



CONSTITUTIONAL JURISDICTION AND THE BURDEN OF
POSTMODERN PURIFICATION:
THE CHALLENGE OF MAINTAINING STRUCTURAL METARELATES*

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“Times change, wills change,
Being changes, trust changes;
The whole world is made up of change,
Taking on new qualities all the time”.
Luís DE CAMÕES.

SUMMARY: 1. Introduction. – 2. Metarelations and their modernist legitimation. – 3. A critical perspective of public reason. – 4. Postmodern purification. – 5. Conclusion.

1. Introduction

The quotation from the Lusitanian poet, duly placed at the beginning of this study, aims to highlight not only the ephemerality of sensitive facts, but above all, the influence that such life situations promote, both on man/woman and on idealized institutions. In his literary works, Camões routinely reflects his personal values on his nautical experiences, but, on the other hand, and with equal force, he also lets himself be affected by them, thus producing a perpetual motor based on descriptions and feelings that would end up eternalized in *Os Lusíadas*.

This integrative effect between man and his environment, between the being who observes and the object observed, in addition to reinforcing the idea of the Heideggerian

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*Dasein*¹, confirms the perennality of everything that is idealized and built by the human being, so that all of us would be doomed to eternal changes, be they about our ideas or even about the institutions resulting from them.

It is precisely on this supposedly evolutionary dynamic (man, world and ideas) that the Rule of Law arises, a figure initially created, according to Skinner², with the purpose of guaranteeing the promotion and control of Mediterranean mercantile relations, but which, over time, gradually transmuted to the level of the mythological Leviathan, in order to be voracious in its nature, but necessary for life in society.

From this centralizing nature of power and stabilization of economic relations, arises the so-called Modern State, by which, notably for the contractualists such as Hobbes, Rousseau and Locke, the government imposes on its citizens a pact by which society must find a force of association that defends and protects from all common force the person and property of each associate, and by which, each, joining with all, therefore obeys none but himself and remains as free as before³.

After centuries of maturation, the modern State reached its philosophical, political and revolutionary peak at the end of the 18th century, through the independence of the United States of America (1776) and the French Revolution (1789), both fruits of the Enlightenment thought that, among many characteristics, sought a government of equal men, excluding from this core any control of divine and predestined order.

Thus, from then on, there would be no more opaque public spaces based on beliefs and superstitions, because, according to Kant⁴, the Enlightenment would be the moment of man's departure from his (intellectual) minority for which he himself is responsible. In this way of clarifying human rationality, a more than symbolic case can be remembered by Darnton⁵, when reporting the *histoire du livre* in France, when booksellers tried to commercialize forbidden works, notably the contractualists, as well as the Herculean attempt to produce and sell the first encyclopedias.

In the nineteenth century, the modern state found itself definitively free of its ideological moorings, such as despotic monarchies, feudalism, precarious mercantilism, or even the clerical policy coming from Rome, however, the novelties did not stop emerging, now not as an obstacle, but by an efficient catalyst of Locke's liberal ideas, *first*, dressed in the industrial revolution of coal in England, and *second*, by the North American oil *boom* at the end of the century, imposing on the world a new global center of power.

To better assimilate what were the preponderant causes of the birth of postmodernism, one of the central themes of our study, it is imperative to make a previous approach, for what we believe to be two side effects of the modern

¹ M. HEIDEGGER, *Ser e tempo* (1927), Parts I and II, translated by M. Sá Cavalcante Schuback, Petrópolis, 2002.

² Q. SKINNER, *The State: Political innovation and conceptual change*, Cambridge, 1989, 93.

³ J.J. ROUSSEAU, *Of the social contract*, translation by L. Santos Machado; introduction and notes by P. Arbousse-Bastide and L. Gomes Machado, 2nd edition, São Paulo, 1978, 4.

⁴ I. KANT, *Resposta à pergunta: o que é o iluminismo*, in ID., *A paz perpétua e outros opúsculos*, Lisbon, 1990.

⁵ R. DARTON, *The Enlightenment as a business: history of the publication of the "Encyclopedia", 1775-1800 I* (1939), translation L. Teixeira Moita, M.L. Machado (French texts), São Paulo, 1996.

liberal/capitalist state, *first*, speculative capital, and *second*, pure positivism. The first for no longer reflecting the true wealth produced, by generating income from nothing, from the void; and the second for taking Kantian rationality to extremes that denied the moral and ethical categorical imperative itself.

As for the first side effect (speculative capital), we can say that economic evolution did not happen for nothing, far from it, it needed an improved scientific backing to support the modernist financial and monetary dynamics, a role duly assumed by some, *see* the famous cases of Adam Smith (the wealth of nations of 1776) and David Ricardo (principles of political economy and taxation of 1817).

These authors and their respective works paved the way for industrial capitalism, through the notion of ownership and wealth generation through the self-referenced system of supply and demand, i.e. the existence of the so-called invisible hand of the market. The great dilemma concerning the invisible hand of the market is that we never know for sure when it is present or not!

Over time, the capital system, free of any state regulation, ended up generating the birth of financial distortions and corruptions, among them, the infamous economic speculation, which is so harmful to man, Hudson⁶ even equates it to a parasite, so that: "*We are brought back to the fact that in biological nature parasites produce an enzyme that silences the host's perception that it is being dominated by a free luncher*".

For epistemological clarity, we need to highlight the distinction between the concepts of economic development and unproductive gains, very well defined by Dowbor⁷, in which the first is externalized by investments (public or private), while the second through financial applications to which the author concludes: "*Banks and the media even call everything investment, it seems nobler than financial investment or speculation*".

Speculation continues to require our attention, as even today we witness an almost total liberalization of speculative markets, a fact that consequently undermines the power of public investment, the exponential increase in internal and external public debts, the decrease in the purchasing power of families and the blocking of growth in the productive market, such events that ultimately allow the crystallization of the largest oligopoly the world has ever witnessed, which is, according to Morin⁸, a group of 28 international banks, direct authors for all economic crises since the mid-1990s (Brazil, Argentina, Greece, Turkey, Southeast Asia).

As for the second side effect of the modern state (pure positivism), we need to justify this arm with due care, since there are still several philosophical discussions about the responsibility of positivism on the infamous Nazism and its spurious variants (fascism, Francoism)⁹. However, at the eminently historical level, it was the strictly

⁶ M. HUDSON, *Killing the Host: How Financial Parasites and Debt Destroy the Global Economy*, Islet, Baskerville, 2015 - www.michael-hudson.com

⁷ L. DOWBOR, *The age of unproductive capital: Why do eight families have more wealth than half the world's population?*, São Paulo, 2017.

⁸ F. MORIN, *The World Hydra: the banking oligopoly*, Lux publishing house. 2015.

⁹ Viewed on 20/07/2022 at: <https://www.conjur.com.br/2019-ago-09/positivismo-juridico-nao-legitimou-nazismo-sim-combateu>

positivist model that underpinned the defense of the defendants at Nuremberg, as we can see in Barroso and Barcellos¹⁰ :

The main defendants at Nuremberg invoked compliance with the law and obedience to orders issued by competent authority. By the end of the Second World War, the idea of a legal system indifferent to ethical values and of the law as a merely formal structure, a packaging for any product, was no longer acceptable in enlightened thinking.

During the rise of Nazism, Carl Schmitt, in his work "*The Guardian of the Constitution*", openly promoted his political passion for the Führer, when he categorically stated that the German Constitution would be below the wishes and orders of its leader, which would promptly place the German normative system on a level of merely operational instrument of the 3rd Reich. Kelsen¹¹, in turn, even if unfairly placed as a supporter of the system - because he radically opposed Schmitt's ideas, stating that the independence of the constitutional jurisdiction was essential for a modern democracy - also stated that, formally, Nazism would be within the limits of German law.

Zagrebelsky¹² even predicts that the imputations of the atrocities of Nazism to positivism and legal subjectivism are based on fragile premises. However, discussions aside, History¹³ ended up attributing to purely formal positivism, the sin of one of the great responsible for the horrors of the two great wars, either for its rationalism devoid of ethical and moral values, or for the weakening of constitutional movements in Europe.

Harvey¹⁴, citing Lyotard and Foucault, states that such authors deny any form of metanarrative or metalanguage by which all things can be connected or that immutable and eternal truths cannot be specified, therefore, the Hegelian dialectical structure conflicts with such eminently anti-structural postmodern thoughts. Thus, the atomization of the social in flexible networks of language games does not dialogue with the solid and impassive structure of Enlightenment modernism, which understood the world through the perspective of Bacon's New Atlantis, read:

To this conception of an elite but collective, male and white wisdom, others opposed the image of an unabashed individualism of great thinkers, the great benefactors of humanity, who, through their unique struggles and efforts, would bring reason and civilization from nothing to the point of true emancipation¹⁵.

¹⁰ L.R. BARROSO, A.P. DE BARCELLOS, *Interpretation: Ponderation, Argumentation and Role of Principles*, in G.M. MILK, *Constitutional Principles*, Malheiros, 2003.

¹¹ H. KELSEN, *Who should be the guardian of the Constitution? Jurisdição constitucional*, São Paulo, 2003.

¹² G. ZAGREBELSKY, *El derecho dúctil - Ley, derechos, justicia*, trad. M. Gascón, Madrid, Trotta, 2008.

¹³ D. HARVEY, *Postmodern Condition*, São Paulo, 1992.

¹⁴ D. HARVEY, *Postmodern Condition*, cit., 50.

¹⁵ D. HARVEY, *Postmodern Condition*, cit., 24.

Without pretending to exhaust the theme, we can say that such side effects (unregulated speculative capitalism and pure positivism), born from the very heart of modernist state institutions, flowed into critical moments of economic and social dismay, such as the NY stock market crash, the Russian revolution of 1917, the German post-first war economic crisis and Weimar's collapse, the 2nd world war and its atomic bombs.

As a direct result of all these discouragements, gravitationally arises to the modernist State, small collective and philosophical satellites, both by discrediting the Public Power, and by the absence of effectiveness of the great legal systems, and that were noted by the constant rebellion to the *status quo ante*, which invariably leads us to postmodernist movements, whether in literature, cinema, philosophy or fashion.

Identity movements explode around the world, especially since the 1960s, of the most varied essences and the most complex desires, as we can see in the racial rights movement with Martin Luther King, or in the war cry for women's freedom in Paris '68, or in the fight against social customs at Woodstock, or even in the cultural reform that took place in Brazil by Tropicália.

However, at the turn of the 1960s and 1970s, when postmodernism emerges, the State loses the legitimacy of the single speech, becomes another social participant, which consequently places it in an unavoidable situation, that is, the loss and dispersion of power, by which the legitimacy of producing its information is distributed to all interested parties and "*with this commodification of knowledge, the privilege that modern nation-states held and still hold with regard to the production and dissemination of knowledge cannot be left intact*". Still according to Lyotard:

The idea that they depend on the "brain" or "spirit" of society that is the state will be supplanted as the opposite principle is reinforced, according to which society does not exist and does not progress unless the messages circulating in it are rich in information and easy to decode. The State will begin to appear as a factor of opacity and "noise" for an ideology of communicational "transparency", which is strictly related to the commercialization of knowledge. It is from this angle that the problem of the relationship between economic and state bodies is likely to present itself with new acuity¹⁶.

The sin of the State as a factor of communicative interference in the highly computerized social fabric imposes an artificial distribution of power among all stakeholders, making the relationship between the public and private spheres rarefied. We could say with some tranquillity that the postmodern State has three preponderant characteristics, which are: *a)* the exceptionality of power, *b)* legitimacy under term, and *c)* the shared exercise of information.

Therefore, the postmodern condition would be, according to Lyotard¹⁷, a disenchantment, an incredulity for state metanarratives, with their timeless and universalizing narratives, thus giving birth to a society that is based less on a Newtonian anthropology (such as structuralism or systems theory) and more on a pragmatics of

¹⁶ J.F. LYOTARD, *O pós-moderno*, transl. Ricardo Corrêa Barbosa Rio de Janeiro, 1986, 5.

¹⁷ J.F. LYOTARD, *O pós-moderno*, cit., Introduction: XVI.

language particles. In this way, the modern State is faced with a new challenge, namely that of readapting to this new world, with its new languages and technologies. See.

We must, for introductory purposes, clarify that this article is based on the inductive method, as we start from the perception of particular phenomena, such as issues involving social minorities, towards theories that can embrace the appropriate answers or good provocations.

Furthermore, we make it clear that the problems presented in this article reveal the challenges faced in Brazil, any colloquial expressions come from an attempt to reflect an attempt to get closer to readers from other countries.

2. The metarelatos and their modernist legitimation

We can say, in a very superficial and introductory way, that metarelato, an expression coined by Lyotard and which we can also understand as metanarrative, would be the very spirit of the great philosophies, the founding soul of the great modernist institutions, the zero mark that bases the great odyssey of every rationalist society, in short, it would be the metanarrative, the legitimizing and ethereal narrative within the palpable narrative itself now presented to all, for the sake of maintaining modernist society and its institutions.

According to Lyotard, it was German idealism that forged one of the most important foundations for the legitimization of the great Western narratives, which fatally led to the meta-relatives of the Enlightenment and Marxism, two philosophical pillars that are preponderant to this day. Kant's transcendental idealism, Hegel's instrumentalized dialectic of opposing parts towards a synthesis, and Marx's description of society in productive and non-productive classes, create a solid framework of how societies should legitimize their institutions and thus maintain themselves in a scientifically verifiable and attestedly Newtonian system. Lyotard expresses the postmodern feeling about modernity:

In revolutionary eyes, postmodernity is reformist. In Enlightenment eyes, it is a regular visitor, that is, another anarchic rebellion of irrationality. In truly modern eyes, it is merely modernizing. However, in its own eyes, postmodernity is anti-totalitarian, that is, democratically fragmented, and serves to sharpen our intelligence for what is heterogeneous, marginal, marginalized, everyday, so that historical reason can see new objects of study there. Greatness is lost, tolerance is gained. Instead of the historical duty of man, there is the full integration of the citizen into communities. And it is to these "plates" (the word is Lyotard's) of sociability that the postmodern gaze is directed, seeking to understand them at the same time in their authenticity and in their precariousness¹⁸.

Further on and on the power in the postmodern scenario, the author follows by stating that the state legitimacy of imposing the great accounts fell into disuse after World War II, not only by the great technological advance, but also by the protection of

¹⁸ J.F. LYOTARD, *O pós-moderno*, cit., 127.

Keynesianism in the following decades and with it, "*the decline of the unifying and legitimizing power of the great accounts of speculation and emancipation*".

Foucault, one of the authors to best address postmodernity, states that this new philosophical court tends to speak, ultimately, of the attempt to readjust and relocate sociological power and its systematic distribution in society through modernist institutions, such as the state, the church, political parties, trade unions or science, duly externalized by the Academy.

For the philosopher, power in postmodernity is fragmented into micropowers, with the production of the respective micro-reports, finally, society ceases to be eminently pyramidal and becomes constituted in a network, where each interlacing line imposes itself as a legitimized portion of the production of power, metanarrative and diluted truth. According to Foucault:

Power is everywhere; not because it encompasses everything, but because it comes from everywhere. Power is neither an institution nor a structure, it is not a certain power that some people have: it is the name given to a complex strategic situation in a given society¹⁹.

Regardless of more detailed discussions about understanding postmodernism as a contradictory or merely reformist movement of modernism and its institutions, we must emphasize the fact that power, as a sociological condition, is reshaped in its dynamics and reinvented in its way of communicating. Much of this new form of postmodern power distribution will be due to technological advances, reinforcing the intertwining of informational sources, which were already foreseen by Deleuze²⁰ when differentiating disciplinary societies (modernists) and control societies (under the postmodern condition).

For Deleuze, contemporary society breaks the barriers of pyramidal hierarchization, the walls of schools, prisons, barracks, public buildings and factories and refers them to a common and open place, by which, each one can be a social and communicative reference, thus no longer being necessary the *panopticon* of Bentham, because the control is done by its own will, through a pseudo technologically assisted freedom, or as he himself preached:

In societies of discipline one never stopped starting over (from school to barracks, from barracks to factory), while in societies of control one never finishes anything, the enterprise, the training, the service being the metastable and coexistent states of the same modulation, as if of a universal deformer.

The metanarratives, as the public spirit of modernist institutions, have always worked with formal, rational, hierarchical power in a pyramid, and with few legitimates for the proper publication of the respective narratives, namely, the State, the scientific academy, the political parties and the mainstream media in concession. Through this

¹⁹ M. FOUCAULT, *History of Sexuality I: The Will to Know*, Rio de Janeiro, 1977, 89.

²⁰ G. DELEUZE, *Post-scriptum on the societies of control. Conversations: 1972-1990*, Rio de Janeiro, 1992, 219-226.

verticalized dynamic, modernist states base their social power structure and institutional legitimation through a self-referenced system, whereby the maintenance of power feeds the very legitimation of such institutions.

Lyotard, directly criticizes the mathematical concept of reason of modernists, inferring that for the acceptance of a scientific statement is necessary to make a greater displacement of the concept of reason, so that a universal metalanguage should be replaced by the plurality of formal and axiomatic systems capable of arguing denotative statements, these systems being described in a universal metalanguage, but not consistent. Santiago²¹, ends in a direct way the origin of modern reason, summarizing all the previous paragraphs, we read that:

The metarelatos were responsible for the constitution - in modern times - of great actors, great heroes, great dangers, great journeys and, above all, of great socio-political and economic objectives, bringing an impossible but longed-for grandeur to a world that was increasingly perceived as bourgeois and capitalist, low and decadent. They had as their starting point the libertarian ideal of the French Revolution and as their foundation the principles of Enlightenment reason.

In addition to the language and public reason used by the rule of law in its formatting, science also plays a preponderant role in this destiny, since its recursive capacity has given rise to numerous theses that promote state viability to this day. Theories of various natures have established the stability necessary for the State, whether economic, legal, anthropological, sociological or even political, so that the ratification or rectification of scientific schools, or even their decline and disbelief can influence the state, governmental and administrative directions.

Postmodernism breaks this institutionalized dynamic, increasingly atomizing social relations, so that modernist legitimacy ceases to be an assumption and becomes a verifiable characteristic, subject to social homologation by all other networked actors. In this way, state metanarratives no longer contain the 'absolute truth' to contain a truth under condition of judgment, a liquid truth, a post-truth. In this sense of understanding, Bauman understood and called postmodernity liquid modernity, or even as immediate modernity, and evaluated:

Whatever the history of modernity is at the present stage, it is also, and perhaps above all, post-Panoptic. What mattered in the Panopticon was that those in charge 'were there', close by, in the control tower. What matters in post-Panoptic power relations is that the people who operate the levers of power on which the fate of the less volatile partners in the relationship depends can slip out of reach at any moment - into sheer inaccessibility²².

Finally, we can affirm that metanarratives are intrinsic qualities of modernist institutions, through which the truth *iuris et de iuris* is manifested, unlike the postmodern condition, insofar as society itself requires a prior legitimization of the information produced by institutions, otherwise it will not be accepted as valid.

²¹ Viewed on 02/01/2022 at: <https://periodicos-teste.ufms.br/index.php/cadec/article/view/7773>.

²² Z. BAUMAN, *Liquid modernity*, Rio de Janeiro, 2001. 15.

Modernist metanarratives are faced with a new reality, namely that of permanent proof of their social validity, having to see themselves no longer at the tip of a pyramid, but in the midst of a self-sustaining network of democratically established narratives.

In time, we must say that the fragmented metarelates of postmodernity can also bring their respective side effects, as severe as those suffered by the extreme rationalization of modernism. We are talking about mass algorithmic manipulation by certain companies and governments, see the life example of Steven Banon, the great propagator of the extreme right worldwide.

Banon, who long before becoming the world's biggest far-right digital influencer, focused his efforts as a media executive at *Breitbart*, or as he described it, the platform of the "alternative right"²³. From there, with the proliferation of his anti-globalist ideas around the world (whatever that is), he glimpsed, on a trip to Rome, his ideological *big bang*, namely the mass algorithmic informational manipulation by social media produced by the so-called 5-star movement.

Such practices were enhanced by Banon, notably when he became vice-president of *Cambridge Analytics*, intentionally placed in this capacity by billionaire Robert Mercer, forerunner of artificial intelligence and major stock speculator in the futures market. We should remember that Cambridge would have mined information on the networks to misrepresent the outcome of the *Brexit* elections.

Such a structure of informational mining and algorithmic manipulation has led Banon to sponsor political campaigns with far-right ideals around the world, choosing as a backdrop the struggle to rescue classical social values, Judeo-Christian, anti-communist, heteronormative, among many other pseudo petty bourgeois values. In these comings and goings, we quote Da Empoli²⁴:

A few days later, on the occasion of Bolsonaro's first official visit to the White House, Steve Banon organized the screening of a documentary about the Brazilian President's ideologue, the philosopher/astrologer Olavo de Carvalho, with whom he shares several ideas and whom he considers, in his own words, "a seminal thinker".

It is precisely from this structure of political manipulation that new extreme right-wing governments around the world resurface, inadvertently repeating long-defeated ideological practices. Therefore, about the expectation of many about a primordial postmodern future, calm down, because the walker is made of clay.

3. A critical perspective on public reason

When we start an approach on the present theme, which is specifically, public reason, three authors come to the fore, very roughly, they are, Kant, Rawls and Habermas, which forms the tripod of our study and gives us the more than necessary

²³ Seen on 6/25/2022 at: [Motherjones.com/politics/2016/08/steve-banon-donald-trump-alt-right-breitbart-news/](https://motherjones.com/politics/2016/08/steve-banon-donald-trump-alt-right-breitbart-news/).

²⁴ G. DA EMPOLI, *The engineers of chaos*, São Paulo, 2019.

basis for the development of our research. But the question that remains is, what is reason itself? Of course, as a logical assumption, we must understand the basic concept of reason and only then assimilate its public specificity, let us see.

According to Descartes, one of the fundamental authors for modern rationalism, reason, besides being seen as an exclusive attribute of the human being, a fact that distinguishes us from animals, should be seen as the main instrument of individual human evolution. Doubting the existence not only of God, but of the 'I' itself, *see* 'I think, therefore I am', Descartes tries to establish a scientific liturgy that governs man in the search for knowledge, so that reason for the French philosopher lies in the objective attempt to explain the world, through objectively safe procedures.

This eminently scientific concept of reason founded not only a philosophical concept, but also paved the way for the modernist rule of law, through its legal positivism, its methodological academia, the progressive disconnection between state and church, or even the calm necessary for the circulation of capital around the world. Aristotle's sensible reason wins out over Plato's metaphysical reason, which was once the gateway to Judeo-Christian theology throughout Europe.

As for public reason, in his work "*Answer to the question: what is enlightenment*", Kant stated that reason could be explained by its two uses, one in the public sphere and the other in the private sphere, without however moving away from Descartes' concepts, so much so that Kant stated that reason associated with freedom are indispensable to what he called 'serving oneself'. We read:

The public use of reason must always be free and only it can bring about enlightenment among men. The private use of reason may, however, often be very narrowly restricted, without thereby notably impeding the progress of enlightenment. But by the public use of one's own reason I mean that which anyone, as a literate person (Gelehrter), makes of it before the general public of the literate world. I call the private use of one's reason that which one may make in a certain public office or function entrusted to him²⁵.

For Kant, the use of public reason would promote social well-being, based on the willing attitudes of each individual in favor of the community in which he lives, so that there would be a direct application of a collective categorical imperative, that is, there would be, as a presupposition of enlightenment, moral and ethical postulates, by which all individuals should be guided.

Such thinking can be translated to our time in the work "*The fundamental duty to pay taxes*" by Casalta Nabais²⁶, since public reason must be understood, first of all, as an act of enlightenment and individual freedom, by which the individual himself understands that a good life for himself, passes through the good life desired for his fellow man.

Following the present study, we now collate, perhaps, the greatest contemporary debate on public reason, which was the dialogical confrontation between Rawls and

²⁵ I. KANT, *Answer to the question: What is enlightenment? Selected texts*, trad. R. Vier; F. de Sousa Fernandes, Petrópolis, 1985, 100-117.

²⁶ J. CASALTA NABAIS, *The fundamental duty to pay taxes: a contribution to the constitutional understanding of the contemporary tax state*, Coimbra, Almedina, 1998.

Habermas about the real contours on the subject. The search for a public rationality indispensable to the democratic and political process, the two philosophers present in confrontational texts, their respective ideas, although, both are based on the Kantian conception of practical reason.

For Rawls, everything that is not essentially against the democratic regime can take its place in the plural discussions of public reason, just like a consensualized categorical imperative. Therefore, for Rawls, public reason necessarily arises from the consensus, previously pluralized, of a duly proceduralized social pact, a phenomenon baptized as constitutional consensus, we read:

In the constitutional consensus, a constitution that satisfies certain basic principles establishes democratic electoral procedures to moderate political rivalry within society. This rivalry concerns not only that between classes and interests, but also that which involves favoring certain liberal principles over others, whatever the reasons for this²⁷.

However, Habermas presents some criticisms of Rawls' model, namely, *a*) the possibility of selfish action by political representatives, *b*) the classification confusion regarding political rights of a liberal nature, and *c*) the impossibility of categorizing the categorical imperative of public reason, excluding moral and ethical issues from this operation.

According to Grava and Passos²⁸, in view of these three main caveats, Habermas proposes the elaboration of a theory of procedural justice, which does not aim at the construction of substantive principles in a manner similar to justice as equity, as defended by Rawls, but instead offers the ideal and rational conditions necessary for free and equal citizens to be able, in a political environment of discussions, to establish their coexistence based on a legitimate positive right.

Regardless of the positions exposed by Rawls and Habermas about public reason, and in time, we must alert to the philosophical depth of such teachings, we come to our provocative point, that is, we ask whether in postmodern times public reason would not be subject to a new analysis.

According to Kant, in the critique of practical reason, only pure practical reason, without the interference of any feelings, can be a legislator, or as Neto and Candiott state, refusing the influence of any empirical, sensitive conditioning for its formation; in this function reason is a legislator and thus the author of the moral law²⁹.

It is the laws, as legislated norms, that give rise to practical reason, since they are prominently objective and universal, regardless of the subjective conditions that may be present in the public discussion. It can be seen from the ideas exposed so far about public reason that an impersonal but democratic common denominator is sought, in which due consensus is produced among plural individuals.

It turns out that, as previously demonstrated, the modernist truth, with absolute characters, no longer fully meets the social needs of a community based on the mass

²⁷ J. RAWLS, *Political liberalism*, translated by D. de Abreu Azevedo, São Paulo, 2002, 205-10.

²⁸ Viewed on 25/07/2022 at: <https://www.indexlaw.org/index.php/revistateoriasjustica/article/view/1700>.

²⁹ Viewed on 25/07/2022 at: <https://www.nucleodoconhecimento.com.br/filosofia/razao-pratica>.

and automatic generation of information, constituted in a network. The metarelations are no longer presupposed, but susceptible to legitimization by this same network, so that we must at least ask ourselves: would a new public reason fit, by which the hard core of public discussions (Habermas' Agora) brings to the process of consensus certain moral and ethical values that have emerged on the periphery of society?

Would it be up to Kantian public reason, through gradual openness, to allow justice as equity to emerge outside legislative cycles, through socially active clamors, or should the plexus of rights considered protected by a liberal policy be expanded based not on the autonomy of will of a being, but of a minority group?

We understand that public reason as we know it must undergo a new constitutional filtering, whereby public places of discussion and legitimation would cease to be mere observers, (like the classical methodological relationship of observer and object), to assume an integrative and enlightening function, inserting morals and ethics as elements intrinsic to public discussions, *see* the public hearings routinely promoted by the STF.

We should note that Kantian morality is found in an act of individual transcendence, or as he himself said "*two things that fill my soul with growing admiration and respect: the starry sky above me and the moral law within me*", so that each individual would take such morality (categorical imperative) to the public sphere of discussions. From a post-positivist perspective, the public reason built by Rawls may have inaugurated a proactive and constitutionally plural public discussion, because according to Silva:

Perhaps the great achievement of *justice as fairness* was to be able to unite around itself the desires of a multiplicity of Social Movements - of a new type, since co-opted by the neoliberal discourse - of a spontaneous character, which claimed the extension of individual rights to other social groups, in such a way as to give life to a fragmentary left of a liberal-democratic nature, expressed through what is conventionally called minorities (black movement; women's movement; homosexual movement) and that come to express themselves from these new Social Movements³⁰.

In Habermas, discourse becomes universal, in clear prejudice to a monological reflection of being, which in itself is an advance, however, his communicative discourse continues to belong to the participants of the public chambers, that is, the approach and consideration of morals and ethics remain in a centrifugal condition. In this sense, Rawls suggests a centripetal direction on morals and ethics.

However, we still consider that identity and minority demands, fatally loaded with moral and ethical issues, should not only be accepted in public discussions, as Rawls states, or even just considered and received by public debaters, but rather, that conditions should be created for the integration of morals and ethics of such movements by the Agora, a democratic filtering by which the public debater places himself in the situation of the other, so that there is an identification of morals and ethics, of those who decide and those who plead.

³⁰ Viewed on 25/07/2022 at: <https://revistas.marilia.unesp.br/index.php/orgdemo/article/view/2664>

Such a role can and should be assumed by the jurisdiction, see.

4. The postmodern purge

From this moment on, having duly addressed the gravitational actors of this study, either in isolation or by their respective intertwining, we can now deal with a contemporary phenomenon, which we call the burden of postmodern purification, constituting a critical and conciliatory activity to be carried out by the Constitutional Jurisdiction.

The concept proposed here of the burden of postmodern purification, before the constitutional jurisdiction, presupposes the intertwining of all the themes addressed up to this point, if not, the Supreme Court in Brazil, or any constitutional court around the world, is a great example of modernist institutionality, holder of a powerful metanarrative; that of the possible procedural truth, or rather, that of the truth published by the Jurisdiction (litigious or administrative).

As the holder of this important portion of the state metanarrative, the constitutional Courts are geographically on the opposite side of postmodern social phenomena, eminently dispersed in their informative movement, but paradoxically cohesive in the defense of truth by consensus, which ends up justifying a necessary more transparent, effective jurisdictional performance and subject to more pronounced popular external control.

Thus, we live in a quarter of a century in which two philosophical schools (modernism vs. postmodernism) are fighting the great contemporary clash whose most advisable result is a miscegenation of ideas.

The postmodern world, reflected in a network society and no longer in superimposed and pyramidal castes, demands from the State better conditions of coexistence and citizenship through horizontal public policies, with emphasis on identity demands, social pressure movements of great prominence in postmodernism.

The constitutional jurisdiction needs to understand that it is often the gateway to many diffuse and social rights, to the detriment of conservative and eminently majoritarian legislative powers, not for nothing, in the Brazilian case, identity rights were granted to its population through binding decisions by the Judiciary, such as the homoaffective civil union³¹, the demarcation of indigenous lands, the indiscriminate limitation of the environment, stem cell research³².

The burden of postmodern purification can be understood in two dimensions, the *first*, in a self-referenced quality, whereby the constitutional jurisdiction must establish a reframing of its own modernist identity, adapting to the conditions of the contemporary world and avoiding as much as possible the publication of anachronistic decisions that are not harmonious with the social values of its time; and the *second*, in heteroreferenced quality, where the constitutional jurisdiction bears the responsibility of

³¹ ADI No. 4.277/DF.

³² ADI n.º 3510/DF.

creating bridges between its decisions (metanarratives par excellence) and the collective flags reached by them, through decisional commands that have exercisable content in the world of facts.

For a greater effectiveness of social fundamental rights, constitutional courts must readjust their traditional public discourse, from a Kantian metaphysical truth towards a postmodern truth by consensus, parceled and local, substantiating the respective decisions (abstract and concrete) in a more efficient way to the identity flags involved.

The burden of postmodern debugging can be seen as a new perspective of public rationality, the premise of a reasoned and publicized argument that imposes on constitutional decisions greater fidelity to social clashes that end up needing a way out of any legislative omissions.

Such an argumentative burden for constitutional courts, falls in the same wake of Alexy's thought, when he addresses the so-called value judgments and how they could be properly justified (internally and externally), thus, considering such a theory, we could affirm that the burden of postmodern debugging can be found in Alexy's external justification³³, where we witness the true field of argumentation and legal discourse.

Therefore, considering that the contours of the postmodern world require a re-reading of the modernist institutionality of constitutional courts, these, in turn, must produce their external justifications by overvaluing the casuistry, the possible truth about the conflict and the imposing facts that shape the proposed discussion. With this, the truth pronounced in a judicial decision, in addition to having a legitimacy based on the very casuistry presented to the constitutional court, will serve as a parameter of judicial control.

The modern structural metarelates, used by the constitutional jurisdiction as a natural means of communicating power between the State and its citizens, need updating, not only in terms of the language used, but above all in terms of the material commands imposed in its decisions.

As for language, it is no longer up to the constitutional jurisdiction to use Hegelian dialectics as the only instrument of rational justification for the search for procedural truth, notably because this metaphysical Platonic truth no longer meets all the new demands prominently postmodern.

As for the material commands, the constitutional Jurisdiction needs to envision new means of social service for its decisions, first because the social relations in dispute are becoming increasingly intertwined, and second, because the identity needs are increasingly complex in their needs, *see* the case of Afro-descendant movements around the world, for which and within it, we have their subramifications; struggles for recognition and respect for their religions, their red skin, their food culture, music and customs in general, so that, for each aspect of struggle, the constitutional jurisdiction must override the proposed casuistry to the detriment of colonial generalizations.

The burden of postmodern purification acts as a filter of contemporaneity in favor of constitutional jurisdiction, since it places constitutional courts in an uncomfortable situation of crisis (in the sense of new opportunities, reinvention), imposing on them a

³³ R. ALEXY, *Law, reason, speech: studies for the philosophy of law*, Porto Alegre, 2010.

list of material assumptions for their decisions, such as the 4.0 revolution of virtual network service capitalism, social identity pressure groups, the imposition of a new dialectic.

This filter, as an instrument of adaptability to the postmodern world, inserts the constitutional courts in a situation of positive social actor, not only in a sense of judicial activism, but rather, as a qualified judicial activist, that is, their decisions will pass through the filter of purification with greater legal rationality, reducing (in theory) the permanent criticism of abuse of judicial activism.

The burden of postmodern purification can still be assimilated as a measure of social control based on the dialectic of enlightenment³⁴ of Deleuze and Horkheimer, when it exposes the side effects of scientific modernism, or even when it denounces the exploitative rationality of the human condition, imputing it a metanarrative disconnected with the truth of the facts, creating a mere institutional defense, in the face of legitimate social demands.

5. Conclusion

The multiplicity of heterogeneous social movements (black movement, feminism, LGBTQIA+, among others) are born from the very questioning of modernist solidity, the monopoly of metanarratives and the reaffirmation of Foucault's micropowers, which, according to Gadea³⁵, leads to what can be called politicization of identities or politicization of identity issues, as belonging to groups of diverse collectives is constituted as a core of political projection and social criticism.

The post-modern State, therefore, finds itself in a remarkably paradoxical situation, since it is the main agent for the promotion of public policies of an identity nature, of fundamental rights of all kinds or of the repression of anti-democratic acts, which become increasingly real and complex flags of struggle, however, step by step, it suffers (the State) a disempowerment of its public force, in a silent movement of delegitimization of its own public discursiveness, and this with a strong role of the media (which hurts the idea of the structure of Habermas' public sphere).

For all the facts addressed in this study, we can state that:

1. Two major philosophical blocks are presented: modernism, structural and cohesive, and postmodernism, prominently anti-structural and atomized, so that the former is based on an idea of full truth, metaphysical and radiating rigorous scientific methods, while the latter defends a consensual truth based on a performance platform, that is, the narrative that proves to be most efficient and productive will be true.

2. The figure of the democratic state of law is in the midst of a silent passing of the baton between these two completely antagonistic philosophical schools, and how this transition, which is still taking place and which we do not know how it will end,

³⁴ T.W. ADORNO, M. HORKHEIMER, *Dialectic of enlightenment: philosophical fragments*, Rio de Janeiro, 1985.

³⁵ Viewed on 06/01/2020 at: <file:///C:/Users/Usu%C3%A1rio/Downloads/4590-17613-1-PB.pdf>.

will influence the establishment, limits and exercise of the figure of state power/force. Therefore, it is necessary to gradually change the understanding and regime of some elements that enable the state (legitimacy, reason and science) in both philosophical schools and how they treat and practice power as a state quality.

3. All the phenomena fruit of postmodernity (many of them as side effects) imposes on the constitutional jurisdiction a rational performance more consistent with its contemporaneity, so that a decision-making filter is necessary, which is the burden of postmodern debugging, endowed with casuistic, identitarian, reactive concepts and formed by eminently concrete decisions, responding to abstract social demands in their values, but concrete in their state needs.

4. The burden of postmodern purification is summarized in a concept of reframing public decisions emanating from the constitutional jurisdiction in the midst of a silent transition from the modern to the postmodern world, from the exclusivity of the production of institutional metarelates to a networked society, holder of consensualized legitimacy and highly identitarian demands, a fact that requires the constitutional jurisdiction to adapt to these new claim languages.

5. It is up to the Judiciary to face this new reality, either in a self-referenced way, knowing itself again, or in a heteroreferenced way, limiting any excesses of capital 4.0, avoiding democratic dispersion, adopting a new postmodern language and making its decisions effective through the casuistry presented.

Such measures will renew the institutional legitimacy of constitutional jurisdiction, previously imposed exclusively by the metanarrative of state authority, in favor of a horizontal legitimacy concatenated with the real needs of a multifaceted society in its cultural identities.

May the winds of change always come.