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## **Justice for all**

### **The challenges of justice in the 21st century and the contributions of indigenous peoples<sup>1</sup>**

This short essay has three parts. In the first, it deals with the structural problems that prevent the existence of inclusion and basically have to do with hegemonic modernity. In a second part, it analyzes the Human Rights' discourse and its limitations. Finally, from the practices of many indigenous peoples, it draws different values and principles of justice, closer to the needs of indigenous peoples.

#### **The conditioning of justice**

Modernity begins with a violent fact: the conquest of America, and is characterized by two basic pillars: coloniality and capitalism. Throughout modernity there has been a tireless struggle from indigenous peoples and from dispossessed peoples to achieve three promises: recognition, participation and distribution (in other words, since the liberal discourse of the French Revolution: fraternity, freedom and equality). In the 21st century, and despite the recognition of Human Rights, this promise has not been fulfilled.

##### *Coloniality*

Coloniality is a phenomenon that begins from the conquest of America. It is characterized by the exercise of power through the classification and creation of the "Indian" category, which differentiates the European -civilized-, from the American, African, Asian -primitive. Peruvian thinker Aníbal Quijano created this category and considered that there were three manifestations: the coloniality of being, knowledge and power (Quijano 2011).

The *coloniality of being* has to do with identity, and with the acceptance of values and perceptions that come from the global North; the *coloniality of knowledge* has to do with the overvaluation of a way of knowing -scientific rationalism- and the invisibility or denial of other forms of knowledge, related to the spiritual, with the "mythical", and with other manifestations of human experience; *coloniality of power* is associated with the ability to classify and label: poor-rich, normal- no-normal, guilty-innocent, developed-underdeveloped, human-animal. This coloniality is possible thanks to representative democracy, which has never represented indigenous people, and that has prevented their participation.

##### *Capitalism*

Capitalism, understood as a form of economic and social organization based on the accumulation and reproduction of capital, gives exchange value to the greatest amount of human activities. Something that has a cultural value or satisfies a need, like feeding, has a price. Capitalism is born with the conquest and develops in all modernity. For capitalism, indigenous peoples and nature is a natural resource, which has to be exploited. Nature is like a great reservoir of goods that have to be extracted, transformed, commercialized, accumulated.

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<sup>1</sup> Justice has multiple meanings. When I refer to "justice", it refers to the conditions to have inclusive societies; and when I refer to "administration of justice", it deals to social and state institutions that resolve conflicts.

Much has been written in relation to capitalism and I do not intend to discuss or summarize its nature, its criticisms and its supposed “virtues.” I would like to draw attention to what David Harvey (2014), one of the most knowledgeable academics of Marxist theories and about capitalism, calls "contradictions" of capitalism. According to Harvey there are three types of contradictions. The first, he calls *fundamental*, which are those that capital needs to function. Abolishing one of them would seriously affect the others to the point of capital extinction. These contradictions are what generate the crises of capitalism. The second contradiction is called the *changing* ones, which "*are unstable and remain in permanent evolutionary change*" (Harvey 2014, 98). Capturing those moments of change are opportunities for transformation, but they are not the same at all times and places. Finally, those that interest us at the moment, which Harvey calls *dangerous contradictions*, because they seriously affect both capital and humanity, and cause damage such as the degradation of the planet, the impoverishment of millions of people, the increase in inequalities, the dehumanization of the majority, police and military control and repression, the formation of totalitarian democracies.

The first of the *dangerous contradictions* has to do with the exponential and cumulative growth without end, which contradicts the growth of productive capital and population: capital depletes. Private and corporate interest groups benefit from capital accumulation and debts. Capital grows without limit and without the need to be linked to production. Capital is in the hands of these rentiers rather than the productive and industrial capitalists. Neither population nor production can grow infinitely. Human beings and nature have limits and may even stop growing. If they decrease, capital goes into crisis. Another contradiction is that capital needs nature to survive and exploits it to the limit of its possibilities: capitalism systematically violates every living species, and has caused climate change among other disasters. The third dangerous contradiction is the one that Harvey announces the path to a dystopian world. Capitalism does business of all human and natural activity, legal or illegal, hence wars, trafficking people and drugs, aggressive extraction of natural resources, and many other violences.

### **The Law of the hegemonic modernity**

Law is one of the manifestations of hegemonic modernity and shares its characteristics. Hegemonic Law shares the characteristics of *coloniality*: There is a "higher" Law, which is the one made by states and by the market. This Law has effective compliance mechanisms, has institutions, and primary attention by the states and companies; conversely, Law of peoples, indigenous customary Law, Law of oppressed people have no deserved attention. Finally, capitalism deserve the primary object of regulation of Law, which is reflected in civil law and property law. Capitalism requires Law to protect, promote and guarantee the expansion of capital. Private law has gradually appropriated nature (land, source of water...) and what it calls as "*commons*." Hegemonic Law protects property over land, water, forests, natural assets, and guarantees its transformation (industrialization) and commercialization.

The administration of justice has been monopolized by the states and has gone hand in hand with markets development. Administration of justice has reflected the interests and values of those who have held power:

1. Individualism. Individuals are entitled with rights. Society is a collection of individuals, endowed with freedom and autonomy.
2. Private property. The individual to become a person must own and expand his property. Nature is appropriable and people have the right to use, enjoy and dispose of property.

3. Individual freedom allows free initiative and competition. Freedom is lost only if it affects the freedom of other individuals and their property.
4. Progress and development is the end of the individual and society. Success in progress is understood as accumulation and development as economic growth. All indicators have to do with having more money, capital or assets.
5. The market is the organizing principle of society. In the market all the actors look for their best interests and in the competition the balance is found. The State must intervene as little as possible, to guarantee the security, competence and freedom of persons. Humans have value only if they can invest or consume.
6. The legal form as freedom manifests is the contract, which is considered as law for the people who sign it. Contracts, in a globalized society, materialize in free trade agreements. Capitals are protected and migrants are repressed.
7. The administration of justice is part of the nation state. Language, religion, currency, flag, laws, armies, institutions, among others, and the administration of justice try to standardize values.
9. The administration of justice is specialized in protecting property and contracts.
10. Justice is bureaucratized, insensitive, slow, expensive, distant, incomprehensible, full of formalities, which is not part of the culture and understanding of indigenous people.
11. The criminal justice administration usurps the conflict of the victims, is selective, is based on prison and generates more violence.

In this type of state justice administration, indigenous peoples have experienced the administration of justice in several ways: the norms have not had their participation and reflect other values; their conflicts and needs have not been taken into account; and indigenous people have been criminalized.

### **Have Human Rights improved access to justice?**

One might think that the recognition of Human Rights has contributed to substantially improve the living conditions of people and indigenous peoples. Human Rights have limited the power of the state. However, two important facts must be noted. The one has to do with the high rates of violation in all areas of rights, and the other with the instrumental use of Human Rights discourse. Exclusion, violence, including war, exploitation has not been stopped by Human Rights. Systematic and widespread violations of Human Rights could not be stopped by Human Rights.

The discourse of Human Rights has been instrumentalized by those who exercise power in order to control, violate rights and recognize rights to the state (Santos 2014, 28). On the other hand, the protection and promotion of certain rights, such as individual civil rights, has been privileged to promote the development and progress development model, which strengthens the capitalist system. Human Rights discourse can have two opposite objectives. On the one hand, some Human Rights could legitimize ideologies of proprietary individualism, encourage consumption, reproduce capitalist disorder, such as the right to private property, the free development of personality, freedom of enterprise. The exercise of these rights is not universal and is rather exclusive and enjoyed by a minority (Ferrajoli 2001, 29). Therefore, Santos affirms that *“the vast majority of the world's population is not a subject of Human Rights, but the object of Human Rights discourses”* (2014, 23). If one compares, and this has been written in abundance in Latin America, the difficulties in demanding the right to health with the rights of the owners, especially if they are foreign investors or holders of external debt, it will be appreciated that the statement is not far from reality. Critical thinking is required to question

the discourses, which Santos calls "*the hermeneutics of suspicion*" (2014, 24). Applying this, Santos looks at five problems with Human Rights hegemonic discourse:

1. Oppression is regarded as liberation (for instance, when Bush invades Iraq in order to rid that country of a dictatorship and impose "free" elections (Klein 2007, 415).
2. Other utopian speeches of emancipation and liberation, such as *sumak kawsay* and *pachamama* are considered inferior to the struggle for dignity.
3. The discourse and conflicts is reduced to what is legal and can decontextualize the struggles of social movements.
4. The discourse of rights may deny contradictions, such as differences between men and women, the north and the south, indigenous peoples and extractive companies, capitalist Indians and environmentalist mestizos.
5. In the hegemonic discourse, it can be considered that Human Rights are opposite and in inevitable tension with the state, and make invisible the control of transnational corporations.

Human Rights reflects the values of hegemonic modernity and not of all peoples: the universal, the human, the individual, secularism, the reason of state, has made impossible considering the particular and local, nature, the collective, the spiritualities, duties, popular reason (Santos 2014, 37-55). This way of understanding Human Rights tends towards regulation, order and submission (Santos 2003, 52), and no emancipation or liberation.

But in spite of all the criticisms and potentialities of Human Rights, we are currently facing an unprecedented crisis in the history of mankind and the planet Earth, which we can call it "*ecological crisis*". Individualistic, proprietary law, liberal understanding of Human Rights have not served to offer deep and meaningful solutions. This situation has to pose new and complex challenges for the understanding of the human being on Earth and human Law has been particularly pernicious. It is urgent to change the paradigm and in that change the way of seeing the world and the practices of the indigenous peoples must be inspiring.

### **Other justices from other perspectives: the contribution of indigenous peoples**

Indigenous peoples who have resisted hegemonic cultures can contribute to construct other ways of understanding and practicing the administration of justice. The values that many indigenous peoples live, which have not yet been considered, can help to understand contemporary problems in different ways:

1. Collective rights allow the individual to be seen in community. There is no way to survive if it is not in community.
2. The common. Many indigenous peoples have no notion of ownership and the most important right is to use and take care of the assets that are necessary for life.
3. The self-determination of peoples is more important than individual freedom. With self-determination, we can reach food sovereignty, which implies an economy of care and self-support. There is no sovereignty if it depends on other economies, markets, money, transnational companies, and investment.
4. The *sumak kawsay* (or other ways to understand happiness or different development objectives) is the objective of social and economic organization, not the accumulation of capital. What accumulates are affections and links between people and communities. Poor is not he or she who has no money but he or she who is alone.

5. The regulatory principle of society is the people and nature. The market is a space that is a function of exchange to meet needs, not to accumulate.
6. Peoples and nature are sources of Law. Contracts and property regulation will only have legitimacy if it is at the service of survival, of harmony between human beings and nature, and of life in fullness.
7. State must reflect the values of all peoples and nationalities that live in a territory. Nationalities, and not individuals, have representation.
8. The administration of justice has several levels. At the local level, the ability to do justice is restored to the communities and local authorities are strengthened. States intervenes in a subsidiary manner and promotes self-determination. At the national level, conflicts that cannot be resolved at the local level are resolved by state judiciary power, such cases as crimes of human trafficking or Human Rights violations. On a global level, institutions are created to protect people, and not the investors or transnational corporations. States and transnational corporations are subject to rights and not vice versa.
9. Administration of justice solves problems that have to do with the needs and sufferings of people, not exclusively those problems of people who have privileges in order to protect their property.
11. Justice is restorative, centered on the victims and the reparation of their rights.

Administration of justice of these characteristics would be able to respond to the problems of recognition, participation, distribution and multiple violence. Recognizing the identity of the peoples and their ability to contribute, participating legitimately in decision-making spaces, and distributing wealth and social opportunities, are the challenges of justice. Contemporary societies may face complex and urgent problems such as climate change, migration, human trafficking, artificial intelligence, wars and more.

States must open spaces to value and learn from many practices of indigenous peoples. Maybe we can find a real and concrete justice for all.