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**Constitution, Document of Culture
and Barbarism**

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Constitution, Document of Culture and Barbarism[†]

Abstract: Based on Walter Benjamin's reflections on history and social struggles, this paper drafts an analysis of the relations of the subject with some problems of constitutional theory, in a first effort to bring the field nearer to social philosophy. After tracing a short narrative on modern constitutionalism and its new relationship with the historical time, we argue that Constitution shall be seen as a cultural document of memory of the social struggles of the past and at the same an object of the struggles of the present. Some inconclusive reflections on the possibility of human emancipation through law are presented as conclusion.

Keywords: Modern Constitutionalism; History; Recognition; Walter Benjamin

It is characteristic of the constitutional theory that it must always deal with the problems that emerge from the relationship between its object, the constitution, and its legitimacy through the historical time. From the old paradoxes that come along with the theme of constituent power until the problems of recent constitutional hermeneutics, constitutional theory seems to find history anywhere it turns its eyes to. Nevertheless, researchers of the discipline rarely devote special attention to this close relation, which remains almost unexplored.¹

Modern constitutions are indeed historical documents, dated and signed. However, they do not immobilize a political community, freezing it in the very moment of its symbolic foundation. As a linguistic practice, a constitution must be always updated, and its meaning is subject to a struggle which is coextensive with the social struggle itself. We attempt to show here that an appropriate understanding of the temporal and historical aspects of the constitutions, which is fundamental also to think their legitimacy, must as well take seriously the dimension of the social conflict. If constitution has something to do with justice, or more particularly with a claim for justice and a denial of injustice, then it is to be thought not only

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[†] We would like to thank specially to Vitor Blotta (USP-Brazil) for our kind discussion and his precious suggestions. To adopt them would require us to write a whole new paper, what would not be the case for this occasion. Further developments of the theme are sure going to take them into account.

¹ For a good overview on the relationship between constitution and historical time, see Stephan Kirste, *Constituição como início do direito positivo: a estrutura temporal das constituições*. *Anuário dos Cursos de Pós-Graduação em Direito*, 13, 2003, 1-30. See also Marcelo Andrade Cattoni de Oliveira, *Democracia sem espera e processo de constitucionalização: uma crítica aos discursos oficiais sobre a chamada "transição política brasileira"*, *Revista Anistia Política e Justiça de Transição*, 3, 2010, 200-229.

from the present on, but especially considering the injustices of the past, as a condition to every justice to come.²

We shall begin by a short narrative on modern constitutionalism and its new relation with tradition, history and time (I.); then, following the reflections of Walter Benjamin on the philosophy of history, sketch out a concept of constitution as normative cultural tradition/transmission (*Überlieferung*) (II.); so we shall try to relate the struggle for cultural memory implicit on every interpretative update of the constitution with the moral grammar of recognition, passing through one of the gaps of Ricoeur's *Course of Recognition* (III.) to finally, in an inconclusive conclusion, make some appointments on the relationship between law and social struggles to further reflections (IV.).

I.

The rise of modern constitutionalism³ takes place in a wider context of social changes that altogether correspond to the phenomenon known as Modernity. In the realms of law and politics Modernity would be characterized by modifications in the notions of political power and normative authority, as well as by modifications in the very relationship between the two spheres.

For many centuries, the foundation of legitimacy to the exercise of political power and for legal norms rested on the triad composed by tradition, religion and authority. That triad tied the present to an immemorial past from which came the legitimating force to law and politics. That roman amalgam had been preserved, notwithstanding the obvious differences and although under a Christian robe, when the Catholic Church assumed the course of the secular matters.

However, the different changes that occurred since at least late Middle Ages – such as the resurgence of cities and trade, the Renaissance, the Scientific Revolution, the Reformation and the building of national state – undermined one by one the elements of that triad. In late eighteenth century the revolutionaries of France and of the Thirteen Colonies found it weakened and in a process of progressive disintegration.

² We're thinking social justice here not in terms of distribution of goods and with the help of a supra-historical original position, but in terms of historically given intersubjective relations of recognition. See particularly Axel Honneth, *Das Gewebe der Gerechtigkeit. Über die Grenzen des zeitgenössischen Prozeduralismus*, in: *Das Ich im Wir: Studien zur Anerkennungstheorie*, 2010, 51-77.

³ Since it is not the main goal here, this approach will not address the important details, contradictions and differences that have characterized the birth and development of the modern concept of constitution. For more detailed analysis see Hannah Arendt, *On Revolution*, 1965; Horst Dippel, *História do Constitucionalismo Moderno: Novas Perspectivas*, 2007; Maurizio Fioravanti, *Constitución: De la antigüedad a nuestros días*, 2001; Maurizio Fioravanti, *Los derechos fundamentales: Apuntes de Historia de las Constituciones*, 2003; Cristiano Paixão and Renato Bigliuzzi, *História constitucional inglesa e norte-americana: do surgimento à estabilização da forma constitucional*, 2008.

Notwithstanding the distinctive paths and solutions found on one side and the other of North Atlantic,⁴ the fact is that from those confrontations would arise a new concept of constitution. With the origin of its core meaning in the discussions between American colonists and the English metropolis, this concept would remain being debated throughout the nineteenth century and reach the twentieth century⁵. On one hand, this new concept responded to the difficulties brought up by the fragmentation of that legitimating amalgam. On the other hand, it founded a new relationship between law and politics: politics should provide legitimacy to the law, while law should provide the binding force of political decisions.

At the heart of this new relationship between law and politics appeared the notion of constituent power. Differing itself from ancient and medieval constitutions, if it is possible to speak of their existence, modern constitutions would have their birth dated in history. Thus, it was not only between law and politics that a new relationship emerged: more than that, the concept of modern constitution established a new relationship of the constitution, and of the law as a whole, with the very historical time.

It is impossible to put under just one name the constitutional experience of Antiquity and Middle Ages. While the ancients saw the constitution as a political ideal, the Middle Ages took it as a given legal system: not something to be sought, but rather preserved. To the ancients, it should legitimize the existence of strong public forces acknowledged within society, while for the Middle Ages it had the fundamental role of restricting intrinsically those same forces. And if the ancients sought a constitution as a counterpoint to the crisis brought about by the recrudescence of economy and trade, comprehending it as a factor of (re)invigoration of political sphere and civic virtue, in the Middle Ages economic and patrimonial relations were the point of support on which was sustained its given legal system.

Briefly, in ancient times the constitution appears as a project of social and political discipline, practically devoid of a normative-legal sense, while in the Middle Ages, although maintaining a social and political feature, it emerges in its normative meaning as given legal system composed by the broad set of agreements and pacts within the very society and destined to maintain the established social structure.

Despite these relevant differences both constitutional experiences were placed under the aegis of the mentioned triad, within which the constitution appears as expressing a mixed character and with its legitimating foundation fixed in an immemorial past. The dissolution of that triad prevented the modern constitutions to seek a basis of legitimacy only in the past.

⁴ See Arendt (note 3) and Paixão and Bigliuzzi (note 3).

⁵ For example, Arthur Jacobson and Bernhard Schlink, *Weimar: A Jurisprudence of Crisis*, 2000.

Instead, written with a certain fixed date at the present, modern constitutions would find their basis in their openness to the future.⁶

However, this would not mean a simple abandonment of the past. The new relationship between time and constitution, between historical time and law, would not be just a jump without origin toward the future. If the past could no more be the main reference of legitimating force, it continued to be the field of experiences from which it was possible to extract the reconstructive substrate for the formulation of constitutions. The relationship between time and law became a complex relationship among past, present and future.

Yet, as a result of a constituent power whose acts are fixed in a certain date, the opening to the future of those constitutions has always been problematic: how could those men who had written the constitutional text claim that this text binds also the following generations? This issue, which afflicted so much Jefferson in the context of the American Revolution⁷, would not abandon constitutional theory through the last two centuries.

The understanding of the constitution and of the constitutional identity⁸ as an open project would enable important reflections on that point. Moreover, the contribution of hermeneutics would also be important: among other things, the distinction between text and norm and the conception of law as linguistic and interpretative practice would be fundamental points of that notion of open project.

This attempt would after all be unproductive if it were not complemented by an analysis of how this open project is appropriated by different social actors in different contexts. Since modern constitutions have as their main purpose to organize and limit the actions of the state and its relationship with citizens as well as the relationship among the citizens themselves by means of a list of fundamental rights, it is precisely in this field, the field of fundamental rights, that this appropriation can show itself more clearly.

II.

Walter Benjamin understood those social changes that characterized Modernity in a very particular way. It is true that he sounds often melancholic and nostalgic about that process that he called the loss of experience (*Erfahrungsverlust*), which accompanies the disenchantment of the world – to use Weber's expression – that mark the transition to Modernity. To him it is

⁶ One of the central features of modern constitution is its comprehension as a norm above the other norms, as a supra-legal norm. However, given the goals of this text, this feature will not receive a more detailed treatment. See: Paixão and Bigliuzzi (note 3).

⁷ Arendt (note 3), chapter 6.

⁸ The main reference here is Michel Rosenfeld, *The Identity of the Constitutional Subject*, *Cardozo Law Review* 16 (3-4), Jan. 1995, 1049-1109.

clear, however, that Modernity brings, as the other side of the same coin, the conditions for the emancipation of the humanity.

The preoccupation with the possibility of an authentic experience, not reducible to the instrumental relation between a subject and a detached object, crosses Benjamin's whole work, from the early writing *On the program of the coming philosophy*⁹ to the thesis *On the concept of history*.¹⁰ Benjamin holds that with Modernity the possibility of such experiences, when our instrumental attention withdraws and gives way to a richer perception of the world, was almost eliminated. The advent of the line production now requires maximum attention of the worker, who could before distract and forget himself, as emerging in what he produces. The oral circulation of narratives, previously responsible for social integration, gives place to the unilateral form of the mass media, which requires also an everlasting attention to every kind of useless information. Lastly, the so called decay of aura of the work of art: with the dissolution of the collective ritualistic distance in face of the work of art, disappears also the medium in whose horizon the individual biographies could relate themselves collectively with the history/memory of the whole community.¹¹ Benjamin sees in these structural changes the substitution of a richer model of experience (*Erfahrung*) by an impoverished one (*Erlebnis*), in which the events and incidents are recorded only for their instrumental value of information.

This new model of experience of the present leads also to another way of experiencing the past. The qualitatively dense and collectively ensured remembrance (*Erinnerung*) is replaced by a memory (*Gedächtnis*) supposed to be under control of the intelligence.

As said before, in spite of this apparent nostalgic diagnostic, Benjamin doesn't aim at a re-enchantment of the world, a return to the pre-modern condition. Rather, as shows for example his essay on the technical reproducibility of the work of art¹², his analysis

holds on to the social, cultural and artistic processes of increasing fragmentation and triumphant secularization, not to try to take from there an irreversible tendency, but possible instruments

⁹ Walter Benjamin, Über das Programm der kommenden Philosophie, in: *Gesammelte Schriften* II-2, 1977, 157-171.

¹⁰ Walter Benjamin, Über den Begriff der Geschichte, in: *Gesammelte Schriften* I-2, 1974, 691-704.

¹¹ An illuminating summary to Benjamin's theme of the loss of experience is given by Axel Honneth, Kommunikative Erschließung der Vergangenheit. Zum Zusammenhang von Anthropologie und Geschichtsphilosophie bei Walter Benjamin, in: *Die zerrissene Welt des Sozialen: sozialphilosophische Aufsätze*, 1999, point III, 101-104. Among Benjamin's texts, key ones are Walter Benjamin, Charles Baudelaire. Ein Lyriker im Zeitalter des Hochkapitalismus, in: *Gesammelte Schriften* I-2, 1974, 509-690; Walter Benjamin, Erfahrung und Armut, in: *Gesammelte Schriften* II-1, 1977, 213-219; Walter Benjamin, Der Erzähler: Betrachtung zum Werk Nikolai Lesskows, in: *Gesammelte Schriften* II-2, 1977, 438-465.

¹² Walter Benjamin, Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit, in: *Gesammelte Schriften* I-2, 1974, 431-508.

*that a true “materialistic” policy should be able to recognize and make use in favor of the masses of excluded from culture, instead of letting the ruling class take possession of them and make of them new means of domination.*¹³

Benjamin's critics on the modern consciousness of time and the way it deals with history and memory can be prolific too to think modern constitutions, since it's possible to think modern constitutions in the conceptual horizon of Modernity.

The reference to the concept of Modernity in a historical context appears first with Hegel, qualifying “his” age (in any case, the age of the present, the current age) as a new age, in opposition and rupture with the old past times.¹⁴ What characterizes that new age is exactly its openness to future, its necessity to break at every moment with the past in order to affirm his present as the peak of the historical process. In Koselleck's classic formulation, in the modern times the horizon of expectation expands while it is more and more separated from the space of experience, which, in turn, shrinks.¹⁵ Therefore, in Habermas words, “Modernity can and will no longer borrow the criteria by which it takes its orientation from the models provided by another epoch; *it must create its normativity out of itself*. Modernity sees itself, without possibility of escape, referred to itself.”¹⁶

In the thesis, Benjamin addresses heavy critics to this hegemonic consciousness of time, especially in the figures of the historicism and the social-democratic historiography in vogue in his time. In these representations of history, which claims to be able to know scientifically the whole of history (historicism) and sees in it the glorious and uninterrupted progress of humanity (social-democracy), Benjamin sees nothing but the narrative of the ruling classes. His counter proposition of writing history (and also of understanding it) is highly subversive. Once again following Habermas, “Benjamin turns back the sign of the radical orientation towards future that characterize in general Modernity to such a extent that it is transformed in a even more radical orientation towards past”.¹⁷ As if inverting the analysis of Koselleck

¹³ “*Ela se atém aos processos sociais, culturais e artísticos de fragmentação crescente e de secularização triunfante, não para tentar tirar dali uma tendência irreversível, mas sim possíveis instrumentos que uma política verdadeiramente “materialista” deveria poder reconhecer e aproveitar em favor da maioria dos excluídos da cultura, em vez de deixar a classe dominante se apoderar deles e fazer deles novos meios de dominação*”. Jeanne-Marie Gagnebin, *História e narração em Walter Benjamin*, 1999, 56.

¹⁴ Jürgen Habermas, *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen*, 1985, 13.

¹⁵ Reinhart Koselleck, 'Erfahrungsraum' und 'Erwartungshorizont' – zwei historische Kategorien, in: *Vergangene Zukunft: zur Semantik geschichtlicher Zeiten*, 1979, 359.

¹⁶ “*die Moderne kann und will ihre orientierenden Maßstäbe nicht mehr Vorbildern einer anderen Epoche entlehnen, sie muß ihre Normativität aus sich selber schöpfen. Die Moderne sieht sich, ohne Möglichkeit der Ausflucht, an sich selbst verwiesen*”. Habermas (note 14), 16. Author's emphasis.

¹⁷ “*Benjamin dreht vielmehr die radikale, für die Neuzeit überhaupt charakteristische Zukunftsorientierung um die Achse der »Jetztzeit« so weit zurück, daß sie in eine noch radikalere Vergangenheitsorientierung überführt wird*”. Habermas (note 14), 21.

Benjamin acknowledges in the past a persistent horizon of not satisfied expectations which can only be pacified through a reconciling remembrance that does justice to it.

As cultural documents, the constitutions are subject to the intergenerational transmission process characterized by Benjamin in the thesis and other texts, a “concrete, material historical process of relinquishment, perseverance, struggle and violence, that carries or not, leads or not, transmits or not an event or a work of the past to our present”.¹⁸ In Benjamin's words:

*Those that until today obtained victory, march together in the triumphal procession that leads the rulers of today over those that lie on the ground. The spoils are, as it uses to be, carried along with the triumphal procession. They call it cultural goods. They will have to reckon, in the historical materialism, with a distanced observer, because what he sees as cultural goods attests, with no exception, a provenance he can't contemplate without horror. It owes its existence not only to the effort of the great geniuses who created it, but also to the nameless drudgery of its contemporaries. There is never a document of culture which is not, at the same time, a document of barbarism. And just as it is not free of barbarism, so does not the process of its transmission, in which it passes from a victor to another.*¹⁹

However, to understand this very often quoted and very often misunderstood passage of the seventh thesis, one needs to notice the specific sense that Benjamin gives to the expression cultural goods, which should not be mistaken for the general concept of culture.²⁰ In his essay about Eduard Fuchs, where he first develops his reflections on the matter, Benjamin alerts that historical materialism should not conceive by culture its disintegration into “goods which become objects of possession for mankind”.²¹ Culture appears here “in a reified form”.²²

¹⁸ “*processo histórico concreto, material, de desistências, de perseverança, de lutas e de violência, que transporta ou não, leva ou não, transmite ou não um acontecimento ou uma obra do passado até nosso presente*” Jeanne Marie Gagnebin, Documentos de cultura / documentos de barbárie, *Ide: Psicanálise e Cultura*, 31 (46), 2008, 81.

¹⁹ “*Wer immer bis zu diesem Tage den Sieg davontrug, der marschirt mit in dem Triumphzug, der die heute Herrschenden über die dahinführt, die heute am Boden liegen. Die Beute wird, wie das immer so üblich war, im Triumphzug mitgeführt. Man bezeichnet sie als die Kulturgüter. Sie werden im historischen materialisten mit einem distanzierteren Betrachter zu rechnen haben. Denn was er an Kulturgütern überblickt, das ist ihm samt und sonders von einer Abkunft, die er nicht ohne Grauen bedenken kann. Es dankt sein Dasein nicht nur der Mühe der großen Genien, die es geschaffen haben, sondern auch der namenlosen Fron ihrer Zeitgenossen. Es ist niemals ein Dokument der Kultur, ohne zugleich ein solches der Barbarei zu sein. Und wie es selbst nicht frei ist von Barbarei, so ist es auch der Prozeß der Überlieferung nicht, in der es von dem einen an den andern gefallen ist*”. Benjamin (note 10), 696.

²⁰ This important distinction is owed to Jeanne-Marie Gagnebin (note 18).

²¹ “*Güter, die der Menschheit ein Objekt des Besitzes würden*” Walter Benjamin, Eduard Fuchs: der Sammler und der Historiker, in: *Gesammelte Schriften* II-2, 1977, 477.

²² “*Sie erscheint verdinglicht*”. Benjamin (note 21), 477.

Benjamin doesn't refer, thus, to culture in general when he points out its immanent barbarism. He refers to its illegitimate use, when its treated as something done that, like an inheritance, is took in possession by its legitimate descendants, those who will carry on the domination.

There is, however, another way in which cultural transmission occurs, described by Benjamin in the fourth thesis:

*The class struggle, which a historian schooled by Marx can never lose sight of, is a struggle for the rough and material things, without which there's nothing fine and spiritual. Nevertheless, these spiritual things can't be represented in the class struggle as the spoil of the victor. They are alive in that struggle as confidence, courage, humour, cunning and firmness, and they act from the depth of time. They will always question each victory of the rulers.*²³

Culture appears here precisely as the medium in which the claims of the past are manifested, their claims for recognition, as we will argue in the sequence.

Understanding the process of constitutionalization inside the broader process of the cultural transmission, it's even possible to sketch a benjaminian critic of constitution, from the distinction between the sphere of culture and its disintegration into cultural goods. This distinction defines also two distinct ways by which men can face up a constituent project.

In the first of them the written text of the constitution is seen as a cultural good of their possession. That's the way, for example, the Brazilian Supreme Court relates sometimes to the constitution: as something of her own, as its only and real legitimate guardian.

In the second way constitution is understood as the living persistence in present of an unfinished past, full of promises and claims. It's one of those fine and spiritual things which Benjamin talks about in the fourth thesis. Facing the constitution this way, social movements like Brazil's MST (Movimento dos Sem Terra - Landless Rural Workers' Movement) appeal to the very law to contest an oppressive traditional order.

²³ "Der Klassenkampf, der einem Historiker, der an Marx geschult ist, immer vor Augen steht, ist ein Kampf um die rohen und materiellen Dinge, ohne die es keine feinen und spirituellen gibt. Trotzdem sind diese letztern im Klassenkampf anders zugegen denn als die Vorstellung einer Beute, die an den Sieger fällt. Sie sind als Zuversicht, als Mut, als Humor, als List, als Unentwegtheit in diesem Kampf lebendig und sie wirken in die Ferne der Zeit zurück. Sie werden immer von neuem jeden Sieg, der den Herrschenden jemals zugefallen ist, in Frage stellen". Benjamin (note 10), 694.

III.

In his *Course of Recognition*²⁴, Paul Ricoeur intends to highlight the ruled polysemy, between the homonymy and univocity, of the term recognition in its everyday use and in modern philosophy. Scrutinizing two great French dictionaries – one from the second half of the nineteenth century, the other from the end of the twentieth century – Ricoeur distinguishes three focus of meaning, which he assimilates to three not chronologically linear philosophical moments that at first appear to have no reference to each other except the fact they come together in French under one phylosofema (*reconnaissance*): the Kantian *Rekognition*, the *reconnaissance* of Bergson and the Hegelian *Anerkennung*, indicating respectively the idea of recognition as identification, as self recognition and as mutual recognition.

If, as Ricoeur argues, there is a ruled polysemy among the broad spectrum of meanings of the term recognition, then it should be possible, if not necessarily to fulfill the gaps of silence between one and other sense, at least to build bridges that enable to overcome those gaps safely.

It doesn't seem so hard to construct such a bridge linking the *reconnaissance* of Bergson, related to the sphere of memory, to the Hegelian *Anerkennung*, a concept of particularly ethical meaning, renewed and developed by a leading name of Critical Theory nowadays, Axel Honneth.²⁵ Thus, more than to partially corroborate the hypothesis of Ricoeur, it will be possible to launch the first foundations to think recognition in reference to what the constitutionalist Stephan Kirste called the temporal structure of constitutions.²⁶

As Ricoeur shows, in the two central chapters of *Matter and Memory*²⁷, Bergson, in order to provide an answer to the old philosophical problem of the union between soul and body, scrutinizes the relationship between the survival of images in memory and its recognition, this “concrete act by which we recover the past in the present”.²⁸

How can an image that comes to mind at the present moment be recognized as an image experienced in other times? To Bergson, it is the act of recognition, usually not conscious or

²⁴ Paul Ricoeur, *Percurso do reconhecimento*, 2006.

²⁵ For it escapes the intentions of this text, we will not deal with the *Rekognition*, the third synthesis operated by consciousness, responsible to establishing the unity of experience, in Kant's Critique of Pure Reason. Approaches to this cognitive meaning of the term are already been done by contemporary theory of recognition, with important profit to his development. See the essays compiled in Axel Honneth, *Unsichtbarkeit: Stationen einer Theorie der Intersubjektivität*, 2003; and the small but brilliant study Axel Honneth, *Verdinglichung: eine anerkennungstheoretische Studie*, 2005.

²⁶ Kirste (note 1).

²⁷ Chapters II e III, respectively “Of the recognition of images: memory and the brain” and “On the survival of images: memory and mind”. Henri Bergson, *Matéria e memória: Ensaio sobre a relação do corpo com o espírito*, 1999, 83-208.

²⁸ “...ato concreto pelo qual reavemos o passado no presente”. Bergson (note 27), 99.

voluntary²⁹, that allows the very distinction between past and present. But if it is possible to recognize, in the present, a past's image, it is necessary to conclude, on the one hand, that the images of the past somehow survive in the present, they are preserved in a latent form; on the other hand, the past does not become past after having been present, but "it is 'contemporary' of the present that it was."³⁰

This Bergsonian conception of time strongly influenced Benjamin.³¹ It is not the "homogeneous, empty time"³², designed "as if a waited or foreseen event, in any case waited from far away in the future, comes gradually near to present and then, once lived and flowed into present, falls in past in order to settle there as a remembrance".³³ Paradoxically, just as the past is contemporary to the present, the present is not always contemporary to himself. To Benjamin, on the trail of Bergson and psychoanalysis,³⁴ all of the lived past remains virtually in each present moment and may emerge as a reminiscence that "flashes in a moment of danger."³⁵

However, if the past is preserved in the present, it does not mean that it is accessible at any time, as if to know it would be necessary just an act of will combined with a research effort. This is the fundamental disagreement of Benjamin with the historicism in vogue at the time of the writing of thesis. For, if on one hand the past is preserved in latency, on the other, "it is an unrestorable image of the past that threatens to disappear with every present *that does not recognize itself as aimed in that image*".³⁶

It is already possible to see in which way, in Benjamin, the recognition of the images of the past described by Bergson takes a normative shape, indicating a coming nearer to recognition-*Anerkennung*. It is clear that the recognition to what Benjamin refers is not merely a cognitive act. History is not a scientific (instrumental) knowledge of the past. The historical truth is possible only when it is recognized in a certain present – not only in the sense of known again, identified, but at the same time in the ethical sense of being recognized

²⁹ "We usually exercise our recognition before we can think it" (*Exercemos em geral nosso reconhecimento antes de pensá-lo*). Bergson (note 27), 106

³⁰ "... é 'contemporâneo' do presente que ele foi". Ricoeur (note 24), 138.

³¹ "We owe thus to Bergson, and so does Benjamin, accordingly his own confession, the comprehension of the essence of time" (*C'est donc bien à Bergson que nous devons, que Benjamin doit, selon ses propres aveux, de comprendre l'essence du temps*). Françoise Proust, *L'histoire à contretemps: Le temps historique chez Walter Benjamin*, 1994, 37).

³² "die homogene und leere Zeit". Benjamin (note 10), 701.

³³ "comme si un événement attendu ou prévu, em tout cas, attendu de loin dans l'avenir, se rapprochait progressivement du présent, puis, une fois vécu et déchargé dans le présent, tombait dans le passé pour s'y installer à titre de souvenir". Proust, (note 31), 36.

³⁴ To an approach on Benjamin's thought and freudian psychoanalysis, see Sérgio Paulo Rouanet, *Édipo e o anjo: itinerários freudianos em Walter Benjamin*, 1981.

³⁵ "im Augenblick einer Gefahr aufblitz". Benjamin (note 10), 695.

³⁶ "es ist ein unwiederbringliches Bild der Vergangenheit, das mit jeder Gegenwart zu verschwinden droht, die sich nicht als ihm gemeint erkannte". Benjamin (note 10), 695.

in its own dignity. The present not just recognizes the past, but it recognizes *itself in* the past when it feels that it is aimed by the past. "The true picture of the past runs out, fast. The past only lets to be fixed, as an image that flashes irreversibly, *at the moment in which it is recognized*".³⁷

In his reading of Benjamin's work, Honneth tries to show exactly what the weak messianic power that past bequeaths to present as its claim must be understood in a post-religious sense: "here the idea of a subsequent payment of a debt we have towards the victims of the crimes of the past must admit the nature of a symbolic restitution of their moral integrity".³⁸ Thus, Benjamin's proposal of writing history in the thesis can be understood as a way of presenting to the "nameless drudgery"³⁹ of the losers of history the due recognition they did not have in life, saving them from a second and final death – the complete erasure of the traces of their passage through Earth, which is the menace addressed to them by the writing of history of the victors: "the dead are not safe if the enemy wins".⁴⁰ The claim (*Anspruch*) that the past directs to the present is precisely the claim for the recognition that was denied in its time.

Only by doing justice to the past it will be possible to interrupt the recurrence of catastrophes that characterizes history. This is what Benjamin means with "to explode the continuum of history"⁴¹, a task he attributes to the materialist historian. The possibility of all justice to come depends on that justice is done to the past. In other words: struggles for recognition can always be understood as struggles for the recognition of a memory and thus they are in a relationship of mutual dependence with the very memory of the struggles for recognition.

IV.

Any connection drawn between Benjamin and law needs to refer to the enigmatic *Zur Kritik der Gewalt*. In that text Benjamin presents a radical critique of law. Prior to Benjamin's contact with Marxism, the language in which that critique appears is not similar to that which characterizes the orthodox Marxist thought. Nevertheless, the coincidence is in the total condemnation of the law, in the condemnation of the law as a whole.

³⁷ "Das wahre Bild der Vergangenheit huscht vorbei. Nur als Bild, das auf Nimmerwiedersehen im Augenblick seiner Erkennbarkeit eben aufblitz, ist die Vergangenheit festzuhalten". Benjamin (note 10), 695. Our emphasis.

³⁸ "hier muss die Idee der nachträglichen Begleichung einer Schuld, die wir gegenüber den Opfern vergangener Verbrechen haben, den Charakter einer symbolischen Restitution ihrer moralischer Integrität annehmen". Honneth (note 11), 109.

³⁹ "namenlosen Fron". Benjamin (note 10), 696.

⁴⁰ "auch die Toten werden vor dem Feind, wenn er siegt, nicht sicher sein". Benjamin (note 10), 695.

⁴¹ "das Kontinuum der Geschichte aufzusprengen". Benjamin (note 10), 702.

Although it is possible to verify positions and trends in a contrary direction, the overview of critical thinking about law tends to be quite negative. Law – with its rules, its concepts, its institutes and its rituals – is understood as a mere instrument of domination, as a limit, an obstacle to social change.

The purpose of this article came from a different premise: law can be understood also in another perspective. It can be taken at the same time as limit and condition of possibility of social transformation. It is the basic premise that remains as the backdrop of the reflections on the relationship between memory, history, social struggle, recognition and constitution.

Understood in the second way discussed above – that is, as the persistence in the living present of an unfinished past, full of promises and claims – modern constitutions open themselves onto a complex temporal relationship which propitiates the articulation between past injustices and demands for justice to come.

In this sense they appear not as a restriction to social change, not as an obstacle to emancipation, but as the very condition to these transformations.

Many questions, however, arise at this point. Is it even possible to understand law as an instrument not only of domination but at the same time as an instrument of struggle against this domination? Or this way of understanding law is only an ideological way to prevent social struggles from reaching their full emancipatory potential? Social changes propitiated by law would always be mere reforms? The revolution, as the need for radical social transformation, would always be incompatible with law? What are the limits of making law a condition of possibility to emancipation? Would the law be apt to deal with all kinds of demands for justice? Or its own formal structure would appear, always and in any case, as insuperable limit to some demands for justice and therefore to justice as a whole?

Undoubtedly, there are many points to be discussed in pursuit of an adequate understanding of the relationship between law and social struggles. While to all these points it is possible to find answers already produced in other moments of history, they do not cease to ask new reflections from different points of view. The aim of this paper was to approach a small, although important aspect of this relationship, hoping to contribute to further discussions on the topic.

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