Editorial

The colonization of justice by criminal justice: the potential and limits of the Judiciary in the era of neoliberal globalization

The analytical fecundity that marks this edition of Revista Katálysis points to the vast complexity and opportunity for analysis inspired by the theme "Judicial Power, culture and society". As these issues can be examined under multiple lenses, it is imperative to establish our choices: we will delineate a possible theoretical horizon for the analysis of the structural contradiction between regulation and emancipation that marks the Judicial Power in the passage of capitalist "modernity", whether central or peripheral. The analysis will have tangents – in different directions and degrees – with the theoretical and empirical articles that interweave and illuminate this edition – and with the emancipative, transformative and democratic concerns of the authors.

Boaventura de Sousa Santos, who has developed one of the most expressive interpretative analyses of the trajectory and crises of modernity, characterizes it as a complex sociocultural complex, which is ambitious and revolutionary, but also internally ambiguous. It is ambitious because of the magnitude of its promises, marked by a profound rationalizing vocation of individual and collective life and in this sense, characterized, at its core, by the attempt at development balanced between "regulation" and ""human emancipation" the two great pillars on which it is based[1]. But exactly for this reason, it appears prone to variability and contradiction, for while the demands of regulation point to the potential of the project for the processes of concentration and exclusion, the emancipative promises and the logics or arguments constructed for its realization, point to its potential to comply, in a contradictory manner with certain promises of justice, autonomy, solidarity, identity, liberty and equality. Thus, "if on one hand, the breadth of its demands opens an extensive horizon for social and cultural innovation; on the other, the complexity of its constitutive elements makes the excess satisfaction of some promises and the failure to realize others, difficult to avoid. This excess and this failure are inscribed in the matrix of this paradigm" (SANTOS, 1989a, p. 240-1). Emerging as a sociocultural project between the 16th century and the end of the 18th century, it is only at the end of the 18th century that modernity came to be materialized and this moment coincided with the appearance of capitalism as the dominant mode of production in the advanced capitalist societies of today. Since the rise of capitalism, modernism has been linked to its development. The intended balance between regulation and emancipation, which should be obtained by the harmonious development of each one of the pillars and by their dynamic inter-relation, which also appears as a decadent aspiration in the positivist maxim "order and progress" was never achieved. To the degree to which the trajectory of modernity is identified with the trajectory of capitalism, the pillar of regulation – which became the pillar of capitalist regulation – came to strengthen it at the cost of the pillar of emancipation. This has been a non-linear and contradictory historic process, with recurring oscillations such as those between liberalism and Marxism, capitalism and socialism (SANTOS, 1989a, p.225 e 1990, p.3), and, we add, globalization and counter globalization. It is within this context that the principle of the market (re)appears with unprecedented protagonism, consolidating the imbalance according to which, in capitalism, regulation progressively colonizes emancipation, to a point that even the processes of counter-globalization or community globalization appear as recidivist prisoners of this colonization. On this track, it is thus possible to conclude, that "both the excess as well as the deficit of realization of the historic promises explain our difficult current situation which appears, on the surface, as a period of crisis" (SANTOS,1989a, p. 223). The Judicial Power that we inherited is a co-constituent of modernity and its contradictory development, and therefore, of its excesses, its unfulfilled promises and its crisis (which appears as a structural crisis) at a time when a locus of its symptoms is established.

What is the face of the "Judicial Power" which emerges in this model? In the first place what emerges is a power which, made sacred by the theory of the separation of powers and institutionalized in the liberal State of Law, and of Government Law (the moral-practical logic of Law) should confine the exercise of its sovereignty to "the mouth that pronounces the words of law" as Montesquieu affirmed, (an author who will appear again in this volume). An independent and autonomous Judicial Power – the sign of ideological neutrality that assures it the serene condition as the impartial arbiter of inter-individual conflicts and the certain application of the law, the guarantor of individual rights – replicated the comfortable liberal separation between power (the legislature) and Law (the depoliticized judiciary). In this way, the Judiciary emerges, in modernity, as the carrier of a set of promises, or declared functions, that are linked to the pillar of emancipation (the defense of interests and rights, justice, and the resolution of conflicts). This discoursivity of power

at the service of man, constitutes the ideological horizon under which its legitimacy is developed until today. It also constitutes the symbolic horizon, under which unending power struggles for the effective enactment of human rights and of citizenship have been waged with untold daily impact on human lives. But not withstanding its emancipative potential, the institutional judiciary has always been a noble arm of social regulation, and therefore a branch of power that functions to reproduce the capitalist and patriarchal social structure and its institutions and social relations and is thoroughly tainted by the ambiguity that constitutes its matrix. It is for no other reason that the face of this sovereignty produces, to make it operative, a positivist legal culture of liberal inspiration (formalist and conservative) whose most secularized subproduct is a branch of knowledge known as "Dogmática Jurídica". Bifurcated in as many branches as the rights that are created, this "Juridic Dogma" is until today the basis for the education of the legal operators and produces a (technical) legal-standard, a legal common sense and a punitive common sense which are not only sustained, but also strengthened in times of neoliberal globalization. It is for this reason that the structural logic of legal operations, in the universe of the justice system, is the selectivity (the differentiated application of justice) which expresses and reproduces the inequalities of class, and the hierarchy of gender and racial discrimination, in its structural contradiction with legal equality (citizenship). The question of the access to justice approaches this selectivity only tangentially. This logic, although it is empirically visible in the Criminal Law, is extended to a greater or lesser degree to the entire model. If the neutrality of this "power" reverted from this form in the "ashes of a past that never existed" (SANTOS, 1989a), it leaves us as one of its inheritances, the symbolic force of myth. The myth must be confronted. For beyond the myth of neutrality, is the myth of unity. In fact, if until this point we are seeking to understand the functional unity of the Judiciary in the universe of the justice system and its functional connection with society (selectivity that reproduces inequality), it is now necessary to pass from the Judiciary in the singular to Judiciary in the plural. It is necessary to pluralize this monumental subject, to re-encounter the multiple justices behind which both that potential ambiguity as well as that functional unity are materialized. First, because the Judiciary is not alone: it integrates a system of justice in which it exercises its functionality with various formal assistants (the Legislator, the Police, the Attorney General, Advocacy, Prison..) and informal ones (the school, the family, the media, the labor market, religion) and then, on distinct objects. It is thus possible to identify, to paraphrase Foucault, judicial archipelagos: the division between military and common justice, criminal and civil, tax, electoral etc. No other distinction better illustrates both the ambiguity that constitutes the Judiciary, as well as the growing colonization of emancipation by regulation, than the politically contradictory functions, which were attributed to the Judiciary, that is its role as one of the protagonists of the social construction of criminality (of criminalization) and of the social construction of citizenship. From here stems its exercise of power as justice that should enable the potentially emancipative promises of citizenship made by the Constitution, and the criminalizing promises of the criminal laws, which not failing to be contained in the constitutional project, are openly regulatory. In the exercise of the first function it selectively distributes crimes and punishments: the negative status of criminals and victims. In the exercise of the other function there it selectively distributes social rights and responsibilities, creating the positive status of citizenship. These functions become antagonized in the binomials to punish and provide, violent regulation and emancipation, which are possible at the limit of regulation (compensation of class based selectivity, as in labor law). Citizenship, protected by constitutional law, is the dimension of the struggle for human emancipation – at the center of which resides the citizens and their intransigent defense (the exercise of emancipative power). Criminalization, meanwhile, is guaranteed by criminal justice (the institutionalized exercise of the power to punish). This is the dimension of social control and regulation, at the center of which resides the reproduction of social structures and institutions, and not the protection of the citizen, although it speaks and takes its legitimacy in his name. While citizenship is the dimension of the construction of rights and needs, criminal justice is the dimension of the restriction and violation of rights and needs. While citizenship is the dimension of the struggle for affirmation of legal equality and of the difference of subjectivities, criminal justice is the dimension of reproduction of inequality and of the definitive deconstruction of subjectivities. While citizenship is the dimension of inclusion, criminal justice is the dimension of social exclusion. They are thus contradictory processes. Because the criminal justice system selectively falls upon and stigmatizes poverty and strengthens social exclusion – preferentially that of males of color (see the clientele of the prison in patriarchal and racist capitalist societies). It reproduces, by imposing itself as a central obstacle to the construction of that citizenship. The current era of globalization of capitalism, which drags along with it the globalization of conflicts and risks, is marked, under the legitimizing domination of neoliberal ideology, by a dual movement. There is a maximization of globalized economic power and a minimization of national political power. The traditional channels of political mediation between State and community are weakened, as are the traditional political actors (parties, parliament, administration) and democratic public space. With the prolongation of this movement –

and as its intra-systemic portrait – another develops, that of institutional re-engineering: that of the maximization of the criminal State versus the minimization of the social State. To the minimal neoliberal state in the social field and citizenship, there is a corresponding maximum State that is omnipresent and spectacular, in the criminal field. The state not only removes itself from intervention in the social and economic order, aggravating the deep deficit of its unkept promises – at the core of which is the deficit of human rights and citizenship, above all of the third generation – but in this withdrawal, it substitutes the model of fighting poverty, typical of the welfare-state, for the model of combating the poor and excluded from the benefits of the globalized economy. It is an openly exclusionary model. Just as power is laid bare, the limit of the class struggle is as well. The social deficit and that of citizenship are broad and vertically compensated with excesses of criminalization. The deficits of land, housing, education, roads, streets, jobs, schools, daycare and hospitals are compensated by the multiplication of prisons. The instrumentality of the Constitution, of the Laws and social rights, are replaced by the symbolism of criminal law. The potentialization of citizenship is confronted with a vulnerability to criminalization. We find an authentic "crime control industry" (CHRISTIE, 1998) which in the passage from the welfare state to the incarcerating state (WACQUANT, 2001), cements the bases of a "genocide in progress" a "genocide in deed" (ZAFFARONI, 1991). It involves the colonization of the State and Justice by the criminal justice system. The direct consequence of this, which is made possible by the technological revolution, is the transfiguration of politics into spectacle-politics, with the strengthening of the media as the locus of social control and legitimation of power. This "voice of power" is charged with presenting, in a mixture of drama and spectacle, a society commanded by outlaws and criminality. By making this "enemy" theatrically greater than all the others, it builds a social imaginary of fear. We are faced with the engineering and culture of fear, a transversal and recurring concern in this issue of **Katálysis**.

The State, unable to offer functioning and democratic solutions to the growing conflict, generated by the exclusionary conditions of globalized economic power and aggravated by its own absence, produces a continued spectacle of symbolic solutions. One of the preferred means of the spectacle-State is to produce laws that promise more rights and solutions, notably punishment, to resolve the monstrous criminality that it creates. We are facing the phenomena of legislative hyperinflation and the symbolic function of Law and of the justice system. An intricate and contradictory mosaic of laws is produced – not to be complied with, since there is no possibility of their operationalization by the Judiciary – but to generate the illusion of the solution of problems. It is exactly in this spectacular constellation of circumstances and the void of responses that one must seek to understand the extraordinary overload of responsibilities that has been channeled and transferred to the Judiciary, perhaps one of the actors most called upon at the beginning of this century to concretize the promises for the realization of human rights and citizenship that have been denied by the economic and political systems. The traditional omnipotence of the Judiciary is placed (once again) in scene, as if it would be able to implement complete and thorough justice, which signifies all and nothing, and that the dramatic power of the media portrays in each interview that focuses on pain. What do you want? Justice! We are facing a movement of "judicialization" of conflicts and social problems, so important to the authors in this issue, and of which, the movement of criminalization (the favorite of globalized power), equally interpellated here, appears as the intra-systemic colonizer. This overloading has its formal matrix in the Legislature where there is a hyperinflation of criminalizing legislation. That is, at the input of the justice system, it boasts the symptoms and criticisms of the inefficiency and slowness of the judicial response. At the output of the system, – while originating an extraordinary and erratic legal reform, always in the name of unkept promises, and in search of "lost efficiency", even at the cost of growing and open denial of the individual guarantees – we live at a time of reforms in all the fields of Law, under the sign of the symptomatic crises of the Judiciary, before which the archipelagos tend to bifurcate (think of the special civil and criminal courts at the federal and state level, etc.).

The crises of the Judiciary, as a co-constituent and symptom of the structural crises of modernity, is configured by the unbalanced development between (excessive) regulation and insufficient emancipation. This imbalance is now aggravated by the excessive criminalization and by the colonization of Justice by criminal Justice. In turn, this excess is under pressure by demands for compliance with unkept promises – whether by bringing to the scene old demands and rights, of no or relative effectiveness, or by bringing to the scene unprecedented rights and needs, for individual and collective actors, – this imposes on the Judiciary a task far beyond its intrinsic capacity. If the Judiciary is passing through modernity, deeply pressured by the contradictory demands of regulation/emancipation (a dilemma between legality-security and justice), its ambiguity has a structural limit, beyond which it cannot advance, even with the best reform.

The problem with the Judiciary is not speed, nor is it quantitative. It is qualitative, related to the structures, the institutions and the culture of modernity. The Judiciary cannot, therefore, compensate for the structural insufficiency of modernity, either by compensating the

genocidal irresponsibilities of the capitalist economy and market (the structural violence), or by occupying the voids left by the State or the shenanigans of its employees (institutional violence). It cannot do so, even when it is in tune with the best and most democratic community demand, but also cannot, on its own, relieve itself of its responsibility. The problematic of responsibility emerges, therefore, – along with the new neoliberal mythology of individual responsibility – at the center of the crisis of modernity and of the Judiciary. This crisis requires an extraordinary "equilibrium" – to balance the necessary learning about the past – that is bold and inventive and can envision new utopias, the only ones capable of breaking with the old script and with the promises of success that always reverberate in new failures. The alternatives to the old and the signs of the new also constitute a strong concern of this provocative and educative issue of **Katálysis**.

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Note

1 The pillar of regulation constitutes the principle of the State (conceptualized most notably by Hobbes); the principle of the market (developed in particular by Locke and Adam Smith) ; and the principle of community (which inspired the social and political theory of Rousseau). The pillar of emancipation is constituted by the articulation between three logics or dimensions of rationalization and secularization of collective life, as identified by Weber: the moral-practical rationality of modern Law; the cognitive-instrumental rationality of science and of modern technnology and the aesthetic-expressive rationality of the arts and modern literature (SANTOS, 1989a, p. 225).

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