Décalages

Volume 2 | Issue 3 Article 5

2020

Marxism and the Critique of Modern Law: The Limits of the Judicialization of Politics

Luiz Eduardo Motta
Federal University of Rio de Janeiro

Introduction[1]

This article aims to explore what Marxist thought can contribute to the problematic of modern law, the theoretical framework of which is shaped by liberalism, by revealing the limits liberalism imposes on the advancement and affirmation of rights as seen in the contemporary phenomenon of judicialization. If liberalism, in its various aspects, treats law from a neutral point of view, and associates it with the concept of justice, Marxism - in spite of its internal differences - defines law by its coercive character, particularly the use of state force or violence for the maintenance of order. We will see, therefore, that the Marxist analysis of the phenomenon of judicialization is situated in the field of realism, in opposition to the liberal, normative perspective that understands right as a rational form opposed to violence. Apart from Marx and Engels who have criticized modern (bourgeois) law, I will refer to the contributions of Pashukanis, Althusser, Edelman, Negri, and Poulantzas.

1) Judicialization as a socio-political phenomenon

From the 1990s, the agenda of the social sciences was to introduce a theme that has since been disputed by scholars of the sociology of law and political science. The theme in question is the phenomenon of political and social judicialization, in which juridical structures and practices are explained through institutional actors, especially the magistrates and prosecutors of the Republic, who had at that point attained a prominence unknown until then in the political arena. The fact is that, since the 1990s, the interest in reading philosophers of contemporary law has grown in Brazil, particularly such figures as John Rawls, Ronald Dworkin, Bruce Ackermann, Michael Walzer, as well as those already established, in particular, Jürgen Habermas and Norberto Bobbio. On the other hand, there was also a growing demand for the work

[1] An initial draft translation was prepared with the assistance of Ricardo Gomes.

of social scientists who, coming from the political right, dealt with issues such as access to justice, citizenship and judicialization, most notably Mauro Cappelletti, C. Neal Tate, Torbjon Vallinder, Boaventura de Sousa Santos, and Niklas Luhmann.

The effect of this movement, concerned with the themes of justice, law and the judicial apparatus had a great impact on Brazilian Social Sciences, especially sociology and political science. The works of Werneck Vianna and Maria Tereza Sadek on the role of the magistracy and the Public Prosecutor respectively, spearheaded this development. Following the path opened by Werneck Vianna and Sadek, was the work of such figures as Rogério Arantes, Cátia Aida Silva, Andrei Koerner, Fabiano Engelmann, Vanessa Oliveira, Debora Maciel, Luciana Tatagiba and Marcelo Pereira de Mello, among others. The objects of analysis for them transcend the institutions and actors initially analyzed - judges and prosecutors – through the inclusion of the phenomenon of judicialization, the Audit Court of the Union, public policies on health and early childhood education, civil procedure, Public Defender, etc. One of the bibliographic results of this set of research can be seen in the book that I edited with Maurício Mota (2011), *The Democratic State of Law in question: critical theories of the judicialization.*

These surveys, generally, offered a positive reading of the phenomenon of judicialization and of the increased role of the functional representatives of the judicial apparatus. One of the rare exceptions is Rogério Arantes (2000) whose study of the Public Prosecutor indicates the limits imposed on popular democratic sovereignty by the increased role of prosecutors in the political field. Further, the positive perception of the actions of the Public Prosecutor and the judiciary was accelerated by the success of several anticorruption operations around the year 2000, in which the object of investigation was composed of a number of representative segments of political and economic power, such as magistrates, Prosecutors, businessmen, police officers, politicians and bankers. We might mention, for example, the operations that had great

repercussions: Marka/FonteCindam, Anaconda, Vampiro, Satiagraha, Sanguessuga, etc.

These actions provided a theoretical and empirical basis - because these actions defended republican interests – for the concept of the Rule of Law, law being understood as a medium between the State and civil society. In addition, this provided support for the notion that axiological neutrality prevailed in the institutions of modern justice, guided by republican principles that were neutral in relation to class conflicts. The changes and advances were affirmed by these neutral institutional spaces, that seemed both to guarantee social equilibrium and to preserve and multiply rights. The fact is that with the crisis of the legislature in the following decades post WWII, the state justice apparatus had a huge growth in demand and intervention in the political field, which came to be classified as the judicialization of politics , or the politicization of the judiciary.

An exemplary text on the phenomena of judicialization is Ferejohn's "Judicializing Politics, Politicizing Law" (2002). Ferejohn is paradigmatic in terms of synthesizing the main aspects of this political phenomenon. As he notes, since the end of World War II there has been a displacement of the legal power originally held by the legislative branch to the courts and other legal institutions. This can be seen in the case of Clean Hands Operations in Italy, the trials of the Argentine military junta and the decision of the US Supreme Court in the case of Gore v. Bush. The same is true here in Brazil, as can be seen in the case of Operation Lava Jet, among other investigations directed against the PT (Workers Party) government. Ferejohn demonstrates the tenuous line between the republican division of powers - an issue already addressed in Book XI of the Spirit of the Laws of Montesquieu and the contribution of Marxist thought to the state - that points to an intense fragmentation of power between political institutions, that limits the ability of each one to legislate.

For Ferejohn, the consequence is a movement by which people, seeking solutions to the conflict, gravitate to institutions able to produce these solutions.

The diminishing role of the legislative branch (a problem already identified by European political scientists in the 1970s, see Poulantzas [1978]), has been accompanied by a migration of legislative power to governmental agencies and courts, which means that they, especially the courts, will make politically important and often definitive decisions.

Ferejohn's confidence in belief in the neutrality of state institutions and of the actors operating within them is clear:

> A supermajority requirement for appointment would mean that newly appointed judges would have to be acceptable across party and ideological lines. This would tend to discourage the appointment of ideologically extreme judges and would probably tend to lead to a court filled with judicial moderates.[2]

The liberal conception of law and judicialization expressed by Ferejohn ends up obscuring what political agents of the legislative, executive and judiciary represent socially and politically in the state apparatus. The place they occupy and act upon, and reproduce in their practice, is not determined by abstract and formal principles, but rather by the inherent social conflicts of contemporary capitalist society. An environmental or labor issue that involves sectors opposed to large corporations, will reveal the position that the state agent, working within the legislative, executive or judiciary, will take prior to the political and ideological direction he receives.

The belief that institutions themselves foster change and engage in the defense of rights, is present in Habermas for whom social conflict is overcome through communicative action in which agents can achieve consensus through debate and disputation. This affirms the idea that there is perfect equality between the agents involved, and transparency in their dialogue, irrespective of distinctions of social

[2] Ferejohn, 2003: p. 66.

position and without any attempt to conceal their intentions: they all start from the same point, and there is no priori privilege possessed by those who hold the greatest economic, political and cultural power.

And Habermas, since adopting liberalism as a political and intellectual model after abandoning the Marxism of his early work, became one of the intellectuals who defended the project of bourgeois modernity, especially the political institutions that emerged in modernity, above all, the rule of law. As he observes:

> The powers of the State only acquire firm institutional shape in the organized offices of a public administration. The scale of this state apparatus varies with the degree to which a society makes use of the legal medium to deliberately influence its reproductive processes. (...) Public power can develop only through a legal code, and it is, in the legal sense of the word, constituted in the form of basic rights.[3]

Modern law for Habermas is the central element in the foundation of state power. It is not the form of law that legitimates the exercise of political power, but its link to legitimately established law. From this we can see how the normativity of law traverses the modern state as its fabric. The legitimacy of the power of the modern state is inconceivable without the normativity of law legitimizing that power. According to Habermas, "only in modernity can political domination develop into legal authority in forms of positive law. (...) Law by no means exhausts itself in behavioral norms but increasingly serves to organize and regulate state power."[4]

Habermas's liberalism is clear in his definition of modern rule of law. He follows the liberal maxim that the rule of law is the antithesis of the authoritarian state, and that law understood as the foundation of state policy prevents the state from exceeding its limits, thereby guaranteeing individual freedom. Modern law would be

[3] Habermas, 1996: p. 134.
[4] Ibid., p. 143-144.

for Habermas (as for Hannah Arendt) a renunciation of violence, and communicative action would assume a central role in modernity.

According to Habermas, "Read in discourse-theoretic terms, the principle of popular sovereignty states that all political power derives from the communicative power of citizens. The exercise of public authority is oriented and legitimized by the laws citizens give themselves in a discursively structured of opinion-and-will formation."[5] For Habermas, each individual is a bearer of the sovereignty that materializes from discursive practice, and through intersubjectivity, forms the sovereign will in which the rule of law incorporates itself, and thereby legitimizes political power.

In Brazil, Werneck Vianna is certainly the clearest intellectual expression of this aspect of judicialization, and the primary proponent of what he calls "jurisdictional democracy" in which the judiciary is the most important site of democratic expansion. For Werneck Vianna, the emergence of the "Third Giant", the judiciary, is due to ~~the~~ democratic constitutionalism that led to an increasing intervention of the Judiciary in the decisions of the other branches of government, highlighting the new role of the judiciary in collective life which would justify the use of the term 'jurisdictional democracy,' as the political designation of the developed West."[6]

Werneck Vianna defines the judicialization of politics as the process that indicates the ability of the Judiciary to guarantee fundamental rights. This is possible, however, only when the judicialization of politics is favored by a set of contextual variables whose presence varies in scope and intensity according to the social-historical characteristics of each country, but which tend to find a homogeneous expression in what can be described as the political West. Such variables could be grouped based on institutional dimensions, on aspects related to social practice and in conjunctural situations, such as the institutionalization of a democratic order, since the proponents

[5] Ibid., p. 170.
[6] Vianna, 1997: p. 30.

of the judicialization point to the absence of this phenomenon in authoritarian regimes. This is in opposition to some - like Garapon (1999) – who warn of a threat to popular sovereignty. Moreover, there is a need for separation of Powers and independence of the Judiciary, and for a constitution that explains rights and values, which can be invoked in defense of individuals and groups who feel the will of the majority is unjust.[7]

In an optimistic reading of the political insertion of the judiciary as a guarantor of the democratic order, and the materialization of justice, Vianna affirms that "the Judiciary, whether as a collective actor or through the heroic and compassionate action of the individual judge, abandons its neutral stance and is identified with the preservation of universal values of a society that are less and less recognized in its State, in its parties and in its system of representation."[8]

Like Ferejohn, Werneck Vianna also points out that this change in the Judiciary occurred after the end of World War II, and especially with the crisis of the Welfare State in the mid-1970s. As this crisis has intensified through the years, the demand for the judiciary to resolve conflicts has increased in response to the erasing of social gains linked to the emergence of the neoliberal model. As he argues in *The judicialization of politics and social relations in Brazil*, "the Judiciary appears as an alternative for the resolution of collective conflicts, for the aggregation of the social fabric and even for the adjudication of citizenship, a dominant theme in guidelines for facilitating access to justice."[9] The Judiciary becomes a new public arena outside the classical circuit of "civil society - parties - representation - formation of the majority will," posing, as he observes, a new problem for the classical theory of popular sovereignty.

In this new arena, political procedures of mediation give way to judicial ones, exposing the Judiciary to direct interpellation by individuals, social groups and even

[7] Ibid., p. 31.
[8] Ibid., p. 39.
[9] Vianna, 1999: p. 22

parties … in a type of communication in which the logic of principles and of material law prevails, leaving behind the border that once separated past time, from which the general and abstract law would derive its foundation, from future time, open to the infiltration of the imaginary, the ethical and the just.[10]

In recent years, however, the prosecutions carried out by the judiciary and the Public Prosecutor's Office have been criticized for a degree of bias in the anti-corruption operations, such as the so-called Operation Lava-Jet, an accusation levelled at prosecutors of the Republic and of Justice, and even magistrates. These state justice operators have criticized for the selective enforcement of justice in which left-wing leaders, or those involved with Workers Party (PT) governments are prosecuted while political representative of right-wing parties or those linked to the Brazilian Social Democratic Party (PSDB) are not. In addition, the Public Prosecutor's Office has been active in pursuing public agents linked to leftist political parties, trade unions and social movement activists, just as judges deny rights to political prisoners who suffered torture during the period of the military dictatorship and appeal to ultraconservative arguments that are anticommunist and religious in content. In addition, legal functionaries represent the highest layer of the bureaucracy of the capitalist state by receiving high paying wages, often exceeding the ceiling of the public wage, thus forming a privileged "caste" with an increasingly corporatist appearance.

This is not strange from the Marxist perspective that defines law on the basis of class domination. If, for liberalism, law is neutral and constitutes a guarantee to the citizens of protection against state violence, for Marxism, law is the central element in the justification and legitimizing of the power of State in the use of force against those classified as rebels or "subversives." Marx, in his work from 1843 on, was already skeptical of the universality of law, especially in the form of human rights. At the

[10] Ibid., p. 23.

same time, however, as his work developed and formed a body of scientific thought in producing the concept of capitalist mode of production, Marx emphasized the importance of law in the superstructure in the famous 1859 Preface. And in his definitive work, *Capital,* Marx points out the determinant function of law in the accumulation of capital necessary to the development of the capitalist mode of production, as a resource available to the industrial bourgeoisie in their struggle against the working class, whether or not it was actually employed. Legal hostility towards the working class, according to Marx, had emerged from the beginnings of capitalism with the Statute of the Workers of Edward III in 1349, and would be maintained and strengthened over the years, as in the statute of 1360, which made penalties harsher, even authorizing employers to resort to physical coercion to extort labor at the legal wage rate. The combination of workers was considered a serious crime from the fourteenth century until 1825, the year of the abolition of anti-combination laws, as Marx himself observed: "the Spirit of the Statute of Labourers of 1349 and its offshoots shines out clearly in the fact that while the state certainly dictates a maximum of wages, it on no accounts fixes a minimum maximum wage but not the minimum wage is dictated by the state."[11]

The law does not pretend to impose justice, nor universal principles applicable to all individuals; it seeks to guarantee of the reproduction of relations of economic, political and ideological power, in short, the reproduction of the relations of production. This is a clear marker of Marx's (and Marxism's) discontinuity with the project of the bourgeois Enlightenment. The rationality of modern law offers guarantees to and defends certain individuals, that is, certain social classes centered on ownership and the exploitation of a large portion of the capital-dominated, working-

[11] Marx, 1976: p. 901.

class.[12] Although the laws against combinations were supposedly repealed in 1825, Marx notes that certain remnants of the old statutes disappeared only in 1859:

> The Act of 29 June 1871 purported to remove the last races of this class legislation by giving legal recognition to trade unions. But another Act, of the same date ('An act to amend the criminal law relating to violence, threats and molestation'), in fact reestablished the previous situation in a new form. This Parliamentary conjuring-trick withdrew the means the workers could use in a strike or lock-out from the common law and placed them under exceptional penal legislation, the interpretation of which fell to the manufacturers themselves in their capacity of justices for the peace.[13]

Marx did not, in fact, develop a systematic theory of law, although he made clear the fundamental position of law in capitalist accumulation and its central role in legitimizing the use of force by the state. But Engels made his own contribution to the problem of law in Marxist theory. In collaboration with Kautsky, he wrote "Legal Socialism" in 1887. In this short text, Engels pointed out the displacement of theological / sacred law by rational / formal bourgeois law (anticipating Weber and Poulantzas on this question). And this displacement rationally and impersonally legitimized, through the State, the economic and social relations that until then were based on theological law.

Law, as Engels observes, produces the illusion that its universality is extended to the working class. He argues that

> The working class (...) cannot adequately describe its predicament by using the illusory concept of bourgeois legality. Only by observing things concretely, without the aid of legally tinted spectacles, can the working class fully comprehend its predicament. Marx helped to attain this

[12] Negri makes a very precise observation in *Insurgencies* when he states that Marx in *Capital* demonstrates throughout his exposition in chapter XXIII how fundamental was the right-violence pair in the constitution of capitalist accumulation. According to Negri "Marx really deals with modern constituent power in *Capital*. This is where he confronts the riddle of the originary, constitutive violence of the social and political order. This is a double problem that points on the one side to the identification of founding violence and on the other to its ordering function "(Negri, 1999: p. 251).
[13] Ibid., p. 903.

> comprehension with his materialist conception of history and by proving that all legal, political, philosophical, religious, and other popular conceptions are actually derived from economic circumstances, from the means of productions and the exchange of commodities. This conception provided the basis of a world view suited to the life and struggles of the proletariat. And this proletarian world view, which corresponds to life and struggle, is now circulating around the globe; to the absence of property corresponds the absence of illusions in the minds of the workers.[14]

The relationship of state, law, and legal violence in the capitalist mode of production was in fact systematized for the first time by Pashukanis[15] in his classic work. The *General Theory of Right and Marxism* (1924). Starting from the assumptions already outlined by Marx and Engels, Pashukanis deepened the analysis of the relationship of the capitalist state to modern law and the exercise of legal violence for the reproduction of capital. Modern law is based on the commodity form, i.e. Marx's economic categories are applicable to legal categories. In their apparent universality, disguised by legal discourse, they express a determinate aspect of the existence of a determined historical subject: the commodity production of bourgeois society.

Anticipating Poulantzas, Pashukanis affirms the fundamental role of law in the set of relations of production: law regulates social relations. And hence the importance of the state in this scenario of the capitalist mode of production, given that the state as a class political domination, arises from the relations of production and property determined. The relations of production and their juridical expression form the civil society, in the sense that Marx gives it in the Preface of 1859, defined as the land where the relationship of possessors of goods, the material relations of life occurs,

[14] Engels; Kautsky, 1995: p. 205.
[15] The interest of the work of Pashukanis in recent years in Brazil has been remarkable, thanks to a group of researchers who have been developing research on his work, such as de Márcio Bilharinho Naves, Alysson Mascaro, Celso Naoto Kashiura Jr., Silvia Alapanian and others.

and also includes the relations And the bourgeois state beyond the relations of economic production.

In this passage opposing the legal formalism of Kelsen, for whom the State is reduced to legal norms, Pashukanis affirms that:

> The distance from the production relation to the legal relation is shorter than so-called positive jurisprudence thinks, unable as it is to do without a mediating connecting link, state authority and its norms. The precondition from which economic theory begins is man producing in society. The general theory of law, in so far as it is concerned with fundamental definitions, should start from the same basic prerequisite. Thus the economic relation of exchange must be present for the legal relation of contracts of purchase and sale to arise. Political power can, with the aid of laws, regulate, alter, condition and concretize the form and content of this legal transaction in the most diverse manner. The law can determine in great detail what may be bought and sold, how, under what conditions, and by whom.[16]

In opposition to the liberal perspective that views law as a means of containing force and violence, Pashukanis (who in this respect converges with Kelsen) asserts peremptorily that, in spite of the apparent opposition between law and arbitrary power, they are in reality closely linked. Law becomes the basis of the legitimation of the arbitrary action the state employs against the dominated classes. Law rationalizes state actions, including the principle of a raison d'état. The dogma of positivist discourse, however, seeks to show that the state hovers above individuals, social classes, and social conflicts. And this means that there is an axiological neutrality of state agents. As he observes, alongside direct and immediate class domination, domination is constituted in the mediated form of the official power of the state as a particular detached power of society. The state is not be situated outside social

[16] Pashukanis, 2017: p. 93.

conflicts, nor would it be situated above classes since the state apparatus was created by the ruling class: the state is the result of the victory of one of the classes.[17]

Thus, class domination does not appear immediately because it is hidden by the appearance of a "neutral", formal, impersonal and rational institutional form. And this is the function of legal ideology. According to Pashukanis:

> If we wish to expose the roots of some particular ideology, we must search out the material relations which it expresses. In the process we shall, moreover, encounter one of the fundamental differences between the theological and the juridical interpretation of the concept of 'state paper'. In the former interpretation we are dealing with fetishism of the first order; consequently, we shall not succeed in discovering anything at all in the corresponding ideas and concepts other than an ideological reproduction of reality, in other words the same factual relations of dominance and subservience. In contrast to this conception, the legal view is one-dimension; its abstractions are the expression of only one of the facets of the subject as it actually exists, that is, of commodity-producing society.[18]

Law in the capitalist state would then fulfill the function of maintaining public and social order by guaranteeing through laws the defense of property, and the control of the dominated classes. In this way, the expansion of judicialization, even if it punctually incorporates some rights for marginalized and dominated sectors, in the last instance works to secure the reproduction of the social relations of production, and public servants, even those committed to the majority, still serve the maintenance of these relations of power, thus forming a bureaucratic layer of power and privileges within the state apparatus.

[17] As Márcio Bilharinho Naves observes in his study of Pashukanis, "if the State is the sphere of the exclusive existence of politics – the place of the representation of general interests - and if civil society is the place where particular interests live, access to the sphere of State can only be freed by individuals deprived of their class status - since the condition of belonging to a social class cannot be recognized by the State - and is qualified by a legal determination: access to the state is only allowed to individuals in the condition of citizens "(NAVES, 2008: p. 82).
[18] Ibid., p. 140.

We will now examine the development of Marxist theories of law following the Second World War and the critique of liberal and neo-institutionalist perspectives on law and the State.

2) The Marxist contribution after WWII: beyond the limits of liberalism.

As we have seen in the previous section, Marxism marks a break with the liberal position that law is a tool for defending the bodies and the thoughts of individuals in relation to arbitrary power by expanding rights and citizenship, and these changes and guarantees would, in modern institutions, (Legislative, Executive and, more recently in the Judiciary), take the form of the institution of new rights. As we have seen in Marx, Engels and Pashukanis, law presents itself as an abstract universality, but its material function is to guarantee order in the face of revolt by dominated classes and groups, and to affirm the legitimacy of the use of force by the state to guarantee the rights of the dominant classes in the reproduction of the relations of production and the process of accumulation of capital. In addition, modern law is based on the process of production that creates legal categories, but that is hidden in the moment of circulation when these categories take the form of law. Hence, there can be nothing more questionable than the assertion that judicialization would be a new expression of modern democracy, and that civil servants would become representatives of republican and popular interests.

After the Second World War, and especially after the 20th Congress of the CPSU (Communist Party of The Soviet Union), there came a renewal of the debates and discussions around issues in Marxist theory, as seen in Sartre's intervention, represented by his *Critique of Dialectical Reason*, the rediscovery of Gramsci, and the emergence of the Althusserian school. Althusser, in particular, changed the terms of many of the theoretical debates within Marxism, by presenting new questions (such as the epistemological rupture in Marx's work in 1845), by entering into a theoretical alliance with so-called "French structuralism" (the opposition to theoretical

humanism), by his introduction of both Mao (with the concept of contradictory plurality) and psychoanalysis (overdetermination, subject, imaginary, mirroring), allowing a rethinking of such Marxist concepts as ideology.

Although Althusser did not devote a systematic study to the concept of law, he made a direct contribution to this problematic in two chapters of his 1969 manuscript *On the Reproduction of Capitalism*, from which the article "Ideology and the Ideological State Apparatuses" was extracted, which unfortunately did not contain his analysis of legal ideology. In any case, his theory was present in the contributions of Bernard Edelman, Michel Mialle, Nicole Edith Thevénin and Nicos Poulantzas on the problematic of Law. Poulantzas, in particular, shows the influence of Althusser, particularly with respect to relative autonomy and the practices of the juridical instance of the capitalist mode of production in *Political Power and Social Classes.*

In *On the Reproduction of Capitalism*, Althusser defines the specificity of legal ideology and its specific state apparatus. Law forms a system that tends to eliminate internal contradiction through saturation. The formality and systematicity of modern law constitute its formal universality: law is valid, and can be invoked, by every individual legally defined and recognized as a legal person. And certainly in Althusser, law occupies an important role in the whole of the relations of production in capitalism. And while law expresses the relations of production, the existence of these relations remains invisible to it.

Further, in opposition to liberal thought, law is defined by its repressive function, in the sense that it could not exist without a correlative system of sanctions. In order to have a Civil Code, it is necessary to have a Criminal Code. And this requires the existence of a specialized apparatus in repressive practice. As Althusser says:

> constraint implies sanction; sanction implies repression, and therefore, necessarily, an *apparatus of repression*. Thus the apparatus exists in the *Repressive State Apparatus* in the narrow sense, the courts, fines, prisons,

> and the various detachments [*corps*] of the police. It is by virtue of this that law is inseparably bound up with the state [*fait corps avec l'Etat*].[19]

If there is a specific apparatus, there must also be corresponding to it an ideology of bourgeois law. This specific ideology of modern law represents a combination of legal ideology in the strict sense and moral ideology. According to Althusser, legal ideology is required by juridical practice, but should not be confused with law. In the law, the element of coercion is expressed in the Penal Code operating directly in the RSA in the police, the courts, and various practices of punishment, from fines to prison. However, legal ideology positions the notions of freedom, equality and obligation, and outside the law, i.e. outside the system of the rule of law and its limits, in an ideological discourse that is structured by completely different notions. While law says individuals are juridically free, equal and have legal obligations as juridical persons, legal ideology makes a seemingly similar but in fact a completely different statement. It says men are free and equal by nature. In legal ideology, therefore, it is "nature" and not Law is who "grounds" the freedom and equality of "men" (and not of legal persons).

As Althusser observes:

> Legal ideology does not say that men are bound to honour their obligations by 'nature'. It needs a little supplement on this point—very precisely, a little *moral* supplement. This means that legal ideology can stand upright only if it leans on the moral ideology of 'Conscience' and 'Duty' for support. (…)
>
> Law is a formal, systematized, non-contradictory, (tendentially) comprehensive system *that cannot exist all by itself*.
>
> On the one hand, it rests on part of the repressive state apparatus for support. On the other hand, it rests on legal ideology and a little supplement of moral ideology for support.[20]

[19] Althusser, 2015: pp. 65-66.
[20] Ibid., p. 68.

Althusser follows the path opened by Pashukanis (notwithstanding the fact that he is not quoted in the text) when he affirms that bourgeois law is universal in the capitalist system because the role of the relations of production is the role of an effectively universal law, since, in a capitalist regime, all individuals are subjects of law and everything is a commodity. In addition, by means of the state's repressive apparatus (codes, police, courts, prisons), Law directly intervenes not only in the reproduction of the relations of production, but in the very operation of the relations of production since it sanctions and punishes infractions of law. The combination of ideological elements with repression defines "Law" as an ideological state apparatus for Althusser, since every apparatus has both ideological and repressive elements, and this gives law a specific function in capitalist social formations. According to Althusser:

> The law is the Ideological State Apparatus whose *specific* dominant function is, not to ensure the reproduction of capitalist relations of production, which is also helps ensure (in, however, subordinate fashion), but *directly to ensure the functioning of capitalist relations of production*. (…) The *decisive* role played in capitalist social formations by *legal-moral* ideology, and its realization, the legal Ideological State Apparatus, which is the *specific apparatus articulating the superstructure upon and within the base*.[21]

Althusser's analysis of ideology and the ideological apparatuses of State will be combined with the theses of Pashukanis in an explicit way in the work of Bernard Edelman. Edelman adheres to the Althusserian thesis that ideology constitutes the individual as a subject. As he himself affirms, "the human person is legally constituted as a subject of law, in 'always - already subject' independently of his own will."[22] Following Althusser's thesis, he argues that every ideology, whatever it may be, constitutes discursively (through its ideological practice, i.e., materializes ideology) individuals as subjects who recognize themselves in a greater subject in a specular way. This means that one recognizes oneself in this Subject (God, Justice, Democracy,

[21] Ibid., p. 169.
[22] Edelman 1976: p. 28.

Socialism, etc.) and in other subjects who recognize themselves in that same Subject. Edelman links this postulate to law and legal ideology:

> The subjection of the subject in law to the Subject enables him simultaneously to legitimize his power outside himself, and to operate the return to power. This double "mirror structure of ideology", that is, this double mirror structure, ensures the functioning of legal ideology on the one hand, the subject of law exists in the name of law, that is, law gives it its power; even better: he gives the right the power to give him power; On the other hand, the power he gave to the law returns to him: the power of law is nothing but the power of subjects of law: the subject recognizes himself in the subjects. Power (property) in power (the state). The State occupies, ideologically, this place, attributed in the Middle Ages to the Church. The constitution of a subject state of law ensures the functioning of legal ideology.[23]

Following Marx's opposition to the liberal perspective from the position of a realist conception of Law and State, Edelman reaffirms the coercive aspect of law in the capitalist state. As he observes, all the categories that underpin the notion of "civil society" - private property, subject, will, freedom, equality - are "specified" by legal ideology. The subject is specified as a subject of law; the production of the subject as production of the subject of law; the freedom and equality as freedom and equality of all the subjects of right. But at the same time, this specification is coactive. This means that if juridical ideology does nothing more than specify "bourgeois ideology" legally, this specification is concretely realized simultaneously in the coercive action of the State apparatus. Therefore, the state apparatus coercively imposes legal ideology, and that legal ideology, in return, justifies coercion. "In this way, the function of law is ideologically expressed in the coercion exercised by the State apparatus, the determinations of the value of exchange (property / freedom-equality). The real

[23] Ibid., pp. 32-33, translation modified.

manifestation is called the juridical, the ideological manifestation, juridical ideology, part of the process of law."[24]

Law, therefore, has a determining function in the capitalist mode of production in relation to the reproduction of the relations of production. Its ideological effect is an imaginary representation of the real relations of existence of the subjects who "experience" this imaginary. Alessandra Devulsky, in one of the rare commentaries on Edelman, explains the reproductive role of law:

> It is from "reproduction" and for "reproduction" that the law is born. Next to him, his major repressive institution - the courts; on the other hand, the legislative houses provided him with his work base. The concept of reproduction is important for the understanding of law in a fundamental sense: the existing law is a bourgeois law, with the sole purpose of keeping the division of classes at a point of equilibrium that does not change the relation between property owners and means of production, thus giving rise to its reproductive character in relation to the relations of production. Without any contours, neither "social" rights, nor the fundamental "guarantees" found in the laws, are capable of changing the class tone that they have. Law does not change sides; it makes concessions to maintain the social gap necessary to have sides.[25]

In his work *The Legalization of the Working Class* (1978), Edelman radicalizes his criticism of modern law. Bourgeois law is far from incorporating the demands of the working class. In fact, law has the effect of disciplining and controlling the subaltern sectors of society. The advantages obtained by the working class remain within the circumscribed limits of bourgeois law. The victories of the working class are *a priori* legitimized in bourgeois law itself in the formal expression of legal codes, thus guaranteeing the impossibility of a rupture with the relations of production. This leads to the domination of bourgeois factions over the sectors of the working class engaged in union struggles, all of which are restricted to those rights recognized in the field of

[24] Ibid., p. 142.
[25] Devulsky, 2011: p. 86.

legal formalism. This means that the strike remains legal under certain conditions: those that allow the reproduction of capital.

Insofar as modern law functions within the capitalist mode of production, the working class "has no right" to use its power outside the limits of bourgeois legality, which is clearly the expression of the bourgeois class power. It is not, as Edelman reminds us, a conflict of law. It is about class struggle: on the one hand, right, including the right to strike; on the other, the "fact" of the masses, that is, the fact of the strike. On one side legal power; on the other, a raw, elementary and unorganized power. Therefore, everything that is not explicitly legal is dangerous in that it belongs to the domain of the "unnamable," the obscure, the unsaid and the unclassified.

Hence, the bourgeoisie "appropriated" the working class; imposed its terrain, its point of view, its law, its work organization, its management. And while the union is a site of reproduction, and limited by the regulation of modern law, it does not mean that resistance and internal conflicts are absent. According to Edelman:

> The masses do not "obey" unions in the same way as employees obey their superiors, or militants carry out the line of their party. Yes, because the bourgeoisie contaminated the workers' organization; it was turned into a bureaucracy, functioning according to the model of bourgeois power and called upon to "represent" the working class according to the bourgeois scheme of representation. . . The bourgeoisie tried - and to an extent succeeded – in denying the masses any existence outside of the law and legality. . . The working class is not "representable": it does not constitute a body - like the nation or the people - it is a class that wages class struggle. Its existence as a class is non-legal "extralegal", "ungraspable." It belongs to "no one", but to itself or to its own freedom. That is why its organization is, in essence, contradictory. On the one hand, the union functions as an ideological state apparatus; on the other hand, what the apparatus produces destroys it as an apparatus.[26]

[26] Edelman, 2016: pp. 111-112.

Edelman articulates Althusser's theory with Pashukanis's pioneering analysis of capitalist law and state. Recalling Marx's analysis in the *Critique of the Gotha program*, and moving beyond it, He recognizes that law will be present in the transitional phase of the Proletarian Dictatorship, given that class struggle will not disappear, any more than inequality. But with the end of the state, law would have no meaning. There would be law but in the secular form that predates the modern state: law as discourse and reproduction. This radically breaks with the liberal perspective that postulates the permanence of law (except, for the liberals, in an "authoritarian" political system), since from these perspectives there is no assertion of the end of the State. For Marxism, the notion of the permanence of law in a communist society conflicts with goal of the end of the State. There is, therefore, a convergence between the Althusserian School with Pashukanis in this aspect, through the work of Edelman.

Antonio Negri also takes up the Marxist critique of the liberal perspective on law. And in many respects his critique converges with that of the Althusserian School to which he has been close since the 1970s. In the chapter, "Communist Desire and the Dialectic Restored," from *Insurgencies,* Negri dissects Marx's analysis in *Capital* on the role of law - and the use of violence - in the accumulation of capital. This clearly opposes the liberal conception of modern law as antithetical to coercion. Distinct from this liberal maxim, law is the state violence of the ruling classes over the dominated classes in order to obtain profit maximization and maintain bourgeois order.

As Negri observes concerning violence, capital has conquered the conditions of "capitalist" development, through the polarization of the market between two types of commodity: on the one hand, the "free" worker; on the other, the conditions of work. Violence is therefore the constant factor in the process, the violence that is necessary to the establishment and maintenance of the "alienation" of the worker. Violence is the constituent and continuous given; it is fact and organization, effectiveness and

validity. It begins to take on legal forms at the same time that it is exercised with greater intensity – applying or removing "legal labels." And "once the expropriation has taken place and accumulation manifests itself in a first capitalist 'organization' of the new mode of production, then the law—the direct expression of the revolutionary violence of the bourgeoisies—takes on a prominent form."[27]

Violence thus constitutes a form of mediation between accumulation and law, and it may take legal forms, making law an auxiliary element of accumulation. For Negri, Marx defines law as the immediate superstructure of violence, as the process of refining of this violence. Violence breeds Law, but Law - as fabricated violence - covers the real. In this way, capitalist law does not appear as it really is in the real world: it is a simulacrum. And at this point the division between Marxism and liberalism is total. Law conceals the forms of its violence by being reproduced discursively as the "other" of violence, even though it contains within it all the provisions of bourgeois violence formalized in codes, and endowed with a supposed axiological neutrality.

Negri explains this problem in the following passage:

> This violence that creates right and law is thus presented as a real and structural force, that is, a constitutive force. Far from confining itself to the form of the process, it spreads and multiplies in the real relation that humans articulate among themselves in production. It produces the producers. (…) The immediate violence of exploitation and the juridical superstructure become a mediated violence and a structure internal to the productive process. The law—or really, the form of violence—becomes a machine, the system's permanent procedure, the source of its constant innovation and its rigid discipline.[28]

In a later work, the *Labour of Dionysus*: *A Critique of the Sate-Form* (published in 1994 with Michael Hardt), Negri offers an intense and systematic critique of contemporary

[27] Negri, 1999: p. 253.
[28] Ibid., p. 255-256.

liberal thought (especially John Rawls), but also the neoliberal state. As a result, he explodes the neo-liberal doxa of the "minimal state": in neoliberalism the state is not weakened; on the contrary, it is strengthened, especially in its repressive capacity.

As Negri and Hardt explain:

> The neoliberal project involved a substantial increase of the Sate in terms of both size and power of intervention. The development of the neoliberal state did not, but moved toward a "thin" form of rule in the sense of the progressive dissipation of disappearance of the State as a social actor. On the contrary, the State did not become a weak but an increasingly strong subject. "Liberaliization" was not a decentralization of power, not a reduction of the State—any reduction was perhaps closer to the heightened reassertion of the "essential" State powers that Vattimo celebrates.[29]

Negri points out that the neoliberal political project converged with postmodern liberal theory (Rawls, Rorty, Vattimo) to exclude the category of work from the Constitution and, consequently, to displace the social contract of the welfare state as its mediating center. While this operation leads liberal theory to propose a narrow conception of a weak state,[30] neoliberal practice, on the contrary, moves in the opposite direction: to reinforce and expand the state as a strong and autonomous subject that dominates the social space within the framework of public spending, but also in legal and police activity.

Despite the claims of classical liberal discourse, state spending, and state intervention in market activity have actually grown. Neoliberalism could not respond to the economic crisis with the dispersion and decentralization of state power, but instead had to promote concentration and reinforcement of authority over economic

[29] Negri; Hardt, 1994: p. 241.

[30] "What we have seen in the development of the postmodern liberal argument that state power is not exerted according to what Foucault calls a disciplinary paradigm. (...) State power here does involve the exposure and subjugation of social subjects as part of an effort to engage, mediate, and organize conflictual forces within the limits of order. The thin State avoids such engagement: this is what characterizes its "liberal" politics. In effect, this line of argument extends the thin conception of the State to a thin conception of politics. Politics, in other words, does not involve engaging and mediating social conflicts and difference but merely avoiding them (Ibid., p. 237).

and social institutions. While spending on social services was reduced to a minimum, the expansion of state expenditures in new areas was huge, particularly with regard to military expenditures. There was thus a restructuring of expenditure. American neoliberalism has retained the structures and economic powers created through fifty years of social welfare policies, and has merely diverted them to other ends.

These changes also affected the judiciary of the United States in the Reagan era, according to Negri, with a series of nominations for the Supreme Court, The Department of Justice and Federal Courts. They thus promoted a new paradigm of biased constitutional interpretation and social activism: liberal activism (in the American progressive sense) was replaced by conservative activism:

> The most serious effects of this shift were felt in the realms of women's reproductive rights, from the gag rule on doctors giving information on abortions to the right of abortion itself. In this way, just as the economic structures of the Welfare State and public spending were maintained and redirected, so too the extensive judicial power have been preserved and oriented toward new goals, despite the rhetoric about a thin, nonideological state.[31]

The neoliberal state in the US crystallized, as seen above, the growth of the conservative tendency in juridical instances, and one of these consequences was the contempt for the principle established by the fourth constitutional amendment prohibiting the state from conducting "irrational" inspections and detentions were drastically limited, while police powers were expanded. The suspect is defined almost exclusively on the basis of racial and cultural parameters. This attack on the fourth amendment, according to Negri and Hardt, coincides to some extent with a new institutionalization of racism in the United States. Thus, this decline in the Bill of Rights initiated in the Reagan era has given weight to the traditional federal bill to strengthen state powers against the danger of "social disorder." For Hardt and Negri,

[31] Ibid., p. 242.

"a rising militarism on both foreign and domestic soil, then, and increasing recourse to a politics of social alarm, fear, and racism, show the emergence of some fascistic elements of the State and the tendency toward the institution of a police state."[32]

In this respect, the current Brazilian political situation - especially since 2013 - has been marked by the rise of conservative ideology in various social segments, particularly in the so-called middle class, and this has been increasingly expressed by the actions of judges and prosecutors in relation to left-wing politicians and political organizations, and the repressive actions of the police on the movements of rural and homeless workers, and on control and repression in the areas of working-class housing, especially on the black and mestizo population.

In the midst of this debate about the arbitrary actions of the capitalist state through judicial actions and the conservative activism judges and members of the Public Prosecutor's Office, which has been classified as the materialization of the State of Exception according to the definition of Agambem (2013), Poulantzas' contribution in his last work *State, Power, Socialism* assumes a new importance: the concept of authoritarian statism. In addition to this concept, Poulantzas systematizes in this work the relation of violence / law, confronting not only classical liberalism, but also with the Euro communist current that defended the game of the political rules of modern liberal democracy and the Rule of Law, and Foucault's tendency to dissipate the physical aspect of law in favor of the disciplinary aspect of the capitalist state.

The problem of law has always been present in the work of Poulantzas from the time of his first book, *The Nature of Things and Law,* influenced by Sartrean philosophy. For the Althusserian School, whose influence is expressed in *Political Power and Social Class*, the problematic of Law is highlighted as a determining element in the articulation of the capitalist state in a concrete social formation. Poulantzas

[32] Ibid., p. 243.

emphasizes the isolation effect of the juridical ideology that constitutes the individual-citizen to the detriment of the social classes. The worker does not see himself as a member of a class, but rather as an individual with formal rights.

But the relationship of law to violence, or the coercive function of law, will in fact be treated with greater theoretical rigor in his last work. Poulantzas returns to the classic position of Marxism that law is associated with state violence. Poulantzas also converges with non-Marxist authors like Kelsen and Schmitt who argue that every state is structured by law. The rule of law is not the opposite of the authoritarian state (or "totalitarian") as liberals like Bobbio and Berlin argue. The cleavage between Law and the State for Poulantzas is completely false, especially in the modern state that, unlike the pre-capitalist states, has a monopoly of the use of force, and especially the monopoly of war.

Law is an integral part of the repressive order and the organization of violence perpetrated by the state as a whole. As Poulantzas says, "By issuing rules and passing laws, the State establishes an initial field of injunctions, prohibitions and censorship, and thus institutes the practical terrain and object of violence."[33] Law, therefore, is the code of organized public violence.

According to Poulantzas, the idea that modern power is no longer based on physical violence is a complete illusion [34]. For Poulantzas, even if this violence does not appear in the daily exercise of power, as in the past, it is more decisive than ever. Its monopolization by the state induces forms of dominance in which multiple consent-building procedures play the leading role. And Poulantzas' argument has become more pertienet with the level of control achieved in the current deployment

[33] Poulantzas, 2000: p. 84.

[34] It is the example of Foucault criticized by Poulantzas in this book, despite the fact that he recognizes merits in the "analytic of power" of the French philosopher. As Poulantzas points out, "Inevitably, Foucault is led to underestimate at the very least the role of law in the exercise of power within modern societies; but he also underestimates the role of the State itself, and fails to understand the function of the repressive apparatuses (army, police, judicial system, etc.) as means of exercising physical violence that are located at the heart of the modern State. They are treated instead as mere parts of the disciplinary machine which patterns the internalization of pression by means of normalization" (Ibid., p. 77).

of information technology, such as the internet and the surveillance cameras used by the Repressive State Apparatus.

Poulantzas rejects the liberal illusions according to which Law plays a mainly protective role, constituted by rational principles from a consensus of individuals, according to modern contractualist thinking. Against this perspective, Poulantzas defines Law as a conglomeration of prohibition and censorship. In addition to the negative aspect of Law, Poulantzas affirms that Law also issues positive injunctions (from the beginnings of the Greco-Roman world), in which it prohibits or permits according to the maxim of that whatever is not prohibited by law is allowed. Further, law also compels legal subjects to act, and to produce discourses. Law imposes silence and compels us to speak. For Poulantzas, the dichotomy between purely negative law and purely positive law is false, because Law organizes the repressive field as a repression of what is not done that is supposed to be done. Thus, Law has an important (positive and negative) role in the organization of the repression to which it is not limited; is equally effective in organizing the production of consent.

Before Agamben,[35] Poulantzas already asserted that every legal system includes illegality, as an integral part of its empty, blank discourse, the "gaps in the law":

> Every state is organized in its institutional structure in order to function (and so that the ruling classes function) both according to the law and against the law. Numerous laws would not have existed in their specific without the support of the set of state *dispositifs* whose function assumes a certain rate of violation that is, moreover, inscribed in the state apparatus. Illegality is often part of the law, and even when illegality and legality are clearly distinct, they do not constitute two separate systems, a kind of parallel condition (illegality) and rule of law (legality), let alone a

[35] For Agamben, the State of Exception is composed of an "illegality" legally legitimized: "as a figure of necessity, the state of exception therefore appears (alongside revolution and the de fact establishment of a constitutional system) as an 'illegal' but perfectly 'juridical and constitutional' measure that is realized in the production of new norms (or of a new juridical order)" (Agamben, 2011: p. 44).

> distinction between a failed State (illegality) and a State (legality). Illegality and legality are part of a single institutional structure.[36]

This coactive and controlling role of modern law is one of the elements that make up the authoritarian statism that is central to the final work of Poulantzas. Law is one of the main elements of the institutional materiality of the capitalist state (the others are individualization, the nation, the monopoly of knowledge); Furthermore, Poulantzas argues throughout this work that the capitalist state is a material condensation of relations of forces, not a subject, or an instrument of a class: it is an arena of struggles between classes and dominant groups against classes and groups that are dominated, and is traversed by multiple contradictions; this means that the contradictions of society are also present within the state apparatuses.

Although the *State, Power, Socialism* was condemned by Marxist-Leninists currents as "Eurocommunist"[37] "reformist," "social democratic", etc., the concept of authoritarian statism embodied in the fourth part of this book refutes these accusations. Poulantzas' concept of law and state, however, lead to a rejection of the proposals for institutional change that emerged from the Eurocommunism of Berlinguer and Carrillo in the 1970s[38]. And well before Agamben took up the concept of the State of Exception, Poulantzas' notion of authoritarian statism already delineated the limits of the capitalist state with regard to the control and repression of protest movements in the second half of the 1970s in Europe. Authoritarian statism

[36] Poulantzas, 2000: p. 85, translation modified.

[37] The error of classifying Poulantzas as a "Eurocommunist" and "retaking his influences from Gramsci" is present in Carlos Nelson Coutinho (1987) and reproduced recently by Bras (2011). Both show a profound lack of knowledge about Poulantzas 'work and ignore (or omit) the influence of Rosa Luxemburg (and not Togliatti as Coutinho asserts) in Poulantzas' criticism of the authoritarian deviations of the Russian Revolution, and in the articulation of right and self-Indirect democracy and partisan plurality.

[38] Nothing would sound strange to Berlinguer and Carrillo's Eurocommunism, the following statement by Poulantzas in his debate with Henri Weber: "the rupture can cross the interior of the state and I think things must happen this way. There will be confrontation, rupture, but it will cross the state. The function of the parallel popular organisms will be to polarize a large fraction of the apparatuses of the state by the popular movement, and these alliance will confront the reactionary, counterrevolutionary sectors of the state apparatus supported by the ruling classes (Poulantzas, 2008: p. 341).

thus refers to the structural changes that specify this phase in the relations of production, and the social division of labor, both at the global and the national level.

Authoritarian statism should neither be confused with fascist "totalitarianism", nor with the military dictatorships that appeared in various social formations of the 1970s, which for Poulantzas amount to a State of Exception.[39] According to Poulantzas, the model of the Liberal Democratic state has within itself all the components of authoritarian statism. As he observes:

> The present-day State is neither the new form of a genuine exceptional State in itself, or a transitional form on the road to such a State: instead, *it represents the new* '*democratic*' *for of the bourgeois republic in the current of capitalism*. (...) Lastly, even in countries where this state is combined with a crisis of the State, there is no question at the moment of a process or crisis tending toward fascism. (...) In opposition to those who celebrate a supposedly essential difference between the various democratic forms (the 'liberal State') and the totalitarian systems, we have to point out this time that certain features are common to both precisely because of their shared capitalist aspect. Leaving aside the fact that the two state forms may exist in a single phase of capitalism (strengthening of the executive order under Roosevelt's New Deal and the fascist States of the thirties), their common features are bound up with the roots of totalitarianism. Every democratic form of the capitalist State itself carries totalitarian tendencies.[40]

Authoritarian statism, besides exercising coercive control over the masses, also manifests the following elements: legislative decline and executive growth in the formulation of laws; the decline of political parties into transmission belts in the

[39] One of the rare comparative studies of the Agambenian Exception state and authoritarian statism is that of Christos Boukalas (2016). In his comparative analysis, Boukalas points out the conceptual advantages of Poulantzas' authoritarian statism over Agamben's State of Exception. Agamben's State of Exception would be immersed in an essentialism whose power is essentially the same, of an eternal nature, and this would express the strikingly abstract feature of Agamben's analysis. The authoritarian statism of Poulantzas, however, tries to distinguish the forms of power in their respective temporalities from which they indicate the types, forms and phases of the State. Poulantzas would not abandon the historical aspects of the State, nor the social antagonism in his analysis of the material condensation of the relations of force in the State, which demarcates its relational character. Thus, whereas for Boukalas the Agambenian Exception State would remain at a high level of abstraction, while the relational perspective of Poulantzas' authoritarian statism invites us to explore the space between high abstraction and particularity.

[40] Ibid., p. 209.

legislature of elected governments; the strengthening of technocracy and public administration, at the expense of popular bases; the "(non)ideologizing" of political parties and a steady employment use political marketing.

Authoritarian statism, Poulantzas argues, also resides in the establishment of an entire preventive institutional dispositive in the face of the growth of popular struggles and the dangers they pose to hegemony. This arsenal, which is not simply a legal-constitutional one, does not always appear first in the exercise of power: it manifests itself above all, at least for the great mass of the population (excepting the "marginalized"), in maneuvers that seem to fail when put into operation. But this arsenal, disguised, continues and is capable of being put into operation in a movement of fascization. For Poulantzas, "Probably for the first time in the history of democratic States, the present form not only contains scattered elements of totalitarianism, but crystallizes their organic disposition in a permanent structure running parallel to the official State."[41]

Conclusion

In the course of this article, we have examined the growing interest on the part of researchers in the field of law in the phenomena of judicialization and the rule of law. From the liberal perspective, political judicialization meant a new stage of contemporary democracy, and an affirmation and enlargement of rights through the decline of the Welfare State and legislative power. The modern rule of law has also constituted itself as the opposite of the authoritarian state on the grounds that rationality, formality and impersonality are its constituent elements. This is very clear in the defense of judicialization and the rule of law by Ferejohn, Habermas and Vianna.

[41] Ibid., p. 210.

Marxist thought from Marx to Poulantzas, and passing through Engels, Pashukanis, Althusser, Edelman and Negri, oppose the liberal position and point to the way modern law in its ideological form conceals power relations between classes. If Poulantzas emphasized the fact that that modern law opens small margins for periodic achievements of the working class, Edelman countered by citing the limits imposed by modern law on the working class. However, despite these minor differences, Marxist thought regards law as fundamental to the reproduction of the relations of production by acting in them. This leads to the conclusion that the increase in the action of state agents through judicialization does not offer an alternative means of change given the inherent limits of law in capitalist states, especially in the current conjuncture, in which authoritarian statism (or Agamben's State of Exception) represents the form of control and repression designed as a response to the organized movements of resistance in their struggle in against capital.

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Luiz Eduardo MOTTA is Professor of Political Science at the Federal University of Rio de Janeiro (luizpmotta63@gmail.com)