers a novel framework that combines hard and soft law instruments, substantive and procedural rules, and overarching principles. A key differentiator is its proposal for a multi-tiered governance system. The Supervisory System for Artificial Intelligence empowers existing regulators while establishing a coordinating body, likely the data protection authority. This ensures safe AI development that fosters economic growth and innovation, but crucially, prioritizes fundamental rights as enshrined in the Brazilian Constitution. The Brazilian AI Bill, therefore, offers a valuable model for other nations seeking to navigate the complex landscape of AI regulation. Its emphasis on

63 Art. 56, *Bill No. 2338/2023*.

64 See Andres Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs' (2024) 73 GRUR International 111.

65 Art. 57, *Bill No. 2338/2023*.

balancing innovation, rights, and safety could serve as a blueprint for AI regulation in jurisdictions with similar legal and institutional context.