ARTIFICIAL INTELLIGENCE AND EVIDENCE PRODUCTION IN CRIMINAL PROCEDURE

A rtificial Intelligence (or AI) is defined by the capacity of a machine to reproduce and mimic certain Human abilities. These might be data analysis, planning skills, but more importantly, the ability to learn and adapt.

These types of systems act because of algorithms that feed on data collected by human interaction. The aim is to build systems that mimic reasoning, like decision- making.

The impact of AI on our lives cannot be underestimated, and it is now present in many of the computer systems we use on a daily basis.

This type of program is designed to assist the human experience and its impact on the legal system is not surprising, nor can the law be ignorant of technological developments.

Caldeira Pires & Associados Sociedade de Advogados SP RL Av. da República, 45, 8.º Dto. 1050 -187 Lisboa
E info@caldeirapires.pt T +351 210 991 736 F +351 210 963 951
www.caldeirapires.pt

AND ON CRIMINAL LAW, WHAT QUESTIONS ARISE?

The **advantages** for criminal proceedings in specific are many, such as speed and efficiency, reducing the cost of justice and mitigating human error.

Despite the positive uses, **AI presents problems when confronted with several essential principles governing criminal procedure**, such as the Principle of Legality, the Principle of the Presumption of Innocence, among others.

Due to their ability to monitor their environment, collect data, learn and act, these systems can pose risks to fundamental rights, especially in the context of criminal justice.

What do you do when a judge is confronted with an image of a political leader committing a crime? How do you decide when a certain algorithm is pre-directed towards a pre-decided answer?

The problem is therefore divided into two essential points:

1.   The evidence generated by AI and its validity.

2.   The analysis of AI evidence in the light of the Guiding Principles of Criminal Procedure Law.

Criminal Procedure Law is governed by the "Principle of Investigation or Material Truth", which is set out in article 340.º, number 1 of the Code of Criminal Procedure (hereinafter, CCP). This Principle guides the actions of the court in the sense that it must carry out all the necessary steps to ascertain the truth behind the facts. It is essential for the correct application of justice.

Supporters of AI in the production of evidence argue that algorithms are not subject to memory failures, nor are they susceptible to the temptation to lie or omit information. These systems can therefore be used to discover the truth.

Despite this situation, one of the problems with using AI in the production of evidence is its confrontation with the Principle of Legality.

This states that all evidence is legal if it is not prohibited by law, as provided for in Article 125.º of the CCP. This means that the means of proof in the Portuguese legal system are not limited by whether or not they are provided for by law.

However, some say that this freedom of evidence is merely illusory, as there are constitutional and legal limitations. These can be so-called absolute prohibitions, such as those set out in Article 126.º, number 2 of the CCP, or relative prohibitions. This means that any evidence that is admitted will always be subject to the rule of law and will also be limited by the Principle of Proportionality.

In this sense, we can question whether certain images or mechanical reproductions made using AI, with the intention of misleading and inducing error, cannot be included in this classification of misleading means.

On the other hand, the question also arises as to Article 167.º of the Code of Criminal Procedure, which concerns mechanical reproductions. In this case, the problem is non-consensual reproductions, which will be used in the proceedings, infringing on the defendant's personality rights. The use of a speech production tool or even the so-called deepfakes, present problems for which there is currently no legal solution.

Another problem is that the defendant's right to defense is not safeguarded when these means of obtaining evidence are used. For this to be guaranteed, it is essential to be able to counter this evidence that is automatically produced. This possibility of defense will thus be undermined. It is also worth noting the existence of the right not to produce evidence about oneself, something that could be called into question by these new developments.

The lack of transparency and explanation as to how it works are also challenges that AI faces in its use in court. These algorithms are often real mysteries. Therefore, only the use of AI systems that ensure these characteristics will make it possible to achieve a balance between the interests of the investigation and the protection of the defendant's right to defense. Oral confrontation between the evidence obtained and that produced at trial is essential.

In addition, many of these systems collect sensitive personal data, which could also undermine the defendant's right to privacy.

An example of this type of misuse is the "COMPAS" system in the United States. This was an AI system that would assess an individual's likelihood of reoffending, and the algorithm was programmed so that people of color would have a higher rate of reoffending than others. This situation violates the principle of adversarial proceedings and equality of arms, as well as the right to a fair and just trial.

FINAL NOTE

Our legal system is not yet properly prepared for the use of these new means of obtaining digital evidence.

But more than that, these systems and algorithms also present the problem of being reliable and transparent. In order to discover the truth, it will therefore be essential for there to be constant dialogue between experts in these technologies, but also with legal experts, so as to ensure that all the necessary information is available.

Rita Cardiga Nobre | r.nobre@caldeirapires.pt