

Regulating Artificial Intelligence in Brazil:

the contributions of critical social theory to rethink principles

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This essay discusses how critical social theory in Brazil can contribute to a revision of dominant approaches to AI regulation and a regulatory strategy focused on innovation, legal certainty, and economic development in Brazil. We explain the origins of the Brazilian Draft Bill on Artificial Intelligence Regulation and the main critiques during the discussions at the legislative houses in 2022. We argue that critical social theory can enlarge the discussion about which should be the regulatory goals of such legislation. Critical theory helps envision new principles that are connected to the structural problems of post-colonial societies. We intend to advance the project of enlarging the epistemologies of the South and expanding the view of Global Data Justice that relates to the social theory developed in the South.

1. Introduction

There has been a strong debate in Brazil about how to structure the regulatory framework for Artificial Intelligence. Some believe that it is better for the State to not intervene and let the markets self-regulate. This group defends that any state regulation should be minimal and focused on legal certainty, fostering economic development. According to this view, AI firms by themselves would have a commitment with basic humanitarian values and be able to develop their own codes of conduct. Economic actors, associations and organizations from the private sector should be responsible for advancing an 'AI ethics' approach, since they have a privileged vision of what the capabilities of their innovations are and which social purposes they can serve. This approach advocates for minimum regulatory intervention from the state, coupled with the self-regulation of economic actors.

On the other hand, a large group of scholars, lawyers and civil society organizations believe that AI regulation in Brazil cannot be limited to minimal state intervention and self-regulation through ethics and

principles, or there could be an 'ethics washing'.¹ AI regulation should be based on fundamental rights, risk prevention, strong *ex ante* obligations and new regulatory tools such as impact assessment.²

Furthermore, the principles should be different from the ones that we observe at OECD, World Economic Forum and other key international forums that are discussing proposal legislation on this subject matter. As argued by scholars of critical legal thinking on racism and AI, Brazil should establish a vision of application of law as a 'preventive and protective system to avoid the naturalization of racism through the dynamics of hierarchical and invisible social relations in the uses of algorithmic systems'.³ As argued by Tarcízio Silva, there is a 'double opacity'⁴ that should be overcome: the denial of racism and the denial of the politics of technology. As explained by Silva, algorithmic racism

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- 1 As argued by Ben Wagner, "unable or unwilling to properly provide regulatory solutions, ethics is seen as the easy or soft option which can help structure and give meaning to existing self-regulatory initiatives". B. Wagner, Ethics as an escape from regulation: from "ethics-washing" to ethics-shopping?, in E. Bayamlioglu, I. Baralic, L. Janssens, M. Hildebrandt, *Being Profiled: Cogita Ergo Sum. Ten years of profiling the European citizen*, Amsterdam, Amsterdam University Press, 2018, p. 84.
- 2 J. Maranhão, J. Abrusio, M. A. Almada, 'Inteligência artificial aplicada ao direito e o direito da inteligência artificial', *Suprema: revista de estudos constitucionais*, v. 1, 2021, p. 154-180; C. Mullholland, *Inteligência artificial e discriminação de gênero*, in: A. Schreiber, G. Martins, H. Carpena, *Direitos fundamentais e sociedade tecnológica*, Indaiatuba, Editora Foco, 2022.
- 3 B. Lima, *Racismo algorítmico: o enviesamento tecnológico e o impacto aos direitos fundamentais no Brasil*, São Cristóvão, Universidade Federal do Sergipe, 2022, p. 107.
- 4 T. Silva, *Racismo algorítmico: inteligência artificial e discriminação nas redes digitais*, São Paulo, Edições Sesc, 2022, p. 13.

is fed and trained by 'digital practices of discrimination' like 'discursive racism'.⁵ This matters for any discussion about AI in a racist country like Brazil.

In this paper, we advance this critical analysis of the principles that should guide AI regulation in Brazil through a different approach. Instead of relying on the emerging scholarship produced by 'AI experts' and the highly sophisticated literature in the field of technology regulation, we take a step back and return to some key fundamental thinkers that have dedicated their lives to the reflection on the deep problems of Brazilian society.

As advocated by critical legal scholar Bianca Kremer,⁶ who first introduced Lélia Gonzalez in the field of law and technology in Brazil, we believe that thinkers like Ailton Krenak,⁷ Lélia Gonzalez,⁸ Silvio Almeida⁹ and Adilson Moreira have a better understanding of the structural problems of Brazil and normative principles that should be assumed from a democratic point of view. While Krenak is a renowned indigenous leader and social theory thinker in Brazil, Lélia Gonzalez was a pioneer in the black feminism movement in Brazil.¹⁰ Both were active participants in the process of debating a new Constitution in Brazil between 1987 and 1988. Silvio Almeida is currently the Minister of Human Rights in the government of Brazil and an influential intellectual.

These structural problems are connected with the colonial history of Brazil, the massive extermination of indigenous communities and the ongoing processes of resistance,¹¹ the experience of slavery (with 5 million African captives, 40% of the total of 12.5 million shipped to America over three and a half centuries),¹² the myth of racial democracy¹³ and the everyday violence that constitutes the Brazilian way of living, including discursive microaggressions in humor towards black people, usually protected by the legal system.¹⁴ The 'myth of racial democracy' permeates the imagination of Brazilian society, which believes there is no racism in Brazil. According to the myth, Brazil was not only the place of harmonious social coexistence between whites,

blacks, and indigenous people, but also a fertile territory for miscegenation in which the figure of the 'mestizo' emerges – an ambiguous subject right in the middle of the optimistic myth of the three races. The exclusion of minorities is connected to the problem of the construction of knowledge in social theory. As social theorist Sueli Carneiro coherently argues, this mechanism of suppression of knowledge (epistemicide) is dispositive of biopolitics that operates in racialized societies such as Brazil, modifying the reproduction of knowledge(s), subjectivities, and power.¹⁵ If epistemicide means delegitimizing black or indigenous people as bearers and producers of knowledge (due to cognitive capacity, material shortages or education processes, as explained by Sueli Carneiro),¹⁶ our approach consists of paying more attention to the 'rationalities of the subjugated'. Our role, therefore, is to show that these thinkers, which are members of political minorities in terms of power, are carriers of a fundamental critical vision, and their vision matters for a critical discussion about AI.¹⁷

We know of our limitations in this task. We cannot offer a complete review and in-depth analysis of this critical literature. Our much more modest objective is to try to mobilize this critical literature, even if partially, for the debate on AI regulation, considering that this is a deeply social regulatory issue that deals with the imbrications of technologies in the political and cultural formatting of a society.

By returning to these Brazilian critical thinkers, we might be able to think about the social problems of Brazilian society from the black and indigenous perspective, and how our multicultural society might be impacted by the advance of AI, considering that 'technologies are not neutral'¹⁸ and operate in culturally shaped institutional forms of social organization, in a renewed form. Therefore, we intend to advance the project of enlarging the 'epistemologies of the South' and of expanding the view of Global Data Justice that relates to a social theory developed in the South. Therefore, this paper tries to answer the following question: what contributions can critically oriented social theories produced in Brazil offer to the debate on Artificial Intelligence regulation?

To answer this question, the paper is organized into three parts. The first one explains the history of the Brazilian Draft Bill 21/2020, which was formulated by the private sector to regulate AI. We explain how this Draft Bill is being highly criticized, as well as what the main outcomes of the public hearings are, which occurred in the Brazilian Congress in the months of May and June 2022. The second part presents to the reader a broad view of the structural problems of Brazilian society, the ongoing effects of colonization, and the contributions of decolonial thinkers in Brazil. The third part mobilizes the knowledge of these thinkers to problematize the principles of Draft Bill 21/2020 and to enlarge them. The final part of the article argues that the critical theories produced in Brazil can offer an opportunity to reframe the principles formulated for the regulation of Artificial Intelligence and enrich the discussion from other normative approaches.

5 T. Silva, *Racismo algorítmico*, p. 19.

6 B. Kremer, *Direito e tecnologia em perspectiva ameericana: autonomia, algoritmos e vieses raciais*, Rio de Janeiro: Pontifícia Universidade Católica, 2021.

7 Ailton Alves Lacerda Krenak was born in 1953 in the region of the Rio Doce valley, in Minas Gerais, territory of the Krenak people who have faced the consequences of the intense mining activity carried out by multinationals for decades. In 1987, he played an important role in the discussions of the Constituent Assembly, which gave rise to the current Brazilian Constitution. His role in the assembly was decisive for the inclusion in the 1988 Constitution of the "Indigenous Chapter", which guarantees indigenous rights to land and native culture.

8 Lélia Gonzalez was an important Brazilian intellectual and activist. Considered the first black woman to dedicate herself to race and gender studies in Brazil, Lélia developed strong research and activism in the area. Thus, it became essential to reflect on the role of black women in Brazilian society, as well as the black movement itself, always bringing a popular and human perspective. She stood for Afro-Latin American feminism and wrote about racism and sexism in Brazilian society.

9 Silvio Almeida is a black university professor, lawyer, jurist, and philosopher. President Lula, in his third term, in 2023, appointed Silvio Almeida as Minister of Human Rights and Citizenship.

10 B. Kremer, *Direito e tecnologia em perspectiva ameericana: autonomia, algoritmos e vieses raciais*, p. 18.

11 A. Krenak, *A vida não é útil*, São Paulo, Companhia das Letras, 2020.

12 L. Gomes, *Escravidão: do primeiro leilão de cativos em Portugal até a morte de Zumbi de Palmares*, Rio de Janeiro, Globo Livros, 2019.

13 K. Munanga, *Rediscutindo a mestiçagem no Brasil: identidade nacional versus identidade negra*, São Paulo, Autêntica, 2019.

14 A. Moreira, *Racismo recreativo*, São Paulo, Editora Pólen, 2019.

15 S. Carneiro, *A construção do outro como não-ser como fundamento do ser*, São Paulo, Universidade de São Paulo, 2005.

16 S. Carneiro, *A construção do outro como não-ser como fundamento do ser*, p. 97.

17 For a similar perspective, investigating the importance of decolonial thinking for AI, see S. Mohamed, M. Png, W. Isaac, 'Decolonial AI: decolonial theory as sociotechnical foresight in Artificial Intelligence', *Philosophy & Technology*, v. 33, p. 659-684, 2020.

18 R. Silva Mariah, 'Orbitando telas', *Sur: Revista Internacional de Direitos Humanos*, v. 18, n. 31, 2021.

2. The Brazilian Draft Bill for Artificial Intelligence up against the wall

This section describes the origins of the Brazilian Draft Bill on Artificial Intelligence in 2020 and the reaction of the Brazilian Senate in 2022. We analyse the conflicts around the discourses of innovation and self-regulation and the problem of technological neutrality.

a. The origins of the Draft Bill on AI in Brazil

The proposal to regulate AI in Brazil emerged in 2020 after a trajectory of legal reforms for technology and Internet issues. Between 2007 and 2014, Brazil led a discussion on a 'Constitution for the Internet' and passed a federal law with rules on net neutrality, civil liability of intermediaries and privacy ('Marco Civil da Internet'). Between 2016 and 2018, the National Congress formulated a General Personal Data Protection Law ('LGPD'), influenced by the General Personal Data Protection Regulation and the Mercosur integration agenda.¹⁹ In 2020, an amendment to the constitution was proposed to include the protection of personal data as an autonomous fundamental right. In the same year, the Brazilian Data Protection Authority was created.²⁰

Marco Civil da Internet is a document that defines principles, rights, and duties regarding the use of the Internet in Brazil. It establishes that access to the Internet is essential to the exercise of the citizenry. It also established rules for the retention of metadata for Internet service providers and Internet application providers. Marco Civil da Internet also pioneered data protection rules regarding transparency, purpose limitation, and control of personal data, which were further expanded through the General Data Protection Law, a comprehensive legislation that defined several new 'data rights' such as the right to oppose abusive data processing, the right to explainability in automated decision-making and the right to the portability of personal data.

The creation of the Artificial Intelligence draft bill was inspired by the Marco Civil da Internet but was limited to a principles-based approach. This approach was well described by Carlos Affonso Souza, Ronaldo Lemos, and Fabro Steibel in a piece about the regulatory strategy of Marco Civil da Internet:

An entire new set of legal rules is not the best answer every time a new technology comes along. Most of the time, the desire to pass a law that addresses a very specific issue (as popular as it might seem) will rapidly lead to an obsolete piece of law. As soon as technology changes, the same law will have little application or might even restrict the framework for innovation. Regulation that addresses technological shifts should follow a principles-based approach to avoid imminent obsolescence. On the other hand, there is a need for regulatory action to preserve fundamental rights and ensure that technology serves as an instrument to enhance the development of personality, the improvement of economic and social conditions - and not the opposite.²¹

Prepared by Congressman Eduardo Bismarck (Brazilian Labor Party of

Ceará) in 2020, the project was formulated with 16 articles, defining AI regulation objectives in a similar fashion as Marco Civil da Internet. According to the original proposal, the use of AI would aim at (i) the research and development of an ethical and prejudice-free AI, (ii) competitiveness and increase in Brazilian productivity, (iii) inclusive growth, society's well-being, and reduction of social inequalities, (iv) measures to strengthen human capacity and prepare for the transformation of the labour market, and (v) international cooperation with artificial intelligence knowledge sharing.

Based on OECD reports on principles for regulating artificial intelligence, Bismarck argued that the Brazilian State should be prepared to use AI in public services and promote the training of Brazilian workers, in a scenario of job reduction due to the advancement of AI. In his justification, he argued:

The present bill takes a human-centered approach to AI and has as its main objective the adoption of AI to promote research and innovation, increase productivity, contribute to sustainable and positive economic activity, improve the well-being of people and help respond to major global challenges.²²

The draft bill artificial intelligence system as 'a system based on a computational process that, based on a set of objectives defined by humans, can, through data and information processing, learn to perceive and interpret the external environment, as well as interacting with it, making predictions, recommendations, rankings or decisions'.

Eduardo Bismarck presented the Draft Bill in February 2020 but it was only properly discussed in 2021, when the bill was sent to the Commission of Science, Technology, Communication and Informatics (CCTIC). In March 2021, the young Congresswoman Luisa Canziani, from Brazilian Labor Party of Paraná (PTB/PR), was designated rapporteur of the Commission. In May 2021, Congresswoman Soraya Santos, Liberal Party of Rio de Janeiro (PL/RJ), demanded urgency to the voting of the draft bill, according to the internal rules of the Chamber of Deputies.

Congresswoman Canziani asked for public hearings in May 2021 and invited members of the University of São Paulo, Insper, Pontifícia Universidade Católica to present their views on the subject matter. She also invited lobbying groups such as Câmara Brasileira da Economia Digital, Center for Information Policy Leadership (CIPL), Brasscom and Instituto Liberdade Digital. It is easy to observe how the discourse changed. While Bismarck was concerned with the labour market and the capacities of the Brazilian industries, Canziani approached the issue with a discourse about legal certainty and investments:

The discussion requires a highly qualified debate so that we can understand the importance and the way of elaborating a legal and regulatory framework attentive to the desires of different public and private actors, in addition to being designed to avoid excessively interventionist approaches that could prevent society from taking advantage of all the benefits. It is necessary to demand that the debate be enriched by different sectors so that, in this way, we have a new paradigm of oppor-

19 D. Doneda, *Da Privacidade à Proteção de Dados Pessoais*, Rio de Janeiro, Renovar, 2021.
20 L. Parentoni, 'A glass half full look at the Brazilian Data Protection Authority', *Revista da Faculdade de Direito*, v. 45, p. 1-23, 2021.
21 C. Affonso Souza, F. Steibel, R. Lemos, *Notes on the creation and impacts of Brazil's Internet Bill of Rights, The Theory and Practice of Legislation*, 2007, p. 5.

22 E. Bismarck, *Justification of Draft Bill 20/2020*, Brasília, Chamber of Deputies, 2020.

tunities, including the entry of new investors in the market and the development of new applications.²³

In September 2021, rapporteur Canziani presented an alternative text for Draft Bill 21/2020.²⁴ She expressly affirmed that OECD principles were influential for the design of the legislation, but that Brazil should not intervene and formulate strong ex-ante norms. The main concern should be fostering economic development and not harming the emerging industry of AI in the country. The bill also tried to limit the regulatory capacity of the State:

The second concern is to guide future regulatory activity in this field, so as not to inhibit technological development, but protecting Brazilian citizens from possible risks. As with the emergence of any new technology, insecurity and ignorance about its functioning and impacts can lead to regulatory excesses that end up discouraging its adoption and preventing innovation. (...) Unlike the European proposal, however, ex ante limitations to types of artificial intelligence are not proposed (absolute bans), not even the ex ante specification of what would be high-risk artificial intelligence, leaving such definitions to legislation, regulation or subsequent sectoral self-regulation.²⁵

Led by Canziani, the Chamber of Deputies built a narrative in 2021 that the legislation would stimulate business, foster competition and allow the private sector to define their own rules, favouring a self-regulatory approach. The draft bill received 413 approval votes and only 15 rejections in September 2021. The lobbying group 'Frente Digital', which played a key role, celebrated the approval as an important step for innovation and economic development.²⁶

As argued by Tatiana Dias, journalist from The Intercept Brasil, the lobbying group 'Frente Digital' is supported by a think tank called Cidadania Digital, founded in 2019. The think tank was founded by Felipe França, connected with the right-wing group Students for Liberty, founded in the USA, and the liberal movement Livres. The other director is João Freitas, president of the Brazilian Association of Mobility and Technology, a group that represents the interests of Uber, 99 and iFood. Dias highlights that they were responsible for gathering the support of Google, Facebook and other Big Techs in the defense of the draft bill. In a political movement, they also gave a prize called 'Alan Turing' for the President of the Chamber of Deputies, Arthur Lira, who controls the agenda of the Chamber.²⁷

The initial reaction against the draft bill came from specialized digital rights organizations, who criticized the speed with which it was passed in the Chamber of Deputies. In 2021, an open letter signed by civil law jurists also criticized the liability model chosen by the

Chamber of Deputies and the difficulties for compensation that the subjective model, based on the notion of 'guilt', would generate.²⁸ It was only in the Federal Senate that the draft bill began to be analyzed from a critical perspective.

To summarize the differences between the texts, while Bismarck's version had an approach focused on how the Brazilian State should be prepared to the advancement of AI technologies, fostering research and innovation, increases in productivity and beneficial developments in the economy, Canziani's version was focused on the least possible amount of regulation, arguing that it could stop innovation, leaving the definition of prohibited forms of artificial intelligence and high risk AI to subsequent regulation, whether in the form of legislation or self-regulation. The contrast here intends to show how the discussion of Draft Bill 21/2020 was captured by a vision that is essentially against state regulation, advocating for the economic agents' self-regulation. This is not to support the original version of the draft bill, which also lacked in terms of protecting human rights and minorities.

b. The debates at the Brazilian Senate: the politics of technology

The private lobby's attempt to quickly pass the bill in the Federal Senate was blocked by an initiative by jurists with strong ties to the Brazilian Supreme Court, the Superior Court of Justice and power circles in Brasília. In March 2022, a Commission of Jurists was created. Chaired by the Minister of the Superior Court of Justice, Ricardo Villas Boas Cueva, the Commission's rapporteur is Professor Laura Schertel Mendes, a scholar in the field of personal data protection.²⁹

Composed of eighteen members, the Commission has a multi-sectoral composition. Among the members are representatives of the National Authority for the Protection of Personal Data, the Brazilian Bar Association, professors from Public Universities, and directors of independent research centres such as InternetLab and Data Privacy Brasil Research Association. Although the creation of the Commission was a clear advance to have more voices heard in the regulation process, it has no black or indigenous members, as noted by the organization 'Coalizão Direitos na Rede'. To compensate for this absence, in the public hearings, there was a more diverse racial composition.³⁰

Faced with the criticism that a merely principles-based legislation would be innocuous, the Commission started with a double strategy in mind: (i) to initiate a broad debate with national and international experts through public hearings and (ii) to organize an alternative text to the bills presented in the National Congress.

The Commission set a high-level strategy of public hearings with the brightest minds in the field in a global and national perspective. In June 2022, the Commission heard the opinion of computer scientist Stuart Russell (University of California), philosopher Mireille Hilde-

23 L. Canziani, Requirement 75/2021 at Draft Bill 21/2020, Brasília, Chamber of Deputies, 2021.

24 In the legislative process, it is possible for the rapporteur to present an alternative text to a Draft Bill, which happened in this case, and that is why the text voted and discussed was the one presented by Canziani.

25 L. Canziani, *Final report on Draft Bill 21/2020*, Brasília, Chamber of Deputies, 2021, p. 5.

26 Frente Digital, 'Marco Legal da Inteligência Artificial é aprovado por 413 votos favoráveis a 15', *Frente Digital*, <https://frentedigital.org/marco-legal-da-inteligencia-artificial-e-aprovado-por-413-votos-favoraveis-a-15/>, (accessed 15 July 2022).

27 T. Dias, A bancada do like: Google e iFood se inspiram em ruralistas e montam tropa de choque no Congresso, *The Intercept Brasil*, 25 November 2021, <https://theintercept.com/2021/11/25/google-e-ifood-montam-bancada-do-like/> (accessed 15 July 2022).

28 Conjur, 'Especialistas criticam responsabilidade subjetiva prevista no PL do marco da IA', *Conjur*, October 27 2021, <https://www.conjur.com.br/2021-out-27/especialistas-questionam-artigo-pl-marco-legal-ia> (accessed 15 July 2022).

29 Both have a strong connection with German legal thinking. While Cueva did his Doctorate at the Johann Wolfgang Goethe Universität, Schertel Mendes attended the Humboldt Universität zu Berlin.

30 Direitos na rede, 'Carta Aberta | Regulação de Inteligência Artificial: um tema transversal que exige debate multissetorial e interdisciplinar', *Direitos na rede*, <https://direitosnarede.org.br/carta-aberta-regulacao-ia/>, (accessed 15 July 2022).

brandt (Vrije Universiteit Brussels), and law professors Wolfgang Hoffmann-Riem (Bucerius Law School) and Hans Wolfgang Micklitz (European University Institute).³¹ Bringing different perspectives, the guest speakers spoke about the centrality of human rights in the design of AI systems, the regulatory strategies to define common values for the coexistence between humans and machines, the role of risk regulation and the *ex ante* regulation in order to measure risks to fundamental rights and a human-centred approach based on human dignity and the maximization of positive effects of AI solutions.

This international approach contrasted with national concerns expressed at public hearings held in May 2022. Unlike the European perspective, centred on the dignity of the person and the development of AI centred on human values, the debates held by Brazilians showed a more acute dimension of ‘structural racism’,³² Brazilian structural inequalities and the interrelationships between technology, politics and society.³³

For Silvio Almeida, former President of the Luiz Gama Institute (an organization to combat racism in Brazil), discussions on AI regulation should have as a starting point the existing structural and institutional racism and the political values hidden in the uses of technologies. In his speech to the Commission, Almeida spoke about three central elements: the neutrality of technologies, the relationship between technology and politics and the relationship between racism, science and technology.³⁴

Almeida also highlighted how one cannot speak of ‘technology neutrality,’ as this is a way of hiding the political objectives that shape the uses of technologies. For him, all technologies are embedded in a ‘political project’ and they affect ‘political processes’, in processes of interaction. Behind technological neutrality, ‘there are a series of socio-political crossings that are disguised by a discourse of technological neutrality’. According to Almeida, technology is never merely a lever or a tool, because it is always culturally shaped by the concrete organization of the society, as argued by Stephen Gould.³⁵

In addition to that, during the public hearings, Almeida provided the example of using an AI system to select students for public universities. What comes into play is how the system is programmed, whether it privileges content that is presented in white private schools, and whether it disproportionately affects black people who attend public schools. There is always a form of bias in defining what will count as an input and a measure of quality.³⁶ It is only possible to

discuss the impact of this technology against the background of the inequalities existing in the country, the differences in what is taught in schools and the political decisions that should be considered relevant (which is considered a *good indicator* that a student learned enough in a school). As explained by Almeida, one of the elements of structural racism is attributing social inequality to racial identity and making society indifferent to the way in which certain racial groups hold privileges. In the case of student assessment technologies, the ‘pact’ of ‘white supremacy’³⁷ consists of taking white children’s schools as a standard and denying the conditions and realities of schools for peripheral and black children. This denial (silence or omission) is one of the operating strategies of structural racism.³⁸

The same goes for the use of automated facial recognition systems. One of the strategies of structural racism is the denial of the concrete realities and effects of the relationship between police violence, inequalities, and the uses of automated systems.

In Rio de Janeiro, 80% of the wrongly imprisoned using the facial recognition technology are black people.³⁹ In favelas, communities are exposed to continuing processes of violence and death. In Jacarezinho, in 2021, 28 people were killed in police action with a high technological apparatus.⁴⁰ Of the more than 6,000 victims of police forces in Brazil in 2020, 78% were black, while only 56,3% of the population in Brazil is black.⁴¹ In Brazil, several organizations such as the Black Coalition for Rights (*Coalizão Negra por Direitos*), Aqualtunelab, the Center for Studies in Security and Citizenship (Cesec), O Panóptico, Conexão Malunga, Cyberxirê, DataLabe and PretaLab are working to spread the debate on structural racism, algorithmic racism and discriminatory problems that can disseminate with uses of AI, especially when related to the police force.

This was also emphasized by Tarcízio Silva, a communications researcher who was invited to speak at a public hearing held by the Commission. Silva defined algorithmic racism as ‘the way in which, in a world shaped by white supremacy, the current disposition of technologies and sociotechnical imaginaries strengthens the racialized ordering of knowledge, resources, space and violence to the detriment of non-white groups’.⁴² The researcher highlighted how the illusion that technology is neutral is ideal for structural racism,

37 S. Almeida, *Racismo estrutural*, São Paulo, Jandaíra, 2021, p. 74.

38 S. Almeida, *Racismo estrutural*, São Paulo, Jandaíra, 2021, p. 77.

39 F. Sampaio, ‘80% das prisões errôneas por reconhecimento facial no RJ são de negros’, Agência Nacional, 12 January 2021, <https://agenciabrasil.ebc.com.br/radioagencia-nacional/justica/audio/2022-01/80-das-prisoas-erroneas-por-reconhecimento-facial-no-rj-sao-de-negros>, (accessed 15 July 2022).

40 N. Gortazár, ‘Não vai embora, vão me matar!': a radiografia da operação que terminou em chacina no Jacarezinho’, *El País*, 13 May 2021, <https://brasil.elpais.com/brasil/2021-05-13/nao-vai-embora-vo-me-matar-a-radiografia-da-operacao-que-terminou-em-chacina-no-jacarezinho.html>, (accessed 15 July 2022).

41 C. Aayaba and T. Reis, ‘Nº de mortos pela polícia em 2020 no Brasil bate recorde; 50 cidades concentram mais da metade dos óbitos, revela Anuário’, *G1*, 15 July 2021, <https://g1.globo.com/sp/sao-paulo/noticia/2021/07/15/no-de-mortos-pela-policia-em-2020-no-brasil-bate-recorde-50-cidades-concentram-mais-da-metade-dos-obitos-revela-anuario.ghtml>, (accessed 15 July 2022).

42 Instituto Humanitas Unisinos, Da necropolítica social à necropolítica digital: as mil faces do racismo algorítmico. Entrevista especial com Tarcízio Silva, *Instituto Humanitas Unisinos*, 2022, <https://www.ihu.unisinos.br/616901-da-necropolitica-social-a-necropolitica-digital-as-mil-faces-do-racismo-algoritmico-entrevista-especial-com-tarcizio-silva>, (accessed 15 July 2022).

31 The Commission also heard from Irina Orsich (European Commission), Indra Spiecker (University of Frankfurt), Jake Effoduh (World Economic Forum), Bojana Bellamy (Centre for Information Policy Leadership), Marc Rotenberg (Center for AI and Digital Policy), Gabriela Zanfir (Future of Privacy Forum), Alessandro Mantelero (Polytechnic University of Turin), Maria Paz Canales (Derechos Digitales), Teki Falconer (Africa Digital Rights Hub) and others. See the whole list at <https://legis.senado.leg.br/sdleg-getter/documento/download/2772423c-b564-4e8c-997f-48321f6592a8>.

32 S. Almeida, *Racismo estrutural*, São Paulo, Jandaíra, 2021, p. 35-50.

33 B. Kremer, *Direito e tecnologia em perspectiva amefricana: autonomia, algoritmos e vieses raciais*, p. 106-142.

34 *Public hearings about AI regulation* [online video], 12 May 2022, <https://legis.senado.leg.br/comissoes/reuniao?7&reuniao=10725&codcol=2504>, (accessed 15 July 2022).

35 S. J. Gould, *The Mismeasure of Man*, New York, W.W. Norton & Company, 1996.

36 C. O’Neil, *Weapons of Math Destruction: how Big Data increases inequality and threatens democracy*, New York, Broadway Books, 2016.

insofar as it allows race to be ignored in the development and implementation of technology systems.

For Tarcizio Silva, the regulation should overcome a principles-based approach and should observe the ‘material reality’ and ‘intersectional inequalities’⁴³ to identify how AI can potentialize discrimination. A draft bill should assume an antiracist approach and should fight the discourse of technological neutrality.

The public hearings held by the Commission of Jurists presented other issues for the discussion of the draft bill. The May 12, 2022 hearing, in particular, was a critical turning point in the discussion, thanks to interventions by Silvio Almeida, Tarcizio Silva and other participants. What they question, in short, is a principles-based approach focused on innovation and legal certainty in a context of profound injustices, structural racism and social struggles that demand other values for AI in Brazil.

The debates in 2022 generated a ‘critical turn’ in terms of structural racism and how technologies operated within specific social and institutional structures, especially in Brazil. What thinkers like Almeida and Silva reinforced is that a democratic regulation of artificial intelligence, conceived in Brazil, must consider the asymmetric conditions of power and violence, which make up the social dynamics that are mediated by AI systems. This reflection places other normative values in the conversation that are not purely centered on legal certainty and innovation. It inverts the priority order of the discussions: inequalities, violence and injustice cannot be reinforced by expanding the use of AI in Brazilian society.

2. Challenging the dominant narrative: what is ignored in the draft bill

This section presents the contributions of critical social theory to thinking about the cultural reality of Brazil, which will be impacted by the advancement of AI in the coming decades. The focus of analysis is on the presentation of data and factual elements that offer insight into the permanence of violence for indigenous communities, the relationship between structural racism and police violence and the centrality of anti racism in AI regulation.

In this section, we provide an overview of the main omissions and absences in the draft bill regarding structural problems and violence and the social theory that must be reclaimed to think about AI principles in other terms. The social theories developed by González and Krenak, for instance, are able to provide a better understanding of the normative values of the Brazilian Constitution of 1988, which is a progressive one. In our view, the regulatory conversation about AI must be aligned with the Federal Constitution and the underlying values of social justice. By advancing these theories, we fight against the suppression of knowledge, reinforcing their role in rethinking principles for regulating AI in Brazil.

a. The colonial structure of the Brazilian society: the persistence of violence and indigenous communities

Brazil is a post-colonial, multicultural, and violent society. As argued by historian Lilia Schwartz, it is a common myth to identify Brazil as a

peaceful society in which indigenous communities, blacks and whites live in harmony.⁴⁴ Brazilian history is actually formed by a permanent process of domination and elimination of the indigenous communities. It is also formed by a violent process of slavery, which began in the 16th century and only ended in the 19th century.

Indigenous leaders in the region of Pará and Amazon are executed almost daily. Brazil has more than two or three hundred ethnic groups and an ‘ongoing war’ between the white population – interested in mining and the exploitation of natural resources for commercial purposes – and the indigenous communities, which are fighting for the preservation of their territories and the maintenance of their culture and ways of living. The percentage of indigenous people murdered in Brazil jumped 22% over the decade from 2009 to 2019, and 202 indigenous activists were killed in 2020. According to the Indigenous Organizations of the Amazon River Basin (COICA), in Amazonia, one indigenous rights defender is killed every two days.⁴⁵

There is a huge diversity in languages and forms of living which are oppressed by the advancement of a unified capitalistic vision. The biggest indigenous group is the *guarani*, divided into *caiovã*, *ñandeva* and *mbya*, formed by more than 45,000 indigenous. There is also the *ticuna*, known for their deep relationship with birds and animals, formed by more than 25,000 indigenous. The third biggest indigenous group is the *caingangue*, formed by more than 25,000 indigenous and known for their democratic methods of elections of the leaders (*caciques*).

It is a common mistake to believe that all Brazilians know Portuguese and are shaped by European values and culture. Several indigenous writers, rappers and artists are part of a movement called *futurismo indígena*, which defends the connection between ancestral knowledge and the diversity of indigenous groups with a multicultural and technological society mediated by information, bits, and the Internet. Artists like Kaê Guajajara claim that the movement is about infiltrating power structures that claim that indigenous peoples no longer exist.⁴⁶ The goal of the movement is to ‘defy a racist mindset’ that has positioned indigenous peoples in a 16th-century colonial imaginary. Some fear that the term might be a ‘colonial trap’. Kunumi MC, a native of the Guarani people, claims that the concept is a white people’s term because the future is not the main concern of indigenous peoples.⁴⁷ They are concerned with the present and the past.

The relationship between the traditional communities and the ‘invaders’ – as the indigenous activists call the Europeans – is deeply problematic, despite the constitutional pact of 1988 and the ongoing process of recognition of territories that belongs to indigenous groups (a process called *demarcação de terras indígenas*). Despite the important victories obtained in the Brazilian Supreme Court regarding their natural rights to the land, there is an ongoing process of

44 L. Schwartz, *Sobre o Autoritarismo Brasileiro*, São Paulo, Companhia das Letras, 2019.

45 R. Gomes, ‘In Amazonia, 1 indigenous rights defender is killed every 2 days’, Vatican News, April 19 2021. Available at: <https://www.vaticannews.va/en/world/news/2021-04/amazonia-indigenous-activists-murder-rights-pope-church-repam.html>.

46 B. Miranda, ‘The way I am is an outrage’: the Indigenous Brazilian musicians taking back a burning country, *The Guardian*, October 26 2020. Available at: <https://www.theguardian.com/music/2020/oct/26/brazil-music-indigenous-tribes-environment-bolsonaro>, (accessed 19 July 2022).

47 B. Miranda, ‘The way I am is an outrage’: the Indigenous Brazilian musicians taking back a burning country.

43 M. Urupá, ‘Inteligência artificial precisa evitar viés racista e discriminatório’, *TeleTime*, May 12 2022. Available at: <https://teletime.com.br/12/05/2022/inteligencia-artificial-precisa-evitar-vies-racista-e-discriminatorio-afirmam-especialistas/?amp>, (accessed 19 July 2022).

exploitation of forest, land, and minerals, especially gold, which are exacerbating the conflicts. In the past years, some indigenous groups started to defend their territories with guns, rifles, and other armory. There is also a rising concern regarding the use of drones, technical devices, and surveillance technologies to monitor the activities of indigenous groups and to instrumentalize attacks by white people interested in their territory.

In 2022, journalist Dom Phillips and the anthropologist Bruno Pereira were killed in the Vale do Javari, the second-largest indigenous area in Brazil, in the extreme western part of Amazonas. One of the reasons for the murder was the fact that Pereira was leading a work on 'indigenous surveillance' in which communities and indigenous leaders used drones, cell phones and technology to produce evidence about illegal activities in the region.

Currently in Brazil there are approximately 30,000 Yanomami and Ye'kwana people, living in more than 360 villages.⁴⁸ Since the beginning of Bolsonaro's administration there has been a repeated attack on indigenous rights and the dismantling of indigenist and environmental inspection bodies. During the most tragic period of the Covid-19 health crisis, the federal government took the opportunity to dismantle the rights of indigenous peoples, allowing the invasion of miners ('garimpeiros')⁴⁹ in protected areas, which caused devastating social, environmental, and epidemiological impacts.

In an interview, the activist for the indigenous cause Ailton Krenak said that 'in the case of indigenous people, we stood on the brink of disappearing' and 'the indigenous coalition was a reaction against a certain negation of our existence, against the negation of our historical rights and our ability to invent other ways of being in any way, but mainly it fought for the respect of our territories where people were still able to maintain resistance, to stay alive'.⁵⁰ In 2022, the massacre of the Yanomami and Ye'kwana represents yet another chapter of the enduring genocide in progress since the Portuguese colonization in Brazilian lands.

The history of violence is the history of Brazil, from the perspective of indigenous peoples. Ailton Krenak recalls that the very idea of Latin America is a colonial construction (the name America is a tribute to a Florentine merchant responsible for the invasion of indigenous lands). In a conversation with indigenous artist Jaider Esbell (of the Macuxi ethnicity), Krenak argued that we are 'immersed in coloniality'.

It is the idea of 'progress' and 'economic development' that characterizes the Anthropocene. It is man who is the main vector of biogeochemical changes on the planet.⁵¹ It is in pursuit of 'progress' that mining, the exploitation of natural resources and the pollution of rivers take place. Indigenous cosmology opposes this vision of

progress and development. For the Krenak, rivers are grandfathers.⁵² For the Macuxi, genipapo trees can be shamans.

The Brazilian AI draft bill from Canziani ignores all this cosmology and repeats the same colonial goals of economic development, increased productivity and progress. Even when it comes to describing the centrality of humans and humanity, it is extremely vague. The first principle for the development and application of AI in Brazil is that the systems should aim to produce results that are beneficial to humanity. The second principle states that humans should be central when it comes to considerations of the systems that will apply to them, respecting human dignity, privacy, data protection and fundamental rights. The vagueness of these principles makes them ineffective, and renders it unclear what conception of humanity and humans is to be considered. Is the maintenance of colonial relations an inevitable part of humanity's future? The regulation is immersed in a colonial vision that ignores the nature of the conflicts and resistance of hundreds of black and indigenous ethnic groups, who were not consulted about what kind of vision of society they support for Brazil. One of the fundamentals of the Bill is non discrimination and inclusion, however, when it comes to the principles, non discrimination is defined by the mitigation of the possibility of using AI systems for discrimination, as well as the recommendation of the search for 'neutrality', which would mean to identify bias and mitigate it. There is no direct prohibition of AI systems that are discriminatory.

A project carried out at the University of São Paulo, coordinated by the Artificial Intelligence Center and by Luciana Storto (Faculty of Philosophy and Human Sciences), aims to document, preserve and vitalize the language of indigenous peoples, requalifying the meaning of concepts and expressions from the perspective of indigenous peoples, and promoting participatory dialogues with communities struggling for survival. It is a concern to avoid a neutralization of cosmologies, recognizing pluralities of concepts and ways of living that need to be introjected into AI systems. This is a concern absent from the original version of the draft bill presented to the National Congress, which is aggravated by the fact that no indigenous leadership, among hundreds of existing peoples, has been invited to debate the impacts of the transformations generated by AI and normative visions of regulation.⁵³

b. Structural racism, policing and oppression

Surprisingly, the AI draft bill is also silent on the chronic problems of police violence and structural racism in Brazil, which can be exacerbated by the spread of AI techniques by police forces, such as body cameras coupled with predictive analytics software of crimes. This silence or omission is one of the ways that colonial thought continues in AI. The problem of racism is not properly addressed in the bill and doesn't consider the black population as the most affected by the abusive use of these technologies.

There are many cases of illegal arrests for facial recognition in Brazilian capitals, which raises the concern of black thinkers. The use of facial recognition by public safety draws attention to racist biases in facial recognition technology. The algorithm already has a racial bias, insofar as it cannot distinguish as well between black people; the

48 A. Machado, D. Jabra, E. Senra and M. Gonjora, 'Bolsonaro, a pandemia e a nova corrida pelo ouro na Terra Indígena Yanomami', *Diplomatique*, 2 February 2021, <https://diplomatie.org.br/bolsonaro-pandemia-nova-corrida-pelo-ouro-terra-indigena-yanomami/> (accessed 15 July 2022).

49 In Brazilian Portuguese, miners are known as "garimpeiros". The conflict between indigenous peoples and miners is a structural and historical problem of Brazilian society. In recent years, there has been a significant expansion of mining activities in protected areas.

50 J. Silva, 'Ailton Krenak — The Potency of the Collective Subject', *Revista Periferias*, 3 June 2018, <https://revistaperiferias.org/en/materia/ailton-krenak-the-power-of-the-collective-subject-part-i/>, (accessed 15 July 2022).

51 J. Eli da Veiga, *O Antropoceno e a ciência do Sistema Terra*, São Paulo, Editora 34, 2019.

52 A. Krenak, *Ideias para adiar o fim do mundo*, São Paulo, Companhia das Letras, 2019.

53 *Jornal da USP. Projeto que utiliza inteligência artificial pretende fortalecer línguas indígenas no Brasil*. 31 May 2023. <https://jornal.usp.br/noticias/projeto-que-utiliza-inteligencia-artificial-pretende-fortalecer-linguas-indigenas-no-brasil/> (accessed 4 July 2023).

database is also mostly racialized. A mostly black target database and a racially biased algorithm will invariably cause more damage to black people – who already suffer from police brutality. Without official data, the Security Observatory Network monitored arrests and approaches made with technology in five Brazilian states: Bahia, Ceará, Paraíba, Rio de Janeiro and Santa Catarina. Between March and October 2019, the survey counted 151 people arrested. In cases where race information was available, 90.5% were black.⁵⁴

In the past decade, more than 400 hundred thousand black people were killed in the country. According to the Brazilian Forum of Public Security, a NGO dedicated to antiracist campaigns in the field of public security, 75% of the Brazilians murdered in 2020 were black. A black person in Brazil is 2.6 times more likely to be killed, in comparison with a white person. While 62% of the police officers murdered are black, 79% of the victims of the police actions are also black. Moreover, 81% of the adolescents murdered (between 15 and 19 years old) are black. The profile of the murder victim in Brazil is young, black, and with little formal education, and death rates peak at 21 years old. While the murder rates for white, yellow and indigenous victims went down 13% between 2008 and 2018, the murder rates for black victims increased by 11.5%.⁵⁵

One of the factors that contributes to the increased murder rates among the youth is the expansion of drug trafficking. Rio Branco, a city in the North Region of Brazil, saw its murder rate double from 2015 to 2016, due to a war between different criminal organizations for the drug trafficking in the border.⁵⁶ In the periphery of all Brazilian big cities, there is a constant war against the black and the poor. Two recent episodes provide a dramatic visualization of this scenario of racism and violence. On May 24th 2022, a ‘special operation’ conducted in the *favela* of Vila Cruzeiro, in the city of Rio de Janeiro, resulted in the death of 25 people. The operation was conducted by the Special Operations Unit of the Military Police of Rio de Janeiro (BOPE) and two units of the Federal Police. As noted by the Inter-American Court of Human Rights, there is a pattern of violent operations in *favelas*, where there is a concentration of black and socio-economically vulnerable people. This is a pattern that can be perceived in the killings (*chacinas*) of Acari (1990), Vigário Geral (1993), Nova Brasília (1995), Borel (2003), Fallet Fogueteiro (2019), Jacarezinho (2019) and Complexo do Salgueiro (2021). Among 17,929 police operations between 2007 and 2019, 593 resulted in killings (with 2,374 casualties).

As argued by Pablo Nunes, any debate on the use of AI in Brazil must begin with an analysis of the problem of the mass incarceration of the black population and the pre-existing racially biased use of police forces.⁵⁷

On May 25th 2022, in the city of Umbaúba, in the State of Sergipe, the Federal Police stopped a black man riding a motorcycle without a helmet – a security rule that is mandatory according to the Brazilian law. His name was Genivaldo Santos. Mr. Santos confronted the police officers. He was beaten and taken to the back of a police car. In a clear demonstration of brutality and elimination of all fundamental rights, the police officers locked the man in the trunk of the vehicle and dropped a bomb of gas. The black man tried to scream for help and, even with many citizens filming the scene, the police officers kept him in the car, which led to his death. The autopsy showed that the man died because he could not breathe, just like what happened with George Floyd in 2020, the event that sparked a global movement against police violence and structural racism.

Érika Hilton, a black and transgender politician in São Paulo on the Commission of Human Rights, argued that the police are engaged in an on-going plan to exterminate the black and peripheric people. The social movement called *Coalizão Negra por Direitos*, an alliance formed by more than a hundred civil society associations, argued that the Brazilian State is a racist one and that ‘black bodies are constantly tortured and murdered’. The case shocked Brazilian society and showed the brutality of the police officers and the State apparatus.

This is an old problem already perceived by critical social theorists. Three decades ago, Lélia Gonzales noticed that when it comes to policing, the dominant white class can perceive it as protection, while the Afro-Brazilian community perceives it as oppression.⁵⁸ Years have passed, and the racist structure of Brazilian society remains stably in place. To sustain itself, racism uses discriminatory acts to keep certain classes of people in a situation of subordination, which is incompatible with the construction of a truly democratic society.⁵⁹

It is in this context that Brazilian activists have discussed the impact of algorithmic racism, which operates both as an online invisibility and a reinforcement of incarceration in the offline world. It is a matter of order and premise: it is only possible to formulate a proposal for regulation based on the reality of racism and violence against the black population. Anti-racism must be an explicit starting point and not something ignored. It is necessary to identify what Lélia Gonzales called ‘racist neocolonialism’ in Brazil.

In 2022, two civil society campaigns try to mobilize the anti-racist argument and mass incarceration to the heart of the debate on new technologies such as automated facial recognition technologies. *Coalizão Direitos na Rede* launched the ‘*Tire Meu Rosto da Sua Mira*’ campaign, which defends the banning of facial recognition in the area of public safety. In Brazil, the country with the third largest incarcerated population in the world, the use of facial recognition technologies in public security would lead to the worsening of the racist practices that constitute the penal system. In June, more than 50 parliamentarians from different parties presented bills to ban facial recognition in public spaces. The campaign ‘*Sai da Minha Cara*’ demonstrates a multi-party consensus on the invasive and discriminatory nature of this technology. The campaign was organized by Coding Rights, MediaLab-UFRJ, the Brazilian Institute for Consumer Protection (Idec) and the Center for Security and Citizenship Studies

54 Rede de Observatórios da Segurança. *Sob críticas por viés racial, reconhecimento facial chega a 20 estados*. 10 July 2021. <https://cesecseguranca.com.br/participacao/sob-criticas-por-vies-racial-reconhecimento-facial-chega-a-20-estados/>. (accessed 2 July 2023).

55 M. Cunha. *Atlas da Violência: 75% das pessoas assassinadas no Brasil são negras*. 31 August 2020. <https://www12.senado.leg.br/radio/1/noticia/2020/08/31/atlas-da-violencia-75-das-pessoas-assassinadas-no-brasil-sao-negras> (accessed 03 July 2023).

56 A. Rossi. *Guerra de facções torna Rio Branco, no Acre, a capital onde homicídios mais aumentam no Brasil*. 29 January 2018. <https://www.bbc.com/portuguese/brasil-42783116> (accessed 03 July 2023).

57 P. Nunes, ‘O algoritmo e o racismo nosso de cada dia’, *Revista Piauí*, January, 2021.

58 L. Gonzalez, *O apoio brasileiro à causa da Namíbia: dificuldades e possibilidades*, in: F. Rios & M. Lima, *Por um feminismo afro latino americano*, Rio de Janeiro, Zahar, 2020, p. 67.

59 A. Moreira, *O que é discriminação?*, Belo Horizonte, Letramento, Casa do Direito, Justificando, 2017, p. 34.

— (CESeC), organizations specializing in technology, security and human rights that mobilized parliamentarians around the agenda.

The draft bill 21/2020 is in complete contrast to civil society campaigns and the anti-racist movement in technology in Brazil. The bill does not provide a ban on high-risk technologies such as AI predictive systems in criminal justice or AI software coupled with facial recognition in public safety. Nor does it impose any type of duty to assess the impact on human rights in the use of certain types of technologies. On the contrary, the bill advocates the adoption of regulatory instruments that promote innovation, such as experimental regulatory environments (regulatory sandboxes) and sectoral self-regulations (Article 7, VII).

c. Antidiscrimination law and AI in Brazil: the link missing?

According to the Brazilian intellectual and black activist Lélia Gonzalez, societies of Latin origin present a type of disguised racism or racism by denial.⁶⁰ Unlike societies of Anglo-Saxon, Germanic or Dutch colonization in which racism is manifestly open, in Brazil the ‘theories’ of miscegenation, assimilation and racial democracy⁶¹ prevail, which operate as vectors of silencing the debate on race in all spheres,⁶² including the discussion on the regulatory framework for artificial intelligence.

The myth of racial democracy, assimilation, and miscegenation do not operate as solid social theories but are deeply rooted culturally and in the construction of Brazilian national identity, as well as in the understanding of Brazilians as a people. According to Gonzalez, there are two ideological tendencies that define black identity in Brazil: on the one hand, the notion of racial democracy and, on the other hand, the ideology of whitening. The myth of racial democracy reinforces the discourse that there is no racism in Brazil. The author states this in the following terms: ‘Racism? In Brazil? Who said that? That’s an American thing. Here there is no difference between black and white because we are all Brazilian above all else, thank God. Blacks here are treated well, they have the same rights as we do.’⁶³

Unlike the United States, black and white people live together in Brazil. At first sight, this may give the mistaken impression that the country is a ‘racial paradise’, where racial relations are harmonious – as long as they are under the shield of the dominant group, which reveals its articulation with the ideology of whitening.⁶⁴ The myth of racial democracy, which advocates the peaceful coexistence of the three races (white, black and indigenous people), romanticizes Brazilian history and renders invisible the violence suffered by the marginalized population.

Such theories or myths are inconceivable in societies of open racism, since the black person is classified as such if there were black ancestors, in other words, ‘if black blood runs in the veins’.⁶⁵ To maintain ‘purity’ and reaffirm white superiority, the political and ideological

mechanism that has been used was the segregation of non-white groups. South Africa’s apartheid model is the best example that illustrates this type of openly racist theory and practice.

Due to Portuguese-Spanish colonization, Latin America is racially stratified and inherited the ideologies of racial and sexual classification, which exempts open forms of segregation. Racially stratified, Latin American societies present a type of color continuum that manifests itself in a true classification rainbow (in Brazil, for example, there are more than one hundred nomenclatures to designate skin colour). Thus, the segregation of mestizo, indigenous or black people becomes unnecessary, because hierarchies guarantee the superiority of whites as the dominant group.⁶⁶ In this context, Latin American racism is sufficiently sophisticated to maintain black and Indigenous people as subordinate segments within the most exploited classes, thanks to its most effective ideological form: the whitening ideology (policies of whitening), which reproduces and perpetuates the belief that classifications and values of the white West are the only true and universal ones.⁶⁷

Once established, white superiority is efficient in dismantling and fragmenting racial identity, producing the desire for whitening, or as they say in Brazil, ‘cleaning the blood’, i.e. denying one’s own race and culture.⁶⁸ Before the notion of racial democracy, the whitening ideology served as justification for a policy developed by the Brazilian government to whiten the population, stimulating European immigration, mainly in the period between 1890-1930.⁶⁹ The whitening policy did not materialize in demographic terms, but it was successful in ideological terms, insofar as it resulted in the projection of Brazil as a racially white and culturally European country.

The whitening ideology also applies to indigenous peoples. Since the beginning of Brazilian colonization, indigenous peoples have been the target of repression and were strategically persecuted during the military dictatorship. The ideology of whitening along with the myth of racial democracy persists to this day, softening indigenous genocide and revealing the disregard of Brazilian institutions with the identity and claim of indigenous people.

The myth of a racial democracy allows lawmakers and law interpreters to consider race as a neutral factor in relation to the law and the existing power structures, even though the Constitutional text directly addresses the issue of racial discrimination. The Brazilian Constitution has among its fundamental principles the objective to reduce inequalities and promote the well-being of all, without discrimination. Here, the state and the law are seen as agents of social transformation and social inclusion⁷⁰: Article 3. The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, just and solidary society; II – to guarantee national development; III – to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.⁷¹

60 B. Kremer, *Direito e tecnologia em perspectiva amefericana: autonomia, algoritmos e vieses raciais*, p. 115-118.

61 L. Gonzalez, *A categoria político-cultural de amefericanidade*, Rio de Janeiro, Revista Tempo Brasileiro, 1992/93.

62 T. Silva, *Visão Computacional e racismo algorítmico: Branquitude e opacidade no aprendizado de máquina*, Revista da ABPN, v. 12, n. 31, 2020, p. 432.

63 L. González. *Racismo e Sexismo na Cultura Brasileira*. p. 226.

64 L. Gonzalez. *Por um feminismo afro-latino americano*. p. 144.

65 L. Gonzalez, *A categoria político-cultural de amefericanidade*, p. 72.

66 L. Gonzalez. *Por um feminismo afro-latino americano*. p. 143.

67 L. Gonzalez, *A categoria político-cultural de amefericanidade*, p. 73.

68 L. Gonzalez. *Por um feminismo afro-latino americano*. p. 132.

69 L. Gonzalez. *A mulher negra no Brasil*. p. 169.

70 A. Moreira, *Pensando como um negro: ensaio de hermenêutica jurídica*, São Paulo, Contracorrente, 2019.

71 Brazilian Constitution in English. Available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?

For an adequate interpretation of the meaning of equality, Adilson Moreira proposes a form of legal interpretation named 'Black Hermeneutics'. By that, Moreira highlights that the social position of the subject is key when interpreting legal rules, and that race has a central role to play in the process of interpreting equality. The author defines equality as an equality of status (cultural and material). What should be protected are the social subordinate groups. The interpretation of the constitution has for Moreira the specific purpose of fighting against forms of subordination. He is directly opposing an interpretation of the equality principle that sees equality as a demand that the same treatment be applied to all people.⁷²

It is important to highlight that 'Black Hermeneutics' is not based on an individual's perspective. What is advocated is that racial minorities' reports about their social realities have normative value for the process of legal interpretation, considering that they live as subordinates in a hierarchical structure of power. That specific interpretative posture sees law as an instrument for social transformation. The opposition to that would be the 'White Hermeneutics', based on a liberal and individual political perspective, with an alleged neutrality and objectivity of the process of interpretation, resulting in a procedural understanding of equality. That interpretation disregards the historical context and sees rights as universals, that race is neutral for legal interpretation and that cultural assimilation is a positive outcome.

Legislation such as the draft bill 21/2020 is an example of 'White Lawmaking', with the same fundamentals of 'White Hermeneutics'. It is also an attempt to disregard the Constitution and its fundamental principles, demobilizing the transformative power of law and the Brazilian legal system.

The principle of non-discrimination imposes a duty of abstention on the part of the data processing agent and decision makers. In the case of artificial intelligence, it is necessary to go further and establish objective and concrete duties aimed at promoting equity by using the full potential of artificial intelligence to reduce discrimination and avoid the existence of bias in automated decisions. The Draft's current content was tailored according to the interests of the market, leaving aside any real commitment to the Brazilian population. Above all, the Brazilian AI regulation should be programmatic in order to prevent technology from simply reproducing, codifying and consolidating for the future this past and current discrimination of Brazilian society. The solution is to open up to a different, more egalitarian future and not to reproduce discriminatory and racist structures.⁷³

Anita Allen, professor of Philosophy at University of Pennsylvania Law School, sustains that US privacy and data protection laws are insufficient to address the vulnerabilities suffered by the African-American population. Previously these vulnerabilities were restricted to the physical world, but nowadays afro-americans also face a digital oppression system which the author calls the 'Black Opticon': discriminatory oversurveillance, discriminatory exclusion, and discriminatory predation.⁷⁴ Considering the legislation's inability

to combat inequalities, Allen proposes an African American Online Equity Agenda (AAOEA) to adequately confront the Black-Opticon. In that agenda, data-privacy reforms must explicitly address group-specific harms, not just general harms.

Like Lélia Gonzales and other Brazilian critical social theory authors, Allen maintains that racism in North American society is structural and that the digitized society reiterates the forms of domination and oppression that exist in the physical world. In addition to proposing a specific agenda aimed at combating racism, there must be a joint multisectoral action in order to avoid this reproduction of such violence.⁷⁵ In this sense, data protection policies and AI regulatory frameworks must ensure that the interests of marginalized racial minorities are not overlooked, and aid in surfacing possible conflicts between the interests of one racialized group and other groups.⁷⁶

In this sense, the draft bill is deeply flawed and does not present any legal architecture built on the significant involvement of peripheral populations in the implementation of new technologies. There are also no legal instruments dedicated to the analysis of risks and disproportionate impacts for the exercise of civil rights and freedoms. The bill ignores all the tools of ex ante legal obligations that could be built to internalize the constitutional values of anti-discrimination law. In short, a supposedly neutral stance is assumed, which is incompatible with existing inequalities and with the positive obligations to repair injustices and promote equality. As mentioned in section 2, One of the fundamentals of the Brazilian AI draft bill from Canziani is non discrimination / inclusion, however, non discrimination is defined as the mitigation of the possibility of using AI systems for discrimination and the recommendation of the search for 'neutrality'. Such a loose formulation implies that AI systems should identify and eradicate biases, but is not a direct prohibition of AI systems from being discriminatory, nor are there obligations or incentives for AI systems to help with anti-discriminatory efforts.

The Brazilian AI regulatory model must necessarily be attuned to the socioeconomic conditions and challenges of the Brazilian racist-sexist society. The interconnections between racism, sexism, discrimination against LGBTQIA+ and capitalism must be recognized, raising awareness of the need, in the fight against discrimination, to deconstruct other structures of domination.⁷⁷

As highlighted by the Commission of Jurists in its final report in December 2022,⁷⁸ it is necessary to recognize and internalize that the Brazilian reality is permeated by inequalities and structural asymmetries, and definitions on direct and indirect discrimination incorporated in the Inter-American Convention against Racism are appropriate, enacted with the status of a Constitutional Amendment in Brazil in 2022. Observing the original text, oriented towards a light-touch regulation approach, we identify that there is practically no regard for the hypervulnerability of black women, for instance. The draft bill

Data-Protection Reform, Yale Law Journal Forum, U of Penn Law School, Public Law Research Paper No. 22-16, 2022. 61 Allen, *Dismantling the "Black Opticon"*, p. 932.

75 Allen, *Dismantling the "Black Opticon"*, p. 932.

76 Allen, *Dismantling the "Black Opticon"*, p. 932.

77 A. Moreira, P. Almeida and W. Corbo, *Manual de educação jurídica antirracista: direito, justiça e transformação social*, São Paulo, Editora Contracorrente, 2022.

78 Senado Federal. Relatório Final da Comissão de Juristas. 06 December 2022. <https://legis.senado.leg.br/comissoes/mnas?codcol=2504&tp=4> (accessed 3 July 2023).

sequence=11&isAllowed=y.

72 Moreira, *Pensando como um negro*, p.17.

73 M. Sgarioni, Reconhecimento facial pode ser proibido na segurança pública no Brasil, MobileTime, 18 May 2022, <https://www.mobiletime.com.br/noticias/18/05/2022/reconhecimento-facial-pode-ser-proibido-na-seguranca-publica-no-brasil/>, (accessed 15 July 2022).

74 A. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online*

missed the link between AI and anti-discrimination. The reflection on disadvantages for people belonging to specific social groups also needs to incorporate the problems of algorithmic discrimination that can occur due to apparently neutral criteria or practices. It is also necessary to reflect on how the affectations of vulnerable social groups configure a situation of high risk in the use of AIs, which should receive special attention from the law.

3. Conclusion

The Brazilian Draft Bill 21/2020 is insufficient for the complex Brazilian reality. It lacks a truly democratic normative approach and focuses too much on principles, missing the opportunity to effectively regulate a topic of enormous socioeconomic impact. Besides the lack of normative approach, the principles contained in the draft bill are mainly about free market, free competition and technological development and innovation. As a matter of fact, the Draft is in contradiction to the strong Brazilian legal tradition in terms of anti-discrimination and promotion of equality. The programmatic structure of the Brazilian Constitution of 1988 enshrines as fundamental objectives of the Republic the construction of a free, fair and solidary society, national development, the eradication of poverty and marginalization, the reduction of social and regional inequalities, and the promotion of the common good, without prejudice of origin, race, sex, color, age or any other forms of discrimination.

By evoking the lessons of critical Brazilian social theory, the South-oriented AI regulation must assume that the way in which social, economic, and political relations are organized is essentially unjust and in need of reparation. Therefore, race-neutral policies should be reconsidered because they will not have race-neutral effects or protect all groups equally.⁷⁹ Critical social theory can enlarge the discussion about which should be the regulatory goals of such legislation. Critical theory helps envision new principles that are connected to the structural problems of post-colonial societies.

As argued in this paper, Brazilian AI regulation should not be limited to innovation, legal certainty, and economic development. Concerning the expected expansion of AI in the decades to come, the work of Ailton Krenak, Lélia Gonzales, Adilson Moreira, and other postcolonial thinkers can reframe the current set of discourses and anchor the diversity of cosmologies in a multi-ethnic society. Their work can place front and centre the relationship between anti-racism and democracy and the role of ex-ante obligations in order to protect fundamental rights and avoid discrimination with respect to the use of AI.

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⁷⁹ Allen, *Dismantling the “Black Opticon”*, p. 935.