



**CONSTITUTION AND MODERNITY: NOTES ON THE EMERGENCE OF THE MODERN IDEA OF CONSTITUTION IN THE LIGHT OF NIKLAS LUHMANN, JÜRGEN HABERMAS, REINHART KOSELLECK AND MENELICK DE CARVALHO NETTO**



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**ABSTRACT**

This paper records an oral communication given by the authors during the X Congress of the Brazilian Association of Researchers in Sociology of Law (ABraSD). On the occasion, an initial draft of the discipline in preparation regarding the emergence of the modern idea of the Constitution was presented. In general terms, it aims to assess how – and in what terms – the recovery of the concept of Constitution and its resignification took place throughout the experience of modernity. The modern idea of the Constitution is presented as an evolutionary acquisition of modernity, which found in it an effective mechanism of structural coupling between law and politics (LUHMANN, 1990). Much more than a mere description of social structures, the Constitution of the moderns begins to function as a juridical-political act of institution of a community founded on principles, in which equality and freedom are reciprocally recognized to all and by all (CARVALHO NETTO and SCOTTI, 2011).

**Keywords:** Constitution. Modernity. Constitutional law. History of Law. Sociology of the Constitution.

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## INTRODUCTION

This article records an oral communication given by the authors during the X Congress of the Brazilian Association of Researchers in Sociology of Law (ABRASD), held between October 16 and 18, 2019 at the Faculty of Law of the Federal University of Pernambuco (UFPE). On the occasion, the initial outline of a course aimed at undergraduate students that the authors intend to teach about the emergence of modern Constitutions and the modern concept of Constitution itself was presented, with a special focus on the experience that led to the promulgation of the Constitution of the United States of America (1788) and on the experience that gave rise to the French Constitution of 1791. It is, therefore, an interdisciplinary course conceived at the interface between the sociology of law, the history of law and the philosophy and theory of the Constitution itself.

In the communication made on the occasion of the X Congress of ABRASD, now registered, the assumptions and part of the argument of the future course currently in gestation, which constitute its motto, were exposed. We would like to thank the members of Research Group 28 of the X Congress of ABRASD, entitled "Modernity and law in sociology and history", for their valuable comments and pertinent criticisms of the exhibition, which we do, in particular, in the figure of the coordinators Alexandre da Maia, Gustavo Angelelli and Raphael da Rocha Rodrigues Ferreira.

## THE UNDERSTANDING OF TEMPORALITY IN THE COURSE OF MODERNITY<sup>3</sup>

A possible interpretative key of the era that called itself modern, which saw itself as modernity, consists in understanding it as an era marked by the rise of reason as a primordial form of apprehension of the world. All knowledge becomes, as a prerequisite for its validity, to be subjected, against the background of the past, to the tribunal of reason and its own methods (whether by means of rational evidence and deductive procedures, or by the path of empirical observation and inductivist operation). In this context, it becomes possible to say, as Gadamer does, that one of the distinguishing characteristics of modern rationalism was the repulsion of any kind of prejudice. For the first moderns, only methodologically assured reasoning deductively or inductively could confer validity to a judgment, relegating preconceptions based only on tradition to the quality of unfounded judgments – and, therefore, inexorably devoid of legitimacy. In these terms, the intention of modern scientific knowledge was precisely to eliminate prejudices, preconceptions

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<sup>3</sup> Part of the theoretical inputs exposed in this item were previously developed in FERNANDES BASTOS, 2019 (Chapter 1 – Introduction) and in CARVALHO NETTO and FERNANDES BASTOS, 2018 (text not yet published).

(GADAMER, 2014, pp. 360-368). Thus, the temporality of the present will intend to break with the past and inaugurate the future.

In this way, the advent of modern rationalism represented, particularly, the problematization of inherited tradition. The possibility that a certain aspect of tradition could be true would ultimately depend on passing through the sieve of reason, the credibility that would be granted to it by reason taken as the last and only legitimate source of authority in the field of authentic knowledge. "What is written does not have to be true. We can know it better", so that tradition becomes the object of criticism, more precisely of rational criticism (GADAMER, 2014, p. 363). There is, then, a profound transformation in the way in which we had until then related to knowledge coming from tradition, to knowledge coming from the past, and, consequently, to the past itself and to the historicity of things in themselves.

For this very reason, when we return to the semantic description that Modernity has constructed of itself, we can perceive, with Hans Blumenberg (BLUMENBERG, 1985, Chapter VIII), how, in an exercise of self-justification, the moderns invented the ages, the ages, raising themselves to the condition of the Modern Age, of the age of the Enlightenment, describing themselves as Renaissance, seeing themselves on a level of rationality, above all institutional, superior to that of the ancients themselves (the rebirth of a rationality that had not ceased to mark the still restricted public dimension of the Greek polis and the Roman republic), and which, throughout a long Middle Ages, had found itself lethargically dominated by the darkness of myths. Blumenberg writes in response to Carl Schmitt, who had raised the thesis that, in fact, modernity, contrary to its discourse about itself, would not have broken with the past, with the absolute, theological foundations, but would have only adopted a deity of a new type, that is, it would have only secularized theology and, thus, started to make a theology of the State, a political theology (SCHMITT, 1934). By demonstrating, however, that the way in which the early moderns described themselves effectively represented an essential alteration of their own understanding of the world, it is that, contrary to Carl Schmitt, Hans Blumenberg, in chapter VIII of his work "The Legitimacy of the Modern Age", consistently deconstructs and refutes the thesis of political theology.

Reinhart Koselleck, unlike Schmitt, was able to capture very well this sensitive transformation in the treatment of the past and history that characterizes the passage to modernity. More specifically, Koselleck will demonstrate this change based on the analysis of the lexical displacement observed in the space of the German language between two expressions used to refer to the historical phenomenon. In this point, it should be clarified that the German language has two distinct lexical expressions (the term borrowed from the

French Historie and the word Geschichte) to designate the phenomenon that, in Portuguese, receives the unique denomination of "history", losing the particular semantic load that each of these expressions has in the context of German historiography. In particular, Koselleck will identify how the word Historie, in the course of the eighteenth century, is gradually replaced in favor of the word Geschichte, and how the word Geschichte itself, which was originally a plural form, at the same time is condensed into a kind of "singular collective" (KOSELLECK, 2006, pp. 48-50).

By resorting to the narrative of various historical episodes, Koselleck demonstrates that, before the eighteenth century, the word Historie referred to the historical phenomenon as a kind of repository of multiple reports and experiences in relation to which the subject in the present places himself in a position of estrangement, but which can be appropriated by study. *Historiamagistra vitae*: history as school, as teacher of life. At the same time, the word Geschichte originally meant the event considered in itself, a series of actions that occurred in the past and not its report or the set of experiences around such occurrences (KOSELLECK, 2006, p. 48).

Speaking of his time, Koselleck points out that, for a long time, Geschichte had also been designating the story, just as Historie also means the event itself ("one lends its color to the other"), and it is precisely this nuance that allows us to unveil the process of change in the approach to history underway in the eighteenth century: in spite of the fact that both terms have become semantically closer, "Geschichte" was strengthened, while Historie was excluded from general use" (KOSELLECK, 2006, p. 48).

Such a change is symptomatic of a new relationship with historical times, a change in relationship that we understand to be intimately related to the deepening of the experience of modernity. "If the old history [Historie] was torn from its chair," Koselleck points out, "it happened in the wake of a movement that organized the relationship between past and future in a new way." The new history, the Geschichte alluded to by Koselleck, claims for itself a temporal condition of its own: "different times and periods of experience, subject to alternation, have taken the place once reserved for the past understood as an example" (KOSELLECK, 2006, p. 47).

This is the finding, much broader than the eventual purely linguistic-terminological investigation, that, with the advent of modernity, history can no longer be seen as a space of experiences that must guide action in the future. In other words, also with Koselleck, the recourse to the historical categories of *the space of experience* and the *horizon of expectation is quite elucidative*, through which it is possible to reveal the dynamics of historical time. By *experience*, Koselleck conceives "the current past, the one in which

events have been incorporated and can be remembered" (KOSELLECK, 2006, p. 309), while by *expectation*, one understands the "*present future, turned to the not-yet, to the unexperienced, to what can only be predicted*" (KOSELLECK, 2006, p. 310). According to Koselleck, these two categories are not simple antithetical concepts, insofar as *they* "*indicate unequal ways of being, and from the tension that results from this can be deduced something like historical time*" (KOSELLECK, 2006, p. 312). That is why we cannot draw from this productive tension a linear conclusion in the sense of directly deducing expectations only from experiences, since the difference between them would reveal a structural characteristic of history. "In history, there is always a little more or less of what is contained in the premises", so that "the historical future is never the pure and simple result of the historical past" (KOSELLECK, 2006, p. 312).

It is undoubtedly "a temporal displacement towards the open future" (PAIXÃO, 2002, pp. 259-260). If the future was, until that moment, determined from the past, in modernity it starts to present itself as an unknown. History is no longer understood as a collection of examples from which it is possible to extract relations of meaning that determine the future (and, in this sense, it is possible to learn from it), to be understood as the expression of our path so far, through which we can better apprehend our situation in the present, with the future being clear for the achievement of the potentialities of human experience.

And, "if the future of modern history opens up to the unknown and, at the same time, becomes plannable, then it has to be planned" (KOSELLECK, 2006, p. 57) – which, in turn, ended up resulting in a deepening of the modern experience that would add new layers of complexity to this peculiar understanding of our own temporality.

The course of law, particularly constitutional law, takes place against the backdrop of the experience of modernity, with all the predicates that such an operation presupposes. Since the invention of the individual, it has demanded, in line with the modern fixation on the elimination of unfounded judgments, the suppression of birth privileges, turning against the hierarchical divisions of the social body existing in pre-modernity. It no longer makes sense to divide the estate of society precisely because this type of social arrangement ensures privileges based on the past, on tradition. In such pre-modern social organizations, contemplative time was one of those prerogatives reserved only for those who made up the most privileged strata of the social body. In the words of Menelick de Carvalho Netto:

Contemplative time was one of these privileges, seen as a reward only for those who, because they were born at the top of the estates or caste hierarchy, could, thanks to idleness, dedicate themselves fully to the highest human activities such as poetry, philosophy, politics. In this way, Aristotle, for example, justified slavery as a necessary evil, essential for some to experience human potentiality in its fullness. In modern society, on the contrary, this idleness is seen as lost, dilettante time.

Individual lives are increasingly longer in quantitative terms, in number of years, but, paradoxically, they are perceived in qualitative terms by the individuals who live them as increasingly faster, shorter, that is, insufficient for everything they could have done, even in the field of leisure. Perceptions that, finally, like the complex society itself that feeds on the permanent incorporation of the risks to which it is exposed, as mobile and dynamic as they are, make it possible to conceive time, the process, as the very meaning of the human being. It is not by chance that, in the contemporaneity of our society, time is always increasingly rare, shorter, since it can be appropriated, qualified, and monetized, and is therefore reducible to quantitative calculations in the composition of projects, investments, and costs (CARVALHO NETTO, 2011, pp. 34-35).

All this profound transformation in the way we relate to our own temporality makes up the substrate on which the idea of the modern State is built, conceived as the rational organization of society. Contractualist theories of the State, power pacts, fundamental laws and the entire theory of the State that supports them emerge. This whole process is accompanied by the invention of modern Constitutions, a late acquisition of modernity.

#### **THE ADVENT OF THE MODERN CONCEPT OF CONSTITUTION AS AN EVOLUTIONARY ACQUISITION OF MODERNITY<sup>4</sup>**

The use of the concept "Constitution" is certainly verified long before the last years of the eighteenth century, when revolutionary experiences in the United States and France gave rise to two formal documents self-styled constitutions, on which the foundation of new socio-political structures was sought. The very idea that political society can be based on law or even that political power can be limited or regulated by a formal legal document, sometimes qualified as "fundamental", is in itself part of a long tradition (see SEELAENDER, 2006).

In any case, in spite of the previous uses of the concept and the socio-historical tradition in which the project is undeniably inserted, it seems to us somewhat uncontroversial to think that, from the end of the eighteenth century, a new conception, an innovative linguistic use, of the idea of Constitution emerges. More than that, we believe it is possible to sustain that the very use of the current concept of Constitution in reference to the ancient fundamental laws or to pre-modern diplomas that provided for the exercise of political power and/or matters today considered as typically constitutional (or even the qualification of such diplomas as "pre-constitutional") constitutes a candid anachronism, or as a naïve projection into the past of current concepts "that says more about the doctrinaires and the political circumstances of their time than about the nature and original function of those diplomas" (SEELAENDER, 2006, pp. 197-198). It remains to inquire about

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<sup>4</sup> Part of the theoretical inputs exposed in this item were previously developed in ROCHA, 2018 (Chapter 3, Item 3.5).



what this linguistic innovation effectively meant, in order to elucidate what would be the purposes and the very function of the idea of the Constitution from the end of the eighteenth century onwards, as well as the expectations linked to it. Niklas Luhmann's conception of modernity can help us decisively in this task.

According to Luhmann, modern society is marked by a paradigmatic change in the perception of the reality of the world, moving from an awareness of reality to an observation of observation (LUHMANN, 2011, p. 150). That is, in modernity "there is a loss of reality, in the sense of the ontological tradition" (LUHMANN, 2011, p. 151) typical of ancient practical reason. In this sense, since society is constituted of communication, social evolution would take place through the incorporation of new communication flows, variants in relation to the established communication units<sup>5</sup>. In this context, access to the objective things of the world can only occur "through information, through what others say and, certainly, what we say" (LUHMANN, 2011, p. 150), which allows society to be defined as a "self-referential closed connection of communications" (NEVES, 2012, p. 4).

Niklas Luhmann identifies modernity with the combination of a process of hyper-complexification of world society and a growing phenomenon of functional differentiation. Modern societies would thus be characterized by the emergence of functionally differentiated social systems: science, art, economics, politics. In particular, the fundamental distinction between system and environment emerges. According to Luhmann, any communication that occurs in society belongs concomitantly to one (or more than one) social system, as well as to the surrounding environment, and the excessively complex and disordered environment (which includes the other systems), is its own order, reducing complexity<sup>6</sup>. In this way, taking a specific social system as a reference, the other systems surrounding it, including world society itself, would function as an environment.

To describe the functioning of social systems, Luhmann borrows the concept of autopoiesis from biology. In his conception, social systems, as with living systems, would be autopoietic to the extent that they would self-constitute, self-transform and self-destruct according to their own components, processes and communicative flows, delimiting their

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<sup>5</sup> On this point, Marcelo Neves, quoting Luhmann, states the following: "Considering that communication is the elementary unit of society, variation occurs when communication deviates from the structural model of social reproduction. More precisely, variation 'consists of an unexpected, surprising communication'. The corresponding social expectations do not count on that innovative kind of communication, which presents itself as a negation of stabilized structures. It opposes a 'no' to the connection of expectations that regulates systemic reproduction" (NEVES, 2012, p. 6).

<sup>6</sup> Systems theory, therefore, "takes as its starting point a principle of differentiation: the system is not merely a unit, but a difference. The difficulty of this theoretical precept lies in being able to imagine the unity of this difference. In order to be situated, a system (unit) needs to be differentiated. Therefore, it is a paradox: the system manages to produce its own unity, to the extent that it makes a difference" (LUHMANN, 2011, p. 101).

space in the world (NEVES, 2012, p. 60). Therefore, social systems should be seen more as a difference (in relation to the environment) than as a unit<sup>7</sup>.

There is, however, a central difference between biological systems and social systems in that the latter are self-observable, since they "maintain their autopoietic character while simultaneously referring to themselves (inwards) and to their environment (outwards), operating internally with the fundamental difference between system and environment" (NEVES, 2012, p. 62). This is what is called operational closure, that is, "meaning is only related to meaning and can only be changed through meaning" (NEVES, 2012, p. 62). With this, Luhmann works with the notion that each social system only operates from its binary code (its meaning), which reduces the complexity of meanings characteristic of the environment.

Despite being differentiated and operationally closed, however, social systems are not hermetic and insensitive to the environment and to other systems. There is always a scope of something called openness to the system, a condition of possibility for the existence of the system itself, since there is only a system if there is an environment. According to Marcelo Neves, the most diverse determinations of the environment act on the system, but they are only inserted into the system when the system, according to its own criteria and code-difference, attributes its form to them" (NEVES, 2012, p. 62).

Having made all these prolegomena about the theory of Luhmanian systems, when we return again to the context of the emergence of the modern idea of Constitution, it is quite revealing that, with the constitutions arising from the American Revolution and the French Revolution, the constitutional form begins to exercise functionality not previously performed by other instruments or texts of an eminently legal nature. The new constitutions are expected not only to establish the political structure of a state, but also to establish the very measure between what is and what is not right. In Luhmann's words, the "right/non-right code generates the Constitution so that the Constitution can generate the right/non-right code. Radicalized difference establishes the text that, in turn, establishes difference – but under the condition that every autological maneuver becomes invisible" (LUHMANN, 2000, p. 12).

At the same time, the Constitution in its modern sense enables a concentrated and lasting interface between the social systems of law and politics, with reciprocal benefits (learning), characterizing an interference between autonomous social systems. The

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Constitution enables the possibility of exercising power (politically) in a legally legitimate way (law), at the same time that these legally legitimate political processes can generate properly legal norms – that is, produce law. This interface mechanism Luhmann calls structural coupling.

Through this concept, Luhmann conceives the thesis that the modern idea of the Constitution arises as "a reaction to the differentiation between law and politics, or to put it with even greater emphasis, to the total separation of both systems of functions and the consequent need for a reconnection between them" (LUHMANN, 2000, p. 4). The modern concept of the Constitution is seen as an "innovation of political origin within the system of law itself" capable of, at the same time, providing the operational closure of the system of law and enabling a lasting interface of reciprocal disturbances between law and politics.

The modern idea of the Constitution, therefore, presents itself as an evolutionary acquisition of modernity, which found in it an effective mechanism of structural coupling between law and politics (LUHMANN, 2000). Much more than a mere description of social structures, the Constitution of the moderns aims to function as a juridical-political act of institution of a community founded on principles, in which equality and freedom are reciprocally recognized to all and by all (CARVALHO NETTO and SCOTTI, 2011). If this constitutional project of modernity, referred to in the previous period, has not yet been fully realized (and certainly will never be absolutely realized, due to the very precariousness of the conditions and possibilities of law in modern societies), it is undeniable that this purpose represented, in itself, the advent of a new paradigm in the scope of the interface between law, society and politics.

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