

# CONSTITUENT CRISES. THE POWER OF CONTINGENCY.

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## CRISES CONSTITUINTES. O PODER DA CONTINGÊNCIA.

**ABSTRACT:** Drawing on the systemic concept of contingency that considers the actualized structure of the world as a possibility among others, the article argues that major social crises release systems from reiterative patterns of selectivity that transform contingent options into necessities. As long as crises deconstruct a particular social order and recombine both elements and relations into an alternative form, they are constituent crises that reestablish the contingency of the world. The article briefly reviews the evolutionary role of constituent crises as an expression of the power of contingency in four fields: the collapse and reorganization of ancient societies, the legal revolutions giving rise to modernity, the crises in modern complex social systems, and the transnational and supranational pressures on contemporary constitutional States. It concludes that the modern, multilayered, and polyarchical architecture of world society seems to be more open than earlier periods of social evolution to contingent, self-constituting forms of social order. Yet, operative and normative polyarchy also means more complex crises.

**Keywords:** Crisis. Constitution. Contingency. Complexity. Systems theory.

**RESUMO:** Com base no conceito sistêmico de contingência, o qual considera a estrutura atualizada do mundo como uma possibilidade dentre outras, o artigo argumenta que grandes crises sociais liberam sistemas de padrões reiterativos de seletividade que transformam opções contingentes em necessidades. Enquanto as crises desconstruírem uma determinada ordem social e recombinarem tanto elementos quanto relações em uma forma alternativa, elas são crises constituintes que restabelecem a contingência do mundo. O artigo revisa brevemente o papel evolutivo das crises constituintes como expressão do poder de contingência em quatro campos: o colapso e a reorganização das sociedades antigas; as revoluções legais que dão origem à modernidade; as crises nos modernos sistemas sociais complexos; e a transnacional e pressões supranacionais sobre os estados constitucionais contemporâneos. Conclui que a arquitetura moderna, multicamada e poli-hierárquica da sociedade mundial, parece ser mais aberta às formas contingentes e autoconstituídas de ordem social, que em períodos anteriores de evolução social. No entanto, a poli-hierarquia operacional e normativa também significam crises mais complexas.

**Palavras-chave:** Crise. Constituição. Contingencia. Complexidade. Teoria dos sistemas.

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## 1 INTRODUCTION

Is there an immanent relationship between crises and constitutions? Could the naked contingency of the world when the crisis breaks out be the source out of which order emerges? Does contingency mean radical randomness and arbitrariness of power or does it contain immanent operational limits that exclude possibilities from being selected, thereby contextually and negatively motivating the self-constitutional practice of society?

Starting from system-theoretical premises, in this contribution I put forward the argument that social crises play a double role when social systems become captured by patterns of behavioral lock-in (or patterns of reiterative selectivity) that constrain the operational relation between system and contingency: on the one hand, crises decompose social order (limitative role), while on the other, they recombine elements and relations (constitutive role). Certainly not every crisis has the power to decompose and recombine society. Social crises follow a power-law distribution: there are many low-intensity events, and a few 'dragon kings' (MALKOV; ZINKINA; KOROTAYEV, 2012). I want to call these exceptional events *constituent crises*, i.e. the low frequency and high intensity critical transitions that accomplish the dual role of decomposing and recombining social relations on a large scale.

In order to unfold this argument, the article proceeds as follows. First, I briefly review selected meanings of the concept of contingency including Luhmann's approach, and put forward a sociological interpretation of contingency as a *negative force* in modern society acting against attempts of closing evolutionary alternatives. Second, I conceive of crisis in a dual role: as an event that releases the system from its self-produced behavioral lock-in (limitative role of crisis aimed at decomposing structural rigidities), on the one hand, and simultaneously, as a process that reintroduces contingency into social relations and a reflexive guidance of society (constitutive role of crisis aimed at reflexively recombining social relations), on the other. Third, I suggest four major fields in which the analysis of constituent crises may play a significant role: a) civilizational transitions, b) legal

revolutions, c) complex systems crises, and d) State constitutionalism. Finally, I make some concluding remarks.

## 2 CONTINGENCY AS A NEGATIVE FORCE OF MODERN SOCIETY

Aristotle originally formulates the concept of contingency with those of necessity and impossibility in the foundations of his logic: “I use the terms ‘to be possible’ and ‘the possible’ of that which is not necessary but, being assumed, results in nothing impossible [...] That which is possible then will be not necessary and that which is not necessary will be possible” (ARISTOTLE, *Prior Analytics I*, §13). The formal propositions of the *Organon* aim to develop a set of analytical instruments for both the rhetoric and the scientific discourse. In the *Rhetoric*, Aristotle formulates this topic in a more ‘sociological’ fashion: “Most of the things about which we make decisions, and into which we inquire, present us with alternative possibilities. For it is about our actions that we deliberate and inquire, and all our actions have a contingent character; hardly any of them are determined by necessity” (ARISTOTLE, *Rhetoric, I*, 1357a23-1357b23). There are few possibilities for rhetorical deductions from necessary facts; most important seems to be the sociological operation of a decision in which a system (a subject in Aristotle’s language) has to select among ‘alternative possibilities’ offered by the environment. In this case, the risk of selection from contingent alternatives constitutes the contingency of a decision: it could have been otherwise.

The Latinization of the Aristotelian logic brought about by Christianity led to the ontologization of the *possibile contingens* in the 13<sup>th</sup> century. The world became contingent as a reality, for the foundation and reason for its existence lies beyond the world (BLUMENBERG, 1959). It lies, namely, in the reign of necessity, as in Dante’s *Paradise*: “and these contingencies I understand to be those generated things the moving heavens produce by means of seed and without seed” (DANTE, 1921, p. 149).

The highest point in this tradition was Leibniz’s *Theodicy* (1710), the defense of (a dying) God before the trial of an emerging reason. The world we live in might have been completely different in shape, motion, and order; it is (just) an expression of all that is possible. If so, the ultimate cause of the world must be intelligent for it contains the

understanding of the alternative multiple worlds, the will that chooses them, and the power to perform them. The cause is, thus, infinite, “since it relates to all that which is possible”, even to sin and suffering, because “God has ordered all things beforehand once for all, having foreseen prayers, good, and bad actions, and all the rest”. To that extent, the world is an “assemblage of *contingent* things”; while its reason, cause, and origin is “*necessary and eternal*” (LEIBNIZ, 2007, p. 130-131).

The 1755 Lisbon earthquake signaled the end of the *optimum mundi*; the end of the era of optimism and the begin of modernity, with Kant’s moral autonomy, Fichte’s idealism, and Voltaire’s political activism as the basis for a world in which human beings replace God as creator. In anthropological terms, Odo Marquard (2003) refers to this topic as the program of absolutization of human beings (from Plato to Marx and Habermas), aimed at removing contingencies from the constitution of human beings. According to this program, individuals should (ought) be the outcome of their pure intentions (freedom of choice). No contingency can control their decisions. Yet, in modern philosophies of history intentionality becomes a matter of moral principles (necessities) that everyone must follow if she wants to be judged as acting correctly. Human beings, however, are finite creatures. Their life is too short to fully assimilate and actualize principles, so they just live without principled justification: “This finite being must be contingent, and base its life on contingencies” (MARQUARD, 1989, p. 16), i.e., she has to renounce principled freedom and welcome real freedoms, in the plural.

Besides Marquard’s anthropological approach, Niklas Luhmann represents the modern usage of the concept of contingency in sociology. Contingency is one of the three categories that constitute the world. Meaning is the basic category. Defined as a difference between actuality and possibility, it requires the operation of meaning-constituting systems (psychic and social systems) to bring the social world into existence. Interestingly enough, in this context Luhmann uses the concept of *constitution* to define the relationship between meaning and system: “What I want to understand and to describe with the term *constitution* is this relationship between a selectively restricted order and the openness of other possibilities, a relationship of mutual dependence, of being-possible-only-together” (LUHMANN, 1990a, p. 26). The actuality of the system is always

confronted with an overabundance of meaningful alternatives that exceeds the operational possibilities of action and experience. The world, therefore, is *constituted* by its complexity (no system, neither psychic nor social, can actualize every possible experience and action) and by its contingency (the actuality of the world and its potential states are just possibilities; they are neither necessary nor impossible).

Under these conditions, meaning-constituting systems have to constantly select their actuality by referring to other possibilities. They can transform themselves to meet the also contingent border conditions of their landscapes, or they can even dissolve if the constituting operation, for whatever reasons, ceases. They can also fall into non-reflexive patterns of reiteration (positive feedback loops, lock-in mechanisms, loss of resilience) to preserve their structure against the selection of alternative possibilities. Yet, in so doing, they underrate the power of contingency to deconstruct structural necessities and reestablish those alternative meaningful possibilities. Contingency acts, therefore, as a negative force of modern society that reintroduces variety where too much homogeneity prevails. As in negative dialectics (CORDERO, 2017), the negative force of contingency does not learn from systems aiming to establish the actuality of the world once and for all. Instead, contingency reacts against homogenization either with minor bifurcations or with constituent crises.

### **3 CRISIS AS HYPERTROPHY CONTROL**

Old system thinking observed the world from the point of view of stability and declared instability as a pathological deviation from the normal case that had to be repaired to reestablish order (PARSONS, 2005). A contingency-based, sociological approach cannot afford such linearity. Instead, it has to deal with the paradox that the constitutive operation of the system is what eventually leads to its collapse.

Even though Niklas Luhmann was not actually enthusiastic about the concept of crisis –he considers crisis as a negative self-description of modern society aimed at motivating individuals for political action (LUHMANN, 1984; see also ESPOSITO, 2017) –, he visualizes that functional differentiation (diverse, yet interdependent social systems accomplishing autonomous functions, such as politics, economy, science, law, religion)

comes along with “an awareness, even a prediction of continuing crises, time pressure, and the need for restructurations which cannot even claim to open the doors for a better future” (LUHMANN, 1984, p. 65). Because of system differentiation and the fact that society has no center from which the whole social order can be organized (the alleged hierarchical architecture of society depends on the observer), the autonomous communication of a system can interfere with the autonomy of others, triggering contradictions, conflicts, and paradoxes. The crises Luhmann foresees are thus a result of the architecture of modern society (the dynamics of autonomy and interdependence) rather than an immanent trait of the operation of systems.

More pointedly, Gunther Teubner (2011) raised the question whether the functioning of social systems is not dependent on the *logic of growth*. The argument goes as follows. The imperative of self-preservation of social systems, archetypical for the old systemic thinking, has been replaced in modern systems theory by the imperative of connectivity. Connectivity means that every event of communication has to be connected with another in order to reproduce the system. The system moves, thus, step-by-step connecting one selection with the next one. In Luhmann’s canon this is called *autopoiesis* (1995, 2012). Autopoietic communication is the operation supporting the connectivity of social systems. In Teubner’s view, some communication chains might enter into patterns of compulsive engagement with an activity (addictive behavior) leading to self-destructive consequences. The corollary of this explanation of systems’ behavior is that we have to distinguish between “necessary growth-dynamics and pathological growth-excesses” (TEUBNER, 2011, p. 7).

From the contingency-based approach I am proposing, there are three problems in Teubner’s argument. First, by drawing on a psychological language (compulsion, addiction, pathology), the author attributes human properties to social systems. This could be an effective rhetoric device, but moves theoretical sociology and systems theory back into the social psychology of the early twentieth century or, at best, into another version of the program of absolutization of human beings – to use Marquard’s expression. Second, the argument reintroduces the distinction between the normal and the pathological that leads to a therapeutic view of society, which always places itself as representing the ‘normal

side' of the distinction. And third, while there might be a dynamics of growth in the operation of systems, this dynamics can by no means be regarded as 'necessary' –without going any further, the crisis itself is the proof for the contingency of the continuity of system's operation.

Drawing on social systems theory and complexity theories, I argue that crises, or more precisely: constituent crises, are a mechanism of hypertrophy control of social systems. Let me explain this. Since there is no foundational necessity for the existence of systems whatsoever (either psychic or social), neither for their actualized potentialities, structures, and network couplings, they depend exclusively on their own present operations to connect the past (memory) with possible futures (oscillation) (LUHMANN, 1997a). This presupposes the construction of recursive identities (social systems) that process and reduce the indefinite complexity of social life by increasing the internal complexity and contingency of social systems (LUHMANN, 2005). However, the construction of identities entails always the risk of reacting to a present perturbation by relying on a model of response that was deemed to be successful in the past. The more recurrently this behavior succeeds, the higher is the risk of falling back into lock-in mechanisms and feedback loops from which escaping is highly improbable – e.g., borrowing money to deal with indebtedness, applying coercion to cope with violent protests, recycling old papers to publish more papers, delegitimizing the opposition to counter the effects of one's own delegitimization. The risk covers three dimensions: factually, the system builds an automation pattern which generalizes a particular situation; socially, the sensibility for variety in the landscape becomes increasingly reduced for the system; and temporally, the system assumes unreflectingly that it can deal with the present as effectively as it dealt with the past.

Theoretically, the pattern of reiterative selection in system dynamics increasingly produces a loss of systemic other-reference, i.e. a loss of sensibility regarding events in the landscape. Self-reference and other-reference are two modalities in which the reflexivity of social systems unfolds (LUHMANN, 1995). While self-reference connects the present selection with a past selection, thereby giving consistence to the system (an investment decision follows a financial evaluation, a legal decision rests on premises of positive law),

other-reference scans the landscape in which the system is embedded to afford a dynamic tuning with the network of relevant events. As long as this symmetry between self-reference and other-reference upholds, the identity of the system remains open to contingent events and alternative possibilities. However, when a pattern of reiterative selectivity (feedback loop) arises, the system falls into a dynamics of hypertrophic self-reference that simultaneously weakens other-reference (CORDERO; MASCAREÑO; CHERNILO, 2017). The reflexivity of the system collapses and loses sensitivity to the always-changing, contingent landscape. The system falls into a self-produced *hypertrophy trap* that announces that the critical threshold to a major regime shift is near.

Empirically, the self-produced hypertrophy trap may be found in many forms: individuals who do not admit that the partner choice was wrong and stick to the inertial movement of their relation increasing their misery; organizations that adhere to a bad strategy up to bankruptcy because the initial investment was too high; financial institutions that insist in supplying derivatives because of premiums even though the hedging demand is satisfied; political systems that increase polarization until the institutional framework breaks down; civilizations that intensively exploit their natural resources until the full depletion of their ecological landscape. As M. Scheffer (2009, p. 245) points out: “This lock-in mechanism caused by self-reinforcing adherence to a mode of behavior tends to promote *inertia*, a lack of responsiveness to changes in the environment”.

Since the hypertrophy trap initially works for maintaining the basic functioning of interactions, organizations, networks, and whole societies, systems tend to remain in the inertial movement and ignore the early warning signals announcing the critical threshold. For instance, they consider violent but still controllable outbreaks of indigenous people with a long history of exclusions as *exceptions to the rule*; or they regard particular cases of corruption in the government as *anomalies* and inflate them as ‘scandals’ to cover up further cases; or they underrate violations to human rights under democratic regimes as *isolated events*, as it happens in countries with increasing migrations. The semantics of exceptions, anomalies, and isolated events results in the neutralization of contingency, i.e. in the neutralization of alternative modes of functioning that could break with the inertia and increase the responsiveness of the system to the dynamic requirements of the

landscape. Until the last moment, systems expect they can control themselves. Yet, in many cases the lock-in mechanism can only be released by the crisis.

In complexity theories, the crisis is conceived of as a catastrophe fold, a phase transition, a regime shift, a relaxation oscillation, a saddle-node bifurcation, a fold bifurcation, a catastrophic bifurcation, a major avalanche (SCHEFFER, 2009; SCHEFFER and WESTLEY, 2007; GLADWELL, 2006; BAK, 1997; HOLLAND, 1995). Common to these concepts is the fact that increasingly, rather slowly, somehow inattentively, systems fall into a production of hypertrophic redundancies leading to a critical threshold after which a rapid and chaotic transition (namely, *the crisis*) occurs, bringing the whole landscape to a reconfiguration phase. At this point, the crisis works as a control of hypertrophy. It decomposes the sequence of non-reflexive redundancies that shrinks meaning production and homogenizes social life. When the system cannot control itself, the crisis radically stops the self-immune dynamics contained in the inertia of the lock-in mechanism. By succeeding over systemic hypertrophy, the crisis releases the system from its feedback loop, reestablishes the symmetry between self-reference and other-reference, and reintroduces the chance for the system of selecting alternative options from a complex and contingent world. The crisis becomes, thus, a *constituent crisis*, i.e. a catastrophe fold with a double role: it decomposes the hypertrophy (limitative role) and recombines the relationship between a selectively construed social order and the openness to other possibilities (constitutive role).

Constituent crises can be regarded as evolutionary devices that break out when selection mechanisms do not take variation into account because they are trapped into their own self-replicating pattern. Systems, however, cannot repeat the same selection indefinitely without confronting the consequences of having ignored their own contingency. At some point the contingent world will react against this non-reflexive production of homogeneity by exerting a limitative role. A constituent crisis dissolves, most of the times dramatically, the self-replicating pattern that keeps society trapped in the logic of *more of the same*. Yet, as long as it is *constituent*, the crisis restores the functioning of meaning-constituting systems by recombining meaning production, complexity, and contingency in a renewed landscape.

#### 4 CONSTITUENT CRISES AND THE EVOLUTION OF CONTINGENT FORMS OF ORDER

At this level understood, constituent crises are not only major legal-political transformations that change the Constitution of a State. Rather, they cover a wide range of situations at different system levels, particularly in organizations, networks, functional systems, regional societies, and the whole world society –as it follows from the global governance mechanisms of sustainable development aimed at preventing ‘the final catastrophe’ (BILLI, 2017).

In order to observe this, one needs to abandon the early-modern equation between constitution and State remarkably summarized by D. Grimm (2004, p. 863): “Initially a concept of experience that comprehensively reflects the political condition of a State, [the concept of] ‘constitution’ increasingly rejects its non-legal components, narrows down to the legal character of a State, and finally, after the transition to modern constitutionalism, coincides with the law that regulates the institution and exercise of State power, thereby morphing from a descriptive into a prescriptive concept”. Historically, this point reflects the classical difference between the legal and extralegal (social-historical) concepts of constitution. While the legal concept refers to the written, positive, and binding character of superior norms organizing State matters, the extra-legal concept may refer to either non-positive sources of legitimate authority or to actual power relations in society (MOHNHAUPT, 2004). A more contemporary form of dealing with this difference is by distinguishing between hard law (binding obligations supported by State) and soft law (covering a wide range of regulations between ‘deviations’ from hard law to political arrangements) (ABBOTT; SNIDAL, 2000).

The problem with these forms of observing the field of law –and the Constitutions in general– is that they assume the State model as being the universal standard for conceiving of and assessing the existence of contingent, yet constitutionalizing forms of social order. In this respect, Koselleck’s proposal seems to be more realistic: “My suggestion that a constitutional history should cover all areas that are characterized by the enforceability of law aims at bridging the gap between the pre-modern legal histories and the modern constitutional histories; as well as to address the post-state, in some ways

supranational, not only intergovernmental phenomena of our present” (KOSELLECK, 2010, p. 370-371).

Indeed, neither today nor before was the State the unique all-embracing actor giving form to society. Even the history of emergence and consolidation of statehood relies on self-organizing social orders such as “the feudal association, the manor, the mark community, the urban community, the guilds and trade unions, the corporations and foundations” (EHRlich, 2002, p. 34). Most of them –including religious communities, ateliers, master/apprentice interactions, and later sport associations– become centers of production of social norms even during the golden days of nation-State politics. To be sure, this should not underrate the successful history of centralization and civilization of power implemented by the State in the 19<sup>th</sup> and 20<sup>th</sup> centuries (constitutionalization, rule of law, fundamental rights), but neither can be overlooked that several contingent forms of social order did emerge from these differentiating practices, giving rise to modern organizations, social systems, and complex networks. As P. Kjaer (2014, p. 140-141) has recently argued: “As has been clear ever since Hegel’s introduction of the state/society distinction, a state is, however, a specific form of formal organization among others, or more correctly, a loosely coupled conglomerate of several organizations, which only exists providing it is formally and operationally separated from the other segments of society”.

In my view, only by considering State constitutionalism as a particular case of societal constitutionalism can we sociologically understand the evolutionary function of constituent crises and their relationship with a contingent, neither necessary nor impossible world. Starting out from this premise, let me suggest four major fields in which the analysis of constituent crises, as described earlier, may play a significant role: a) civilizational transitions, b) legal revolutions, c) complex systems crises, and d) State constitutionalism.

#### **4.1 Civilizational transitions**

As described by archeology and anthropology, civilizational transitions represent the most general scenario to observe the functioning of constituent crises as evolutionary moments (constitutional moments) that have to deal with the emergence of contingent

forms of social order. After too simplistic linear sequences, such as band-tribe-chiefdoms-States (SERVICE, 1975), or rather classical interests in the ‘rise and fall’ of civilizations (SPENGLER, 1991), the modern approach to civilizational transitions deals with the question as to how social complexity reorganizes itself after generalized societal collapses.

Contemporary research on this matter shows that societies rarely disappear after major crises or catastrophes. Rather, they reorganize themselves in different forms depending on the interplay between past structures and the new social (or social-natural) landscape in the aftermath of the crisis (SCHWARTZ, 2010). The connection between past and present may be *weak*, as in new settlements occupying niches with favorable environmental conditions but developing new social landscapes brought about by trade or political alliances; the past could also be a *stimulus* to recreate meanings (revivals) or to radically oppose them (rejections); or a *template regeneration* could take place, i.e. periods of centralized complexity followed by hypertrophic collapses after which patterns of centralization reappear with new meanings, as in China in the last 2,200 years (BRONSON, 2010). As Eisenstadt (1988) has argued, the collapse of civilizations is just a particular case –albeit the most extreme– of how social boundaries are reconstructed. Since there is no natural form of social organization, human environments are created and selected from contingent options. Boundaries are thus “continuously constructed, open, and very fragile” (EISENSTADT, 1988, p. 236). Because of this fragility, boundaries seek for mechanisms of control to overcome the instability of the absence of foundations. The coupling of power and law in societal constitutions (supported by complex ideological structures) has proven to be the most efficient mechanism to declare as necessary what is actually contingent (YOFFEE, 2004), but in so doing, it also became the cause for incubating hypertrophy traps and loss of resilience.

Collapses and civilizational transitions are, therefore, the outcome of the power of contingency reacting against the freezing of boundaries. It is precisely this negative power of contingency lying behind the collapse that motivates the crisis and the reconfiguration of social boundaries in terms of a renewed societal constitution.

## 4.2 Legal revolutions

A more restricted view on constituent crisis, but closer to the history of the particular system of law, is the concept of legal revolutions. Legal revolutions are regarded as regime shifts in the evolution of Western law that reconfigure the internal structure and dynamics of law and the social landscape it inhabits. As a research object, they are reconstructed to emphasize how certain normative ideals that are considered building blocks of modernity have emerged in the past as a response to the incapacity of existing institutions of dealing with the demands (complexity, contingency) of the social landscape. We can distinguish a natural law-based comprehension (Berman), a neo-Kantian version (Brunkhorst), and a positivist interpretation of legal revolutions (Halpérin).

After ruling out the positivistic approach to law as the ultimate source of law (body of rules, court decisions, legislation, State), H. Berman (1983) argues that the origins of Western legal tradition go back to natural law as comprehended in Christian theology and in 13<sup>th</sup> century Aristotelian philosophy. The six revolutions he identifies (the Papal, the Protestant, the English, the American, the French, and the Russian revolution) follow this model. However, in systemic evolutionary terms, natural law works as self-produced semantic pattern of selectivity that formally connects past and present, allowing contingency to institutionalize in different structures that trigger revolutionary changes, e.g. the redistribution of land by constitutional monarchies, the State separation from the church under the Bourbons, the rise of democratic institutions in colonial America, the supremacy of the Parliament under the Stuart kings: “Thus – Berman (1983, p. 22) argues– the great revolutions of Western political, economic, and social history represent explosions that have occurred when the legal system proved too rigid to assimilate new conditions”. In other words, when they fall into the hypertrophy trap.

In a similar vein, albeit from a critical perspective, H. Brunkhorst (2014) aims at establishing a balance between the contingent evolution of social systems and a normative template that he calls the *Kantian constitutional mindset*, following Koskenniemi’s (2006) category. The argument is rather simple: “Once evolutionary constitutionalization leads to forms of systemic adaptation which contradict the normative core of a particular set of revolutionary advances of modern society, a crisis of legitimization is hard to avoid”

(BRUNKHORST, 2014, p. 3). Brunkhorst observes a dialectic movement between systems and the constitutional mindset. Each major revolution (the Papal revolution in the 12<sup>th</sup> century, the Protestant in the 16<sup>th</sup> century, the Atlantic revolution in the 18<sup>th</sup> century, and the Egalitarian revolution in the 20<sup>th</sup> century) represent a normative response to social contradictions that trigger the building of social systems (correspondingly, the legal system, the political system, the economic system, and the educational system) whose functioning contradicts prior achievements. By means of legal revolutions, a constitutional system of normative constraints is established, which in the 21<sup>st</sup> century even leads to the constitutionalization of functional differentiation regarding global problems of inclusion and exclusion. While Brunkhorst's *Kantian constitutional mindset* plays a similar role as Berman's *natural law* (a self-produced semantic structure to avoid the absence of foundations, i.e. the radical contingency of the world), his resort to negativity reopens selectivity to contingency: "the very medium of emancipation is the negativity that emancipates us from the illusion of an unchangeable world" (BRUNKHORST, 2014, p. 467). Negativity is thus more than a normative attitude against the functioning of systems; it is rather the (ultimate) medium that prevents the world from becoming a one-dimensional world –as contingency does.

For J. L. Halpérin (2014), legal revolutions are explicitly not a metamorphosis of the 'spirit of laws' as in Berman reconstruction. Rather, they have to be conceived of as "sudden swings from one legal system to another" (HALPÉRIN, 2014, p. xi), even though its propagation, "through legal transplants and influences, takes a long time to appear in other legal orders" (HALPÉRIN, 2014, p. 74). Halpérin proposes to apply Hart's distinction between primary rules (imposing duties) and secondary rules (conferring powers, including rules of recognition, change, and adjudication). A legal revolution changes both. Revolutions producing innovative legal systems and contingent forms of order are: the construction of modern States (more or less centralized legislation and emergence of lawyers as 'holders' of the law), the codification (not only systematization but social generalization of law, as with the Napoleonic code), the constitutional revolutions (propagating a constitutional language all over the world from the 19<sup>th</sup> century), the construction of the EU, and the international law of a global world (being the last two still

ongoing revolutions). Even though Halpérin's concept of revolution is, eventually, less radical than Berman's and Brunkhorst's, changes in the rules of recognition inside the law should reflect significant reorganizations in the relationship between meaning, complexity, and contingency in the social landscape of law. Considering this, States, codification, and constitutionalization seem to reflect the emergence and consolidation of the rule of law at the national level, while the last two revolutions represent the challenge to the modern constitutional State coming from the contingency of globalization and functional differentiation. In this case, the power of contingency is experienced as a limitation of State's sovereign power constructed by and instituted in its Constitution.

#### **4.3 Complex systems crises**

From the perspective of systems theory, legal revolutions assume the point of view of law to describe the constituent crises leading to the contingent form of contemporary society. A second order observer can raise the question whether the constituent process of law and its crises can also take place in other functional systems. The autonomy of social systems presupposes a degree of indifference coupled with high sensitivity to external events that differ from system to system (LUHMANN, 1997b). Systems produce their own norms, justifications, and principles condensed into symbolic media to increase the social motivation to act according to their operations. The constitution of systems is thus originally particularistic; only reflexive mechanisms and their own self-produced crises can increase the spectrum of environmental considerations.

In G. Teubner's view (2011, p. 11), the crisis itself is a 'constitutional moment': "The constitutional moment is the direct experience of the crisis: the experience of a liberated social energy, yielding destructive, even self-destructive consequences that can only be overpowered by their reflection and by the decision of self-limitation". However, reflection and self-limitation are internal operations to dissolve the hypertrophy trap leading to the crisis; they are preconditions for constitutionalization, but not the constitutionalization itself. "Constitutions emerge – Teubner (2012, p. 104) argues– when phenomena of double reflexivity arise – the reflexivity of the self-constituting social system and the reflexivity of the law that supports self-foundation". Constituent crises are, therefore, critical transitions

by means of which the system connects its own reflexivity to a secondary reflexivity, namely, the reflexivity of law.

The most striking example of a systemic crisis leading to a constitutionalization process (a constituent crisis) is the 2007 financial crisis. The net supply of derivatives functions in a proper way until it meets the demand from non-banks. Once this point is reached, incentives to trading (premiums) lead the system to engage into a lock-in mechanism: it supplies new instruments even though there is no demand. As explained by Haldane and May (2011, p. 352): “Such trades are essentially redundant, increasing the dimensionality and complexity of the network at a cost in terms of stability, with no welfare gain because market completeness has already been achieved”. The cascade of consequences of the crisis is well known; they are still experienced today (WALBY, 2015). Yet, the international regulatory framework known as Basel III appears as product of a double reflexivity that combines financial self-limitation with the reflexivity of law supporting the regulation. This makes a strong case for the networked character of the global financial system (BATTISTON et al., 2016).

Similar processes of constitutionalization and self-limitation through law take place in the fields of commerce, sports, scientific ethics, Internet, and the corporate sphere (TEUBNER, 2000, 2012; WERRON, 2010; THOMPSON, 2012; NEVES, 2013; THORNHILL, 2016). Even the regime of human rights (Brunkhorst’s egalitarian revolution) has been considered a supranational constitutionalizing sector (HABERMAS, 2008, 2012). Constitutionalization, however, neither means the ultimate domestication of complexity nor the final control of the risk-laden decisions to deal with contingency. In other words, the process of constitutionalizing social systems does not exclude future crises. At least several conflicts appear between the transnational logic of social systems and the regional logic of States, or between the excessive influence of one system into the operation of others, or between the supranational logic of human rights and the sectorial logic of systems, on the one hand, and the regional logic of States, on the other (FISCHER-LESCANO; TEUBNER, 2010). For critical theory, this fact reaffirms the power of negativity; for systems theory it signals that contingency not only has power over the crisis of the system, but also over the norms aiming to deal with it.

#### 4.4 State constitutionalism

Not every new State constitution should be regarded as a product of a crisis. Some of them are aimed at managing the incubation of an increasing institutional indifference toward contingencies in the social landscape (Brazil 1988, Colombia 1990); others are instrumental products of patrimonial politics resisting alternative forms of organizing power (Bolivia 20XX, Venezuela's ongoing process) (SCHORR, 2006). Not many seem to be an outcome of a generalized societal crisis (Russia 1918; Germany 1933, 1949; Chile 1925, 1980; Venezuela 1999). Most of the legal revolutions discussed above, such as the English, the American, the French, and the Russian revolution, are constituent crises at the level of the nation-State, with significant effects for other regional societies as well; while others, such as the Papal, the Protestant, the Atlantic, and the Egalitarian revolution, also triggered constituent processes at the supranational level in different historical times.

Besides the collisions between the sovereign logic of the State and transnational systemic processes of constitutionalization, a subtler problem lies behind the building of contemporary world society, which changes the scene for constituent processes. In the wake of the globalization of international law; the emergence of supranational regimes such as the EU or ILO; the proliferation of transnational courts in sports, commerce, investments, and environmental issues; ethic committees in different professions; and particularly the increasing relevance of the human rights regime, the *discourse of rights* ceases to be a property of lawyers and becomes a generalized medium to reflect one's own condition in multiple social processes in terms of fulfillment/disappointment of rights. In different ways and certainly to different extents, the *power to constitute* –the ultimate foundation of authorization for the classical constitutional doctrine of the nation-State since Sieyes (2003)– is already legally pre-constituted by decisions and the communication of decisions of multiple legal forums at different levels: “Polities require little constituent force except that of actors enunciating rights” (THORNHILL, 2013, p. 561).

If so, the power to constitute lies more than ever *in the people*, but less than ever *in the people of the State*. Under the difference between constituent and constituted power, political power aims to de-paradox its own self-foundation by transferring to a supposedly external subject (*the people*) the agency to constitute the validity of power. Since this

operation comes actually not *from the people* but from the system of politics, *the people* remain an internal construction of politics that works affirmatively when it comes to a constituent process (LUHMANN, 1990b). With the emergence of the discourse of rights as a generalized medium, the people become real constituents who do not need the State politics to create valid power. They do it by themselves, with or without functional equivalents to the democratic procedures of the modern State.

Under these circumstances, ‘the people’ cannot be simply considered as a set of individuals. Different forms of organization (from self-organized neighborhoods and local NGOs to transnational corporations), formal and loosely coupled networks (from scientific projects to transnational drug cartels), governance bodies and private regulators (in almost every social field), social movements (in all their thematic variety), and virtual communities (from gamers to online consumers and porno visitors) make use of their rights to refer to rights to self-sustain their rights. Institutional politics experience this as ‘a loss of sovereignty’, ‘a loss of trust in political institutions’, ‘a crisis of the elites’, or ‘as empowerment of the people’. Rather, it is the constituent power of contingency that increases radically on the basis of a generalized discourse of rights that everyone can translate into their own terms to self-support their actions and demands, thereby triggering an ongoing conflict with the State –a sort of polyarchical conflict of jurisdictions.

## 5 CONCLUSIONS

Let me briefly present three concluding remarks. First, at least in systemic terms, contingency cannot be understood as randomness or arbitrariness. It rather means that the actualized structure of the world is just a possibility among others. External to contingency are necessities and impossibilities. So, as far as society describes either contingent selections as necessary or contingent possibilities as impossible, the power of contingency aims at decomposing rigidities and recombining possibilities in a constituent process that, in any case, undergoes the same negative rule.

Second, crises in complex social systems arise when the contingent selectivity of the system engages in a pattern of non-reflexive reiteration (lock-in mechanism) that decouples it from the multiple, dynamic connections with its landscape. If the system

cannot react to its own loss of contingency, the crisis releases it from the endless production of redundancies, and reestablishes the open relation between meaning production, complexity, and contingency. The crisis becomes, thus, a constituent crisis: it decomposes the rigidity of the hypertrophy trap (limitative role) and reconfigures the relationship between a selectively construed social order and the openness to other possibilities (constitutive role).

Third, if a constituent crisis releases the system from its self-immune dynamics, major crises (constituent crises) are significant evolutionary devices for actualizing possible forms of social order. The collapse and reconfiguration of ancient civilizations under different forms, the legal revolutions giving rise to modernity, the crises in modern complex social systems, and the social pressures over contemporary constitutional States reveal a plurality of constituent crises that shape the evolution of contingent forms of order. The modern, multilayered, and polyarchical architecture of world society seems to be more open than earlier periods of social evolution to contingent, self-constituting forms of social order. Yet operative and normative polyarchy also means more complex crises.



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