REFLEXIVE LEGAL DECISION THEORY: LAW, SOCIAL CHANGE, AND SOCIAL MOVEMENTS*

// TEORIA REFLEXIVA DA DECISÃO JURÍDICA: DIREITO, MUDANÇA SOCIAL E MOVIMENTOS SOCIAIS.

ARTUR STAMFORD DA SILVA

>> ABSTRACT // RESUMO

Setting out from court decisions collected from the sites of tribunals of the Brazilian judicial authority, we identify pleas for inclusions and exclusions in law, permitting us to observe the adaptation of law (system of communication on the licit/illicit) for movements within society. The observations are guided by the application of elements of systems theory (recursivity, auto and hetero reference, reflexive circularity, second order observation, heterarchy, autopoiesis) to human social communication. The research done up to this point indicates that the reflexive perspective applied to the juridical decision offers distinct readings from those provided by juridical hermeneutics and by the theory of juridical argumentation. // A partir de decisões judiciais coletadas em sites de tribunais do poder judiciário brasileiro, identificamos inclusões e exclusões de pleitos sociais no direito, o que nos permitiu observar a adaptação do direito (sistema de comunicação sobre lícito/ilícito) a movimentos da sociedade. As observações estão pautadas pela aplicação de elementos da teoria dos sistemas (recursividade, auto e heterorreferência, circularidade reflexiva, observação de segunda ordem, heterarquia, autopoiesis) à comunicação social. As pesquisas até aqui realizadas indicam que a perspectiva reflexiva aplicada à decisão jurídica oferece leituras distintas daquelas fornecidas pela hermenêutica jurídica e pela teoria da argumentação jurídica.

>> KEYWORDS // PALAVRAS-CHAVE

Legal decision; social movements; systems theory; self-constituting discourse[1]. // Decisão jurídica; movimentos sociais; teoria dos sistemas; discurso constituinte.

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Associate Professor of the Federal University of Pernambuco (UFPE). // Professor Associado da Universidade Federal de Pernambuco (UFPE).

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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1. FROM CYBERNETIC REFLEXIVITY TO THE REFLEXIVITY OF THE JURIDICAL DECISION

In the analysis of judicial decisions collected from the site of the STJ (*Superior Tribunal de Justiça*, Supreme Court) and the STF (*Superior Tribunal Federal*, Supreme Federal Court), and from the data collected during trials at the Forum of Recife (and by way of informal conversations with magistrates, prosecutors, defense attorneys, lawyers, chief secretaries, justice officials) we observe that a court decision contains factors and information beyond what is found in legislation, doctrine, jurisprudence and juridical customs. The juridical system thus allows for processes of adaptation in the midst of society's variety of changes. Under this perspective, I propose a reflexive theory of the juridical decision — being a theory which makes it viable to research the presence of social movements' discourses for the construction of law in society. After all, political and economic pressures, for example, influence but do not determine court decisions.

The starting point for the reflexive theory of the juridical decision is the reflexive circularity[2] of communication (we only communicate through communication) within the molds of cybernetics[3], which postulates that "society is an autopoietic system based on sense-bound communication; it is constituted by communication and only communication; it consists of all communication. Communication reproduces itself by communication"[4].

After researching court decisions on themes related to social issues[5] (testimony by video conference of a prisoner; petty crime; social orientation, property and the MST; anencephaly; homosexuality as a family unit; legal equity; the lawfulness of evidence seen as illicit) we observe that the decision of a concrete case cannot be confused with legal systemic decision. Thus, we distinguish the judicial decision (court's decision) from the juridical decision. The judicial decision is information in the system of law; and the juridical decision, in turn, as an operation of the system of law. A decision taken to a lawyer, prosecutor, promoter or a judge is not yet legal system, but information to be recognized or not for a legal system. In view of this, distinct responses with respect to the dichotomies between hermeneutic confrontations and the theory of juridical argumentation took place, as exposed in the first part of this work.

One of the consequences of reflexive circularity is that "it is not possible to not communicate"[6]. Therefore, ambiguity and vagueness do not prevent human beings from communicating, as demonstrated in Harold Garfinkel's ethno-methodology. Thus it is not a matter of returning to Cratylus through Plato to follow up on the relationship between words and things. This would be, as Foucault will always remind us, to insist upon the theory of truth as representation. An escape route from the dichotomies of words and things is reflexive legal decision theory, which takes up the ideas of theory on society as a system of communication[7] (Niklas Luhmann) and provides — from the socio-cognitive theory of understanding as inference[8] (Luiz A. Marcuschi) and from the theory of constituent discourse[9] (Maingueneau) — the conception of discourse as *transphrastique organization*. This is because discourse is submitted to

an organization situated beyond the phrase, there coexisting rules of a discursive organization or community, as well as the fact that discourse is orientated in space and time, being a form of acting, interactive, contextualized, assumed and reigned over by rules, considered in the middle of an inter-discourse[10].

Reflexive legal decision theory is not just a sum of theories; but it is interdisciplinary, resulting in a theory which makes it viable to observe the juridical decision as an operation of society's law. After all,

> *[T]o think in terms of circular systems forces us to move away from the notion that, for example, event A occurs first and event B is determined by the occurrence of A, since, due to the same faulty logic, one could affirm that event B precedes A, depending on where, arbitrarily, we would choose to break the continuity of the circle[11].*

Reflexive circularity, it is worthy of note, is neither preoccupied with the beginning nor the end, nor origin nor future, which does not imply ignoring historicity in the formation of values in human society. However, it does entail the idea of "society not being organized through causal results (*outputs* as *inputs*) nor in the form of results of mathematical operations, but reflexively; that is to say, through the application of communication to communication"[12]. After all, communicating is not only transmitting information, but a process of constant production of information. At each point of communication a re-entry occurs (recursivity) of knowledge upon knowledge itself[13]. For this reason, the theoretical path set by reflexivity to observe juridical decisions will not trail a search for the origin of the decision, as if it were the causal result of an application of information prepared beforehand, since legislative texts, previous judicial decisions, doctrines and customs do not determine the judicial decision to be taken — therefore they do not determine the juridical decision previously. This is how we arrive at the recursive circularity of the "systems which observe"[14].

Applied to the juridical decision, the circular reflexive perspective in communication offers distinct responses for dichotomies resulting from clashes in theory of the kind which are ruled over by causality, taking the question of completeness of juridical order as an example. When the sufficiency of state law for a decision to be juridical is being debated, it involves the relationship between law and politics, taking into consideration the subject of fundamental norm in Kelsen and Bobbio's theory on juridical order — the certainty of law and juridical safety as guarantees of the State of Law. When the risks of a decision becoming a precedent are being discussed, it is the relationship between law and morality which is involved — and then there is the decider's power of decision (arbitrariness). When the capacity of law to regulate itself and manage itself is under debate, it involves subjects like juridical pluralism and the relationship between law and social change.

Exploring elements of the theory of systems (recursiveness, auto and hetero referentiality, reflexive circularity, second order observation,

heterarchy, autopoiesis) in humans' social communication, we will present how reflexive theory of the judicial decision leads with the dichotomies between completeness and certainty in law and the arbitrariness of the judger. We follow on to present the perspective on discourse as a social element, to then expose some of the research done.

2. SYSTEMIC BASE: REFLEXIVITY AND DICHOTOMIES IN THE JURIDICAL DECISION

The reflexive theory of the juridical decision parts from the supposition that law is the system of communication of society responsible for licit/illicit sense, as in Niklas Luhmann. In being communication, law is a system of communication, not a physical, biological or psychic entity, but human and social. Being a system, law is not to be confused with communication of the moment (that which is determined by time and space) nor with an organization, but with the systemic level of observation[15]. In a nutshell: reflexive theory in the juridical decision guides itself by the systemic perspective, and therefore neither by interational nor organizational guidelines.

Under this perspective, inside the sphere of the completeness of juridical ordering, if there is a legal blind spot, the explanations of Hans Kelsen and Norberto Bobbio will not exist. There is neither an occasion to speak of "blank juridical space", nor the maxim "what is not prohibited is permitted", as a principle of completeness. Nor even the hetero and auto integration of law itself, in Bobbio's conception, since this author considers there being a hierarchy between the methods of hetero integration and auto integration in juridical ordering: "in each ordering there is an uncertain zone of non-regulated cases, but which have a potential place in the sphere of influence of visibly regulated cases"[16]. Within the scope of that text, it is sufficient for the reader to remember that the completeness of state law involves the guarantee of a judicial decision not being arbitrary, since it should be necessarily justified by the quoting of the legislative text which is the foundation of the decision taken. In reflexive theory, the completeness of a system finds its answer in the theorem of incompleteness by Kurt Gödel.

For Kurt Gödel a system can only be formally complete. In reality it is necessarily incomplete, as occurs, for example, with the set of real numbers which, to be complete, contains inconsistent elements (in this case, infinity). The two theorems of Kurt Gödel are:

> Theorem 1 — Each formal system S which incorporates Z and which has a finite number of axioms, having rules of substitution and implication as the only principles of inference, is an incomplete system;
>
> Theorem 2 — In each S system it is impossible to deduce the principle with which S is consistent.[17]

With these theorems, Gödel demonstrates that, in the midst of paradoxes, it is not about proving the inconsistency of one of the paradoxes in order to resolve the paradox; nor is it sufficient, in order to deal with a paradox, to look to a third paradox, or a new theory — for example, that which occurred with the theory of types, proposed by Bertrand Russell to resolve the problem of the completeness of set theory. It is not a matter of seeking to eliminate the paradox, but of deparadoxing it to jump to another paradox. In terms of the juridical decision, hence law, we have the gödelization of juridical rationality[18]. Therefore law, to be a complete system, is bound to be incomplete. Consequently, the judicial decision as the existing operation of law contains non-juridical elements which are processed by the juridical system in their reflexivity, not prior to the case, and necessarily through legislation.

While in Gödel the reflexive theory of the juridical decision does not remain stagnant before the paradox of the completeness of the juridical system, in Heinz von Foerster the reflexive theory of the judicial decision has via law an observing system. Inside this perspective the matter of the precedent, therein the matter of a judicial decision integrating law, has earned new controversies.

Applying the idea of law as a system of communication in society, not as juridical interaction or as a juridical organization, the judicial decision is not to be confused with the juridical decision; while a judicial decision is a decision made in a delimited time and space, it is the act of a jurist (of a certain deputy, lawyer, prosecutor, attorney or judge), in a judicial case it is information for the legal system, but not yet integrated into the legal system. By juridical decision we have an operation of society's law system. Therefore it is a reflex of law's observing system (understanding — *Verstehen*), an expression of information (*Mitteilung*)[19]. Since law is an observing system, a judicial decision becomes a precedent in the case where the law continues its observation of it. That is to say, through recursivity, the judicial decision comes to have the form of law, or further still, the judicial decision takes on the form of the juridical decision, of the operation of society's law. To be clear, observing systems, as affirmed by Heinz von Foerster (2002), are those capable of learning and not trivial machines[20]; they observe at the second level, since they learn from the observations of other systems; they are self-referential and procure from their own elements, their reaction in the midst of the novelties of their environment.

In other words, holding law as an observing system steers reflexive theory away from juridical decision (with its dichotomies like law and society, or law and politics), since the judge's power of decision, in the judicial case, is restricted to the sphere of interaction. In the interactive environment the judicial decision is thought of as the act of the magistrate who hands down the decision. However, in the systemic sphere, the judicial decision is expressed information to be understood by the system. Distinct from the judicial decision, the juridical decision is an operation of society's system of law. In reflexive theory, for a judicial decision to come to have a part in society's law, therefore becoming a precedent, it needs to be replicated, that is, recursively return to be communicated, as referential.

As long as it is the decision of a concrete case, the judicial decision is information launched towards law which will operate recursively, according to its auto referencing, therefore being able to autopoietically produce law in society. In the end, autopoiesis is "the production of internal indetermination in the system"[21].

Data collected on the sites of tribunals, NGOs and social organizations (church, organized civil society, blogs of judicial activists); from newspaper reports, bibliographies and legislation, permitted us to observe the presence of discourses belonging to social movements and which influence judicial decisions. From these observations, we question the viability of thinking about law as a self-referring system while it is capable of learning from its environment.

The research up to this point indicates that considering law as an observing system makes it viable to understand that neither does law simply incorporate (*order from order*) information, nor does it disunite (*order from disorder*) upon living through the interferences of its environment — as in the cases pointed out by Erwin Schrodinger in the text "What is life?" — but, similar to the self-referring systems of Heinz von Foerster, law is a system which learns with its environment (*order from noise*) while capable of incorporating irritations from its environment, those irritations which, in a self-referencing way, make the strengthening or loss of energy viable in the maintenance and/or mutation of its own elements.

The procedures of law in the face of external factors do not happen automatically, but under the influence of limits, from the relation of law with itself (law is a *self-organizing system*), and its relationship with its environment (law is a system structurally coupled with its environment). Law is not isolated, but in permanent contact with and in relationship to its environment (formed by society, by the other systems of society, as well as with physical systems like machines; by biological factors; by psychic factors)[22]. In the end it is because we live in society and produce, reproduce, and produce images and communication which make sense because we imagine and communicate. We do this not because of reproducing or producing, but for our capacity to compose. For living in society, we develop human communication in a way of how human communication is[23]. We clarify here that composition is not a result of the properties of the components of society, but a construction within, and living with, society[24].

At last, the third dichotomy referring to law's capacity to reproduce itself from its own elements. This dichotomy is precisely about law's autopoiesis and hence its capacity to co-exist with its own environment, from the structural coupling of society's legal system to its environment.

We begin with a reminder that observing is, at the same time, selecting and distinguishing[25], from which there results the sense of being recursive. Sense retains a past (history, memory) at the same time as it becomes current (reference to the present). When we communicate we operate by observation and, therefore, we distinguish the communication reference area from the subject area which will not participate in communication.

Sense, therefore, contains a marked reference (the internal side of sense) and one which is not marked (the external side of sense). This is what we gather from the "laws of form"[26] in George Spencer-Browne's terms. For the one who knows the act of distinguishing is implicit. Knowledge gains form in a medium which makes its formation viable. Knowing is to mark, design and limit knowledge; it is to distinguish that which marks and that which does not mark a determined piece of knowledge. The marked side of what we know designates a frontier (limit) around something, in this way separating it from everything else, at the same time as it distinguishes the marked side from the rest. It establishes a frontier between the known and the unknown; and it involves the crossing from the limited side of knowledge to the side of the unknown.

The paradox of knowledge containing, in itself, the known and the unknown, the marked side and the non-marked side of understanding is undone with the theory of the two-sided forms, for which the form has the following axioms and laws:

The distinction is a perfect continence.

Axiom 1: The law of the calling. The value of a calling done again has the value of the calling.

Axiom 2: The law of transposition. The value of a transposition done again has the value of a transposition.

From these axioms, Spencer-Browne develops the form of condensation and the form of cancelation, with the laws of form:

$\urcorner\urcorner = \urcorner$ → First law of form (law of condensation) = Form of Replication

$\overline{\urcorner}\!\urcorner =$ → Second law of form (law of cancelation) = Form of Creation

In a form, therefore, there is contained replication (historical) and creativity (present). As each form is constituted by a medium (medium/form differentiation) it contains as much something to which it refers (the form of the form) as something to which it does not refer (medium of the form or the environment which made the formation of the form viable). In this way, the form has two sides: the internal (the form) and the external (the medium). Law has the legal and the illicit as its two sides: being in the environment that which is *not* law.

It is with Louis H. Kauffman that we have greater clarity on the subject. Following the laws of form of Spencer-Brown, Kauffman brings the terms self-reference and recursivity to systems theory with knot theory[27]. For Kauffman, systems contain themselves (the internal side) and their environment (the external side). As the form has elements of the medium, systems contain elements of the environment, since if the systems are not balanced, in harmony with their environment, they will cease to exist.

Furthermore the internal environment is distinguished from the external environment of the system. That is to say, self-reference (reference to itself, to its internal environment) from hetero-reference (reference to the external environment).

Applying the perspective of the theory of observing systems to human communication, we must, when we communicate, promote a distinction between the subject of the conversation and what is not the subject of the conversation. Without this distinction there is no conversation. Above all, one does not have a conversation about everything at the same time. This distinction, indispensable for there to be conversation, involves the realization of a series of other distinctions for the conversation to develop. Accepting that this is so, it is agreed that in the flow of conversation the subject is constantly reintroduced (*re-entry*). It is precisely for this reason that we continue the conversation on the same subject during a conversation at the same time that, to continue talking, we necessarily include new information in the conversation. It is always possible to change the subject, yet this "is another conversation". The re-entry of the subject of a conversation in the conversation, for us to continue maintained in the same conversation, is given by the promotion of new selections/distinctions and the selections/distinctions that follow. This operation of select/distinguish is called observation, occurring when we communicate.

Reference to the subject is processed again at each distinction at the same time that the inclusion of new reflections occur, happening in the measure of their relevance to the subject of the conversation. The first movement is what Louis H. Kauffman calls recursivity of the form in the form; in the second there is self-reference[28]. Each sense, in this way, has its meaning in its own sense (self-reference) at the same time as it refers to the non-referenced side of the distinction (hetero-reference)[29].

To carefully consider what is affirmed up to this point permits one to admit that all sense has an internal referenced side and an external side, the latter temporarily non-referenced, but potentially present and which can come to be referenced at any time.

In this perspective, law is all communication on licit-illicit which occurs in society. In the words of Luhmann:

> *[O]nly communication oriented by the code of law belongs to the juridical system, just that communication which firmly maps licit/illicit values (*Recht/Unrecht*). Because of this only communication of this type searches and affirms a recurring integration in the network of the law system. Only communication of this nature requires from the code a form of* autopoietic *openness, as a necessity for more communication in the law system. This type of communication can occur in daily life for a large variety of reasons*[30].

In these circumstances, deciding upon juridical cases is to attribute sense to something. It is to distinguish between the licit and the illicit. To agree with such an affirmation means admitting that each judicial case provokes information in the system of law, being for the law to put such

information into operation – therefore to observe (mark, signal and distinguish) which will be the side to be marked (licit/illicit) and that which is not to be marked (environment). In this conception, data and information referring to the factual in a trial pass documents brought to trial through a self-referencing filter according to what is relevant and not relevant. This is what the legal actors do — lawyers, attorneys, prosecutors — in their petitions and spoken arguments during judicial audiences. They select and filter what to include and not to include in their arguments for the judicial case.

Do not think for a moment, upon reading this, that we have reduced the paths for social movements to the sphere of judicial processes. We know that political and economic paths are used too. However, for the aims of this text we only explore research relevant in the juridical field. We refer to moments when social movements make protests, as well as to when the MST occupies a land to pressure the government to promote or facilitate agrarian reform. This debate led us to consider the subject under discussion: how do we classify a discourse as juridical and not political or economic? This question leads us to Dominique Mainguenau's theory of constituent discourses.

3. THE LINGUISTIC BASE FOR THE REFLEXIVE THEORY OF THE JURIDICAL DECISION

With systems theory we obtain systemic analytical categories like recursivity, self-reference and autopoiesis to deal with the juridical decision as an operation of the legal system; thus, it is not as though it were an act of decision or even the power of decision.[31] Even so questions persist, mainly involving linguistic controversies. For example, to deal with how much each participant dedicates themselves to outline footage for a statement in order to make their arguments legitimate, we turn to Dominique Maingueneau's theory of constituent discourse, from which we take out the idea that, as much as an uttered argument is not juridical, discursively one can identify the pretense to develop an argument as integral to a discourse, in our case juridical discourse.

With Maingueneau we have the distinction between utterance and discourse, fundamental for the identification of the place from where a speaker parts to enunciate and explain their arguments. While enunciation is an "establishing device for the construction of sense and for the subjects who recognize themselves in this"[32], discourse is the "organization of restrictions which regulate an activity"[33], which leads to the idea that discourses limit language, for "they should textually generate the paradoxes which their statute implies"[34]. As an alternative to these paradoxes Maingueneau proposes constituent discourses, those which — for their normative dimensions ("a process through which discourse installs itself, constructing its own emergence in interdiscourse") and political ones ("modes of organization, discursive cohesion") — plan to demarcate "the space which encompasses the infinity of 'common places' which circulate in the collectivity"[35].

Constituent discourses are those which proceed by "not recognizing any other authority beyond their own, not admitting any other discourses above them. This means that the variety of verbal production zones (conversation, the press, administrative documents, etc.) do not exert influence over them; on the contrary, there exists a constant interaction between constituent and non-constituent discourses, as well as between constituent discourses"[36]. Similarly to observing systems and *autopoietic* systems, constituent discourses are constituted by a memory and a capacity for adaptation to what is to come. If it were not so, it would not be discourse but utterance, since "discursive formations possess two dimensions — on one side their relationship with themselves, on the other, there relationship with what is exterior to them. However, it is worth thinking, from the outset, of identity as a way of organizing the relationship with what is imagined"[37].

Applying this information to the reflexive theory of the juridical decision, a discourse is juridical not because it is uttered by a jurist, but for managing law's form of sense. A discourse is juridical when it refers to something as licit or illicit. In the analysis of Maingueneau's discourse we read that "when linguists need to face enunciative heterogeneity, they are led to distinguish two forms of the presence of the 'Other' in the discourse: 'shown' heterogeneity and 'constitutive' heterogeneity"[38]. "Shown" heterogeneity "permits one to apprehend delimited sequences which clearly show their alterity (cited discourse, etc.)" and "constitutive" heterogeneity is linked to the dialecticism of all discourse, therefore, to the "discursive universe", to the delimiting horizon of discursive formations due to the conjuncture in which it occurs. When debating over whether or not something is licit or illicit one sees that law's discursive universe delimits which elements will have a greater possibility of entering the discursive field of law.

We remember that a "field of discourse" is "a set of discursive formations which come together to compete with each other, they delimit themselves reciprocally in a determined region of the discursive universe"[39]. The discursive space, contained in the interior of discursive fields, represents "subsets of discursive formations which the analyst judges relevant, for his purposes, to place into a relationship with one another"[40]. For Maingueneau "interdiscourse consists of a process of unceasing reconfiguration in which the discursive formation is carried [...] to incorporate pre-constructed elements produced beyond it"[41]. Consequently the juridical discourse is not isolated from other constitutive discourses (politics, philosophy, literature, etc.).

In Maingueneau the utterances of constitutive discourses are closed in their internal organization at the same time as they are re-inscribable in other discourses (they are capable of imposing and remodeling themselves to include new enunciations)[42], which takes us back to the conception that "the world has the potential for unlimited surprises; it is virtual information, however, that needs systems to generate information; better said, to give sense of information to certain selected irritations. Consequently, all identity should be understood as the result of the processing of information"[43].

With reflexive theory, therefore, society and discourse are seen as traces of the continuity and, at the same time, of the discontinuity of text, of utterance, of social life, of discourse, since the said and the unsaid are integral parts of what is said. Applying this conception to the juridical decision, we can observe the construction of law and therefore the formation of sense for law, starting with judicial decisions and in these identifying the discourses of social movements. We observe the adaptation of law to social life, since social change is not necessarily illicit and juridical practice does reveal this. The ambivalence order/ change in law is observable from the judicial decision since "the direction is the frontier and the subversion of the frontier, the negotiation between points of stabilization of speech and forces which exceed all localities"[44], as well as the fact that "to enunciate is not only to express ideas, but also try to construct and make legitimate the framework of enunciation"[45]; and furthermore

> *[…] In the discursive space, the Other is neither a fragment that can be localized, nor a quotation, nor an exterior entity; it is not necessary for it to be located because of a visible rupture in the compactness of the discourse. It is found at the root of a Self always prone to being decentered in relation to itself, which is at no moment susceptible to being considered a figure with a fullness of autonomy. It is what is lacking, systematically, in a discourse and what permits it to close in on itself. It was that part of sense which was necessary for the discourse to sacrifice in order to construct its identity. From this comes* the essentially dialogic character of each utterance in discourse, *being impossible to disassociate the interaction of discourses having intra-discursive functioning. This overlapping of the Self and the Other removes from the semantic coherence of discursive formations whatever character of 'essence', in the case that the insertion of such an essence in the story would be additional; it is not from there that the discursive lining has its principle of unity, for it comes from a conflict which is articulated"*[46].

In order not to confuse discourse with utterance, argument or text, Maingueneau proposes as discourse the "constituted artefact to and for an analytical procedure which will have the function of situating and configuring, in a given space-time, the utterances kept on file[47]". The complexity of the term *discourse* leads us to the idea of it being, simultaneously, constituted by the following characteristics: a) it poses itself as a *transphrastique* organization (discourse is an organization situated beyond the phrase, thereby existing rules of an organization, of a discursive community; b) it is orientated; c) it is a form of action; d) it is interactive; e) it is contextualized; f) it is assumed; g) it is ruled over by rules or norms; h) it is considered in the center of an inter-discourse[48].

Each one of these characteristics of discourse will not be clarified here, yet it is due to them that this conception of discourse is situated in the pragmatic perspective and, additionally, differentiated from text and utterance. While texts are "verbal units belonging to a discourse *genre*, utterance, distinct from enunciation, is a "verbal mark of an event which is the enunciation"[49].

We visualize juridical discourse as a kind of discourse which contains rules, limits, organic substance (discourse, as a *transphrastique* unit, is submitted to the rules of organization which are current in a determined social group), temporality (the discourse is orientated even by developments over time), concept of space and time (the direction of the discourse requires the contextualization of the utterance, the identification of subjects as sources of personal, temporal and spatial references, besides modeling), constitutive interactivity (dialogism, interdiscourse).

With this notion of discourse included in the reflexive perspective of systems theory, we have a reflexive theory for the juridical decision, therefore a theory which deals with the juridical decision as an operation of the legal system and not yet included as law. The judicial decision is an enunciation, information to be processed in juridical discourse, in society's legal system.

We research cases where social movements seek rights in judicial processes to observe how pleas for rights promote inclusion and exclusion in state law.

4. RESEARCH

Amongst research already done we will first present the question of the legality of the use of video conference to hear the statement of a defendant in jail; following this, the research done on the case for inclusion in the expression "family unit" for the union between people of the same sex; and finally, the research on anencephaly.

With certain innovations, changes in means of communication created the possibility, by way of video-conference, of having a defendant interrogated in prison. In order for a change in criminal procedural law to occur, as envisaged in the Brazilian Constitution, it is necessary for the National Congress to legislate. The coupling between law and politics is a legal right, since changes in the practice of the Judiciary (organization of the system of law) require and depend upon changes in legislation promoted by the National Congress (organization of the political system).

In the state of São Paulo, Brazil, Law 11.819 was passed on the 5th of January 2005. It permitted the interrogation of the accused by video-conferencing, specifically for the very dangerous crime of drug-trafficking.

The lawyers who appealed took the case to the Supreme Court of Justice (STJ). This is the largest court for deciding appeals on Brazilian legislation, such as the Civil Code, the Penal Code, the Code of Civil Procedure, etc. It also went to the Federal Supreme Court, the largest forum to decide on cases and appeals relative to the application of Brazil's Federal Constitution. In this investigation we used texts from these Courts. Our research collected twenty-one (21) decisions by São Paulo's Court of Justice, three (3) decisions by the Supreme Court and seven (7) by the Federal Supreme Court.

Our reading of the decisions lead us to observe that consistently Law 11.819 was read as unconstitutional, since the National Congress is the competent power to pass laws referring to procedural law. The decisions of

São Paulo's court denied that the law was unconstitutional and added that there could not have been any violation of the rights of the accused prisoner when he was being interviewed by video-conference. On the contrary, rights were guaranteed due to the fact that the video-conference avoided the risk of the prisoner's escaping while he was being transported to the place where he would be heard, the Forum. Besides this, the video-conference bettered the police service and avoided public spending. For the accused to be transported it would be necessary to mobilize many police, vehicles and other resources, especially when the accused is a drug trafficker.

The appeals presented by the lawyers in the Supreme Court were unsuccessful since in this court the understanding of the interpretation of the Court in São Paulo was maintained. In *Habeas Corpus* HC 34020/SP, a report confirmed, on 15/09/2005, that: "the interrogation done by video-conference, in real time, does not violate the principle of the due legal process and its consequences". This interpretation was repeated on 10/05/2007, in *Habeas Corpus* HC 76046/SP, where the *Relator*[50] stated: "the stipulation of the video-conference system for interrogation of the accused does not offend the constitutional guarantees of the accused, who, in such circumstances, can count on the support of two lawyers, one of them in the hearing and the other in prison beside the accused".

Insisting upon the unconstitutional nature of Law 11.819 from São Paulo, lawyers were able to solicit *Habeas Corpus* in the Supreme Federal Court (STF). The President of the STF was responsible for judging claims for *Habeas Corpus* due to the urgency of the trial. We have observed that the first decisions were made in the sense of affirming that there was no unconstitutional element, maintaining the interpretation that the statement by videoconference was not illicit; these decisions were emitted on the 5th and 6th of July, 2007, already referring to the decision made for HC 90.900 on the 27th of March 2007. On 14/08/2007, *Habeas Corpus* 88.914-0/SP was judged by the Second Panel of the STF, considering Law 11.819 as unconstitutional upon affirming that video-conference is inhumane for producing loss of personal contact of the defendant with the individual who judges. Video-conference makes the service done by the Judicial Power a "mechanical and insensitive" activity. It affirms, moreover, that "anxious, the accused waits for the moment of being before a natural judge".

Our research is concerned with observing such changing behavior in the law as a system. The presence of discourses which tell us of the humanization of the statement held up against the communication on the reduction of risks involving the drug trafficker — and then there is the financial side in avoiding the costs of transportation — are elements that are observed and put forward as producing the direction law takes. It is not about observing one decision or another. Here one sees society's production of sense in law, that is to say, how it is possible for law to produce its own sense. It is not about observing the argument of a judge, a lawyer, or a prosecutor, but the law itself, the judicial decision, not the juridical decision or the judiciary's decision.

Our proposal is to warn about the necessity of observing law as an observing system, and therefore look at how the law operates through its

own decisions, since that information is observed by law as a system. The point here is that law operates as a system with its own decisions, not by the decision of magistrates or courts. Without removing the power of the magistrates, we uphold that the law is a social system not to be confused with the Judiciary as an organization of the juridical system[51].

We observe how jurists (lawyers, prosecutors and magistrates) exploit legislative texts and other factors of information to communicate the licit nature of the video-conference, and they do not identify the loss of any of the rights of the defendants. Those who communicated that Law 11.819 was illicit, therefore unconstitutional, also relied on legal texts and other factors to identify rights that were lost and that left defendants in a hard situation. What cannot be denied is the influence of economic and political factors in the law, since law is not isolated but distinct and coupled with other social systems. In any case, the presence of these is not explicit enough in the jurists' or magistrates' partaking in a decision in order to have sufficient data and be able to affirm that the juridical decision was a result of economic and political factors, and not legal factors and criteria. We observe the recursivity of law in the production of law. In Luhmann's word, "everything operating with sense always also reproduces the presence of this excluded element because the world of sense is a total world: what excludes it excludes it in itself"[52].

Another study revealed the paths followed by social movements to defend rights present in cases of relationships between people of the same sex (homosexuality). The rights present in the union between people of the same sex began in juridical debates which concerned property, when judicial actions involving the right to a pension, social security, and the division of assets in the couple's separation took place in the STJ, followed by questions on the right to raise children, adopt, etc., to the point where one approaches the juridical form of a family entity. An article by Maria Berenice Dias states that homosexual union is not only a question of economic sharing, it involves feelings. Patrimony had already become recognized in homosexual relationships. Berenice Dias alerts us about the "coming and going", in the Judiciary, of the recognition of rights for this type of human union, since more than 800 trials which go through the Judiciary come to be judged in various ways. The author identifies judicial decisions which recognized the rights to an inheritance, a pension, adoption and those related to changing name and sex on birth certificates[53].

On the 10th of February 1998, in Special Recourse 148897/MG, which passed through the 4th Panel of the Superior Court of Justice, with Minister Ruy Rosado de Aguiar as *relator*, homosexual union became, *de facto*, part of society. On the 17th of June 1999, Associate Judge Breno Moreira Mussi of Rio Grande do Sul State's Justice Court, *relator* of Bill of Review nº 599075496 — judged in the 8th Civil Chamber — decides that judicial actions involving union between people of the same sex should go through the Family Court. In this way, the "news" of the decision on the 5th of May 2011 in the Supreme Federal Court was not so new.

On the other hand, in 2004 decisions deciding that rights to be conceded for homosexual relationships were illicit continued and, in this same

year, there were also favorable decisions. Until today there are decisions which accept and others which do not accept the recognition of the union between two people of the same sex as family, as an entity legally considered to be a relationship of affection. In 2006 and 2007 there were decisions that were favorable for this recognition. Fairly recent research tells of a decision in 2008 in the STJ, Special Resource RE 820.475, which deals with the Declaration of Homosexual Union. In this action the STJ decided in favor of recognition, the arguments being that there was no legal impediment. Because of this lack of impediment Brazil's juridical order does not allow for prohibition of this act. The fact that the constitution establishes that the family is the union between men and women does not permit us to deduce that there is a prohibition against homosexual families. The law already recognizes the principle of affection in the context of family law. The appeal to non-juridical discourses calls our attention, which again indicates that the world vision of those judged is not limited to legal factors. For this reason, the production of sense in law is beyond the State, beyond the thirst for power which would wish to take control of the law-society relationship.

The production of sense in laws in cases of homosexuality had been taking form in parameters already present in the laws, but demanded the inclusion of information from other social systems. In the system of love, for example, it is the sentiment and affection which produce the meaning of family. In this system it makes sense to have the love sentiment, not the sex criterion. Family, in this way, is not just a relation between people of different sexes. Jurists gain information from the system of love to interpret and argue juridical cases, as we can read in the decision by the Federal Supreme Court on the 5th of May 2011.

With the decision by the Federal Supreme Court on the 5th of May 2011, the juridical system becomes remodeled, independent of change in legislation. On the 4th of May 2011 ten *amicus curiae* briefs were presented on the case. On the 5th of May the ministers of the Supreme Federal Court voted to arrive at the Court's decision.

We need not delve into the research in detail; however, we present the coupling between religious system, juridical system and political system. We will limit this debate to the question of the literalness of the expression "family entity". Representatives of the CNBB[54] and the AEB[55] confirmed the impossibility of there being another interpretation other than to deny that the harmony between two people of the same sex could be equated with the union between a man and a woman. This is because the constitutional text contains "stable union between man and woman" for the "family entity" to be licit. The other *amicus curiae* interventions, favorable to the new mode of family, put forth arguments by taking advantage of the side of the law which does not impede the development of affection in the family environment. The literalness in this case is the absence of prohibition expressed in the union of people of the same sex when the constitution delimits the family entity. In the constitutional text the expression "family entity" carries the inclusion of the homosexual relationship. Law readily recognizes other forms of family union

which diverge from the concept of "family entity" in terms of the union between man and the woman.

Also, the *amicus curiae* favorable towards equality relied on the constitutional principles of equality, liberty and dignity of the human person to argue that the *literalness* is consistent through diverse texts. They affirm that the idea of justice present in Brazil's federal constitution is guided by the unacceptableness of discrimination, and therefore all prejudiced legislation is unacceptable and unconstitutional, including the legislation which denies the recognition of union between people of the same sex as equivalent to the family entity. The "literalness" of the constitutional text (Art. 226, § 3º) finds its body of support in constitutional principles. There is a certain "unconstitutionality in the constitution", states Carmen Lúcia, Minister at the STF.

One of the results of our research is that literalness does not prevent us from having more than one interpretation[56]; even "in the production of sense through communication, recursivity is obtained above all through the words of language, those which — even though they are the same words — can be utilized in all sorts of situations"[57]. In Marcuschi we also find out that meaning is a sharing of knowledge[58], as will be demonstrated by our case studies. The content of an expression, or of a juridical institute, is not previously established in a text, in the power of a judge, or in any other place. This content is established constantly, since meaning can have the form of a coin that shows us two sides: memory and change; history and renewal[59]. In this way we can understand how it is possible to affirm that the absence of a specific juridical regime for the union between people of the same sex does not imply exclusion, in terms of current legislation, of this union as a type of family entity.

In this research we observe the presence of diverse factors in juridical decision making by juridical actors (definitely involved in the operation of society's system of law) who are not to be confused with judicial decision nor with the judiciary's decision. Law as a system in society is a system which observes and, as such, is capable of learning from its own environment, and therefore from a society endowed with its other social systems.

To finalize the discussion we present research on the issue of abortion. I would like to thank the participation of Thaís Guedes Alcoforado de Moraes for bringing forth the data on the subject. The idea of researching this theme had already occurred in the group, but finally became concrete when the acts of a doctor performing an "abortion" in Recife had become apparent. In Recife, Pernambuco, Brazil, on the 3rd of March 2009, with the consent of the mother, the operation was performed on a nine-year-old who had been raped by her stepfather, alleging that the continuity of the pregnancy would result in serious risks to the life of the child. The Archbishop of the cities of Recife and Olinda, Dom José Cardoso Sobrinho, excommunicated the doctor. In Recife's newspapers the Church's lawyer confirmed that he would represent the mother in the State Public Ministry.

Observing this case, we can localize the presence of diverse communication systems which exist in society: the juridical, political, scientific and religious systems being amongst them. This research allowed us to

observe the autonomy of law in the production of legal meaning — even in countries like Brazil, which are developing.

In Brazil abortion is illegal according to Brazil's Penal Code. The maximum sentence for abortion, be it by consent, can come to ten years in prison. Even though it is classified as a crime against life, the protected legal asset is not human life but its embryonic formation, the life inside of the uterus from its conception until the moments before birth. The subject has been debated in many developed and under-developed countries, and has grown due to cases of anencephalic fetus abortion. In Brazil there is no law to exclude the illegality of abortion at this stage. The debate includes social movements in defense of human rights, feminists, religious movements, educators and jurists.

This matter entered legalistic debate in 2004 when the National Confederation of Health Workers (CTNS) initiated, before the Federal Supreme Court, an Action of Non-Compliance with Fundamental Principles (ADPF 54) on this matter. Amongst the arguments there were cited the violation of Article 1, *IV* (the dignity of the human person), Article 5, *II* (the principle of legality, liberty and free will) and Articles 6, *caput*, and 196 (the Right to Health), all from the Federal Constitution. The acts by the Public Authority which were claimed to have caused injury were Articles 124, 126, caput and 128, items *I* and *II*, of the Penal Code. After six years of proceedings, ADPF 54 was judged by the STF on the 11th and 12th of April 2012, the vote of the reporting member prevailing by 8 to 2, determining the legality of abortion for an anencephalic fetus and, therefore, adding to Brazilian law yet another hypothesis for the decriminalization of abortion without altering the text of the Penal Code.

With this it can already be observed that law as a social system learns with its environment based on its own elements, internal criteria.

The information conveyed by the doctors was considered to pertain to the scientific system, with the position of the Federal Council for Medicine (CFM) and the Brazilian Federation of Associations for Gynecology and Obstetrics (FEBRASGO) in the public audience of ADPF 54. Both CFM and FEBRASGOconfirm that maintaining gestation in cases of anencephaly increases the risk to the mother. They point out health matters such as high blood pressure and increase in the volume of amniotic fluid, respiratory alterations, severe hemorrhaging by premature displacement of the placenta, post-birth hemorrhaging by womb deterioration and amniotic fluid embolism (a grave condition which causes acute breathing problems and altered blood coagulation). We must not forget the psychological impacts which the woman is subjected to. Doctor Roberto Luiz D'Ávila, representing the CFM in the public hearing for ADPF 54, stated that:

> *If we respect the autonomy [of the woman], this autonomy must be respected when she wishes to continue the pregnancy, for whatever reason, at whichever moment — but if she says "I cannot carry this baby — that will not be able to think — with me any longer, for it won't be a human person protected by Law, in the sense of having all of its potential"… this is why it is atypical in terms of the Penal Code. For the Penal*

> *Code — according to the understanding of a doctor who works from day to day in his surgery — what is important is life expectancy, with all the potential of someone who will come into being, with the promise of becoming somebody. This will not be the case for the anencephaly.*[60]

Based on this definition of brain death, FEBRASGO confirms that anticipating the birth of this kind of fetus is not an abortive procedure. They defend (in a similar way to CFM) this atypical conduct because it is not an abortion and therefore not a crime.

With regard to the religious perspective we collected information from the National Confederation of Bishops in Brazil (CNBB). The choice of this organization is justified for Catholicism's being Brazil's traditional religion. The CNBB published on its official site the "Notice from the CNBB on the Abortion of the 'Anencephalic' Fetus, Referring to Non-Compliance with Fundamental Principles, *Case* 54 of the Federal Supreme Court".[61] Data were also collected from the declaration by Padre Luiz Antônio Bento, National Adviser for the Episcopal Commission for Life and Family of the CNBB, which represented the CNBB in the public hearing related to Non-Compliance 54.[62]

For the CNBB abortion is "a direct and deliberate death, independent of how it is performed, on a human being in the initial phase of existence which continues until birth".[63] In the case of the anencephaly the permission to abort can lead to eugenics which, for Padre Luiz Antônio Barreto, has already left deep wounds in the history of humanity which will probably never be healed. The CNBB recognizes the suffering of the family and especially of who is pregnant with an anencephalic fetus, but considers that "this suffering does not justify nor authorizes the sacrifice of a child which is carried in the womb".[64] Amongst the teachings from the Bible explicitly mentioned by the CNBB we have: "Thou shall not kill" (Ex 20, 13); "Now choose [eternal] life, so that you and your children may live" (Deut 30:19); and the affirmation that Jesus Christ had arrived so "that they may have life and have it in abundance." (Jo 10,10).[65]

Amongst the jurists, what predominates is the vision that the burden placed on the woman to maintain the undesirable pregnancy with an anencephaly will lead to grave psychological disturbances in the pregnant woman because of the *torture* suffered, besides the degrading treatment foregone — that which is forbidden by item III of the 5th Article of our Federal Constitution. Besides this, such an imposition would violate the autonomy of the woman, representing one of the pillars of principalist theory, the most accepted in current Bioethics.[66] For Luiz Régis Prado anencephaly would not be biologically capable of concretizing into a viable human life, therefore anencephaly cannot be considered a case of "abortion". The woman is not responsible for taking the anencephaly from her body. The elements of an "abortion" are lacking to qualify the case of anencephaly as "abortion". For one to be able to say that there is a crime in our midst, we need to see some evidence of trickery, or that something is blameworthy.[67]

Before the time of the ADPF 54 judgment, when a pregnant woman had discovered that her fetus was anencephalic and in the case that she

wished to interrupt the pregnancy, she would have to look to Justice for this permission. In the absence of a legal benchmark, the magistrates pronounced decisions full of discrepancies and originating mainly in constitutional principles which, as they are so malleable, ended up confusing themselves with the idiosyncrasies of judges, harming the principle of juridical safety (art. 5º, XXXVI, da CF/88). Decisions from diverse tribunals in Brazil prevented the pregnant woman from proceeding to terminate the pregnancy. The STF (Supreme Federal Tribunal), in judgment, considered the abortion in the case of anencephaly to be illegal, also stating that:

> *The penal legislation and the Federal Constitution, as it is well known, protect life as the greatest good to be preserved. The hypotheses where abortion is legally permitted are included in a restricted sense, neither permitting an extensive interpretation, nor analogy* in malam partem. *There must prevail, in these cases, the principle of legal reserve. The Legislator did not include on the list of hypotheses for authorizing abortion, foreseen in article 128 of the Penal Code, the case described in this trial. The maximum that the defenders of the proposed conduct can do is lament the omission, but never demand of the Magistrate, interpreter of Law, that there be added a further hypothesis which would have been excluded on purpose by the Legislator.*[68]

The STF, upon judging ADPF 54, made it constitutional to interrupt the gestation of anencephalic fetuses, the majority of the ministers (8 against 2) accompanying the vote of the *Relator* Minister (Marco Aurélio). It was judged this way in the affirmation of Brazil as a secular state. Taking away the religious factor, scientific information was exposed in the case. Entities representative of the scientific system (medicine) could pronounce themselves in public audiences in the judgment of the STF, leading the ministers of the court to agree that anencephaly is equivalent to brain death for there not being life expectancy and, therefore, there is no reason to speak of violation of the right to life. Moreover it was recommended that the nomenclature should be altered to "interruption of pregnancy in the case of anencephaly", not "abortion". On the subject of the terminology that ought to be applied, the adjective "eugenics" was removed for being charged with much negative ideology.

The STF recognized, moreover, that "right to life" — *in this case not having been violated* — does not present a character of absoluteness, being relativized by Brazilian law when in conflict with other fundamental rights, and subject to history's diverse moments. It still contemplates the rights of the woman which are at play in the situation at hand, especially the right to health, understood not only as physical well-being but also psychological.

5. THE PURPOSE OF REFLEXIVE LEGAL DECISION THEORY

Reflexive theory of the legal decision (**TRDJ** — *Teoria Reflexiva da Decisão Jurídica*) helps towards an understanding of movements in law in the

construction of sense for social situations unforseen in legislation, for example petty crime, the function of the social contract, social bonds, homosexuality, abandonment, etc., as well as changes in reading and, therefore, in the sense of historical terms such as contract, family, property, etc.

To affirm that law adapts itself to society does not imply affirming that law is always just and tuned into society. On the contrary, it is society, in its movements, which provokes changes in law. While the velocity of change can be very slow and the unwillingness of jurists, strong and stubborn, one can still conclude that neither does the law go in the other direction in relation to social movements, nor does it ignore them.

Our research has permitted us to observe the presence and influence of discourses of social movements in juridical decisions, as well as the presence and influence of economic, political and religious discourses, etc. For all of these reasons, it is more difficult to conclude that law is an instrument of power in the hands of the dominant, that law is a system in favor of corruption, of criminality.

To affirm that **TRDJ** identifies that law as a system of communication in society suffers mutations due to social changes does not imply defending that the law will always function, in countries like Brazil, as justice. After all, we cannot ignore that "civil law is the right of the rich and penal law the right of the poor" — meaning, for some, that "to respect laws is a signal of social, political and economic weakness", that economic and political interests influence law". Yet we understand that these interests do not determine law.

A theory, one might add, is not to be confused with a manifesto or with a model for happiness. Theory does not go beyond being an instrument for analysis. A theory is always and necessarily limited, above all because an observer "does not see what they do not see"[69]. Henceforth one cannot observe what was not observed. "Everything that is said is said by an observer"[70]. Theory learns from observations of another theory, being, in itself, second order observation. The observer is not a physical human being, an individual, but a system of observation in the shape of theory. Theory as an observing system learns from other theories. Being, therefore, reflexive, the theory itself observes (signals and distinguishes) each time it is applied. After all, circular reflexive systems act by self-observation and self-description, that is to say, the realization by the system itself by selection of elements and relationships between elements. Needless to say, "it is not possible to indicate without making a distinction"[71].

Admitting that self-organizing systems exist is to admit that the system lives in a constant state of interaction with the environment, an interaction which means recognizing that the system observes energy and order from its own environment, as well as existing a reality for the environment which does possess a structure[72] from which, applying the vision from Erwin Schrödinger's physics, Foerster presents the principle of "order from disorder". In Foerster's own words: "if I consider finite universe Uo ... and I imagine that this Uo universe has a closed surface which divides the same universe into two reciprocally distinct parts: one of the two parts is completely occupied by self-organizing system So, while the other we

can call 'environment' Ao of the self-organizing system: So & Ao = Uo. To this I may add that it makes no difference placing our self-organizing system into the interior or exterior of the closed surface. Undoubtedly, this self-organizing system permits selecting, at any moment, its own task of organizing itself, in its interval of time; its entropy will be necessarily diminished, which does not transform it into a mechanical system, but a thermodynamic one."[73]

In this logic, law reflects society. A reflex of its environment, law develops its own characteristics recursively, its elements, and its interior infiniteness; and, by means of its own elements (self-referencing), it reproduces itself (autopoiesis). This does not imply the isolation of the law, but hetero referencing around it since the exterior elements will irritate the law, leading it to react.

There can exist a society, however, where the law lives under a greater influence of economic and political factors than in other societies. There is no such thing as a society in which law is immune to economic and political interests. Law is a system of communication for society and is coupled, structurally, to its environment.

As well as not confusing juridical discourse with political or economic discourse, law is not to be confused with politics or economy.

In the end, being a reflexive theory, the theory itself being the object of theory; thus, up to this point, we can affirm that the information here is merely presented to be known about, available to be understood and subject to mutation.

>> ENDNOTES

* This paper was made possible by the CNPq, the National Council for Scientific and Technological Development – Brazil. Translation: Peter Malcolm Keays.

1 Foerster, 2002: 289.

2 Foerster, 2002: 289.

3 Cybernetics as a theory of communication was developed at the Macy Conference. The mathematician Norbert Wiener was one of the most notable authors present. Even though the word "cybernetics" is strictly related to government, direction and control, during the Macy Conference (a set of meetings held in New York between 1946 and 1953) it served to give foundation to a theory of communication which parts from circular causality, there being neither linear causality nor tautological circularity, as in the constructivism of Heinz Van Foerster, Gregory Bateson and Humberto Maturana. For Wiener a piece of information (exterior message) is not completely received (in a pure way) by an element (an individual, a machine or an animal) within the sphere of communication. This is because there are forces of internal transformation for the same element. This element, taking in external information which transforms itself into internal information, is inclined towards future information. In the words of the author: "It is my thesis that the physical functioning of the living individual and the operation of some of the newer communication machines are precisely parallel in their analogous attempts to control entropy through feedback" (WIENER, 1954: 26-27).

4 Luhmann, 1988: 50. In the original: "Die Gesellschaft ist ein autopoietisches System auf der Basis von sinnhafter Kommunikation. Sie besteht aus Kommunikationen, sie besteht nur aus Kommunikationen, sie besteht aus allen Kommunikationen. Sie reproduziert Kommunikation durch Kommunikation".

5 STAMFORD DA SILVA, 2010: *passim*; STAMFORD DA SILVA, 2012a: *passim*; STAMFORD DA SILVA, 2012b: *passim*.

6 Watzlawick; Beavin; Jackson, 2008: 67.

7 Begging the question that communication is society's cell, Luhmann applies Spencer Browne's theory of differentiation (the theory of the form that has two sides), distinguishing between *medium*/form and system/medium to affirm that "Society is a system of sense", since society is organized in the form of sense (Luhmann, 2007: 28 e ss.).

8 "understanding is social work" (Marcuschi, 2007a: 77; Marcuschi, 2008: 229).

9 Constituent discourses take the position of "not recognizing any other authority beyond their own, not admitting any other discourses above them. This means that the variety of verbal production zones (conversation, the press, administrative documents, etc.) do not exert influence over them; on the contrary, there exists a constant interaction between constituent and non-constituent discourses, as well as between constituent discourses" (Maingueneau, 2008: 37).

10 Maingueneau, 2005a, p. 52-56; Maingueneau, 2005b, p. 21-25.

11 Watzlawick, 2008: 40-41.

12 Luhmann, 2006: 105.

13 Luhmann, 2006: 28-30.

14 Foerster, 1987.

15 Luhmann, 1998: 3.

16 Bobbio, 1995: 146.

17 Gödel, 2006 [1968], 103-104.

18 Stamford da Silva, 2009: 113-137.

19 For Luhmann a piece of communication is composed of three selections: information; expression (*Mitteilung*) and comprehension (*Verstehen*). Luhmann, 2007: 49.

[20] Along with Warren McCulloch, Norbert Wiener, John von Neumann and other authors, Heinz von Foerster was the architect of cybernetics. It was he in particular who developed second-order cybernetic theory based on self-referring systems and on the importance of *eigenbehaviors* (self-behaviours) to explain complex phenomena. In the words of Von Foerster: this is the "cybernetics of observing systems". Von Foerster's famous distinction between trivial and non-trivial machines is an initial point for the recognition of the complexity of knowledge" (http://www.univie.ac.at/constructivism/HvF.htm).

[21] Luhmann, 2007: 46.

[22] Luhmann, 1998: 3.

[23] Maturana, 2009: 13; Luhmann, 1989: 29.

[24] Foerster, 2002: 319.

[25] Luhmann, 2007: 29.

[26] Spencer-Brown, 1969: *passim*; Matherne, 2009.

[27] Kauffman, 2010; Kauffman, 1987: 53-72.

[28] Kauffman, 1987: 67.

[29] Luhmann, 2007: 31; Maturana, 2009: 30.

[30] Luhmann, 2005: 45. In the original text: "Rechtssystem selbst gehört nur eine code-orientierte Kommunikation, nur eine Kommunikation, die eine Zuordnung der Werte» Recht« und »Unrecht« behauptet; denn nur eine solche Kommunikation sucht und behauptet eine rekurrente Vernetzung im Rechtssystem; nur eine solche Kommunikation nimmt den Code als Form der autopoietischen Offenheit, des Bedarfs für weitere Kommunikation im Rechtssystem in Anspruch. Das kann im täglichen Leben aus den verschiedensten Anlässen geschehen". LUHMANN, Niklas. Das Recht der Gesellschaft. Frankfurt: Suhrkamp, 1995, p. 67.

[31] Luhmann, 2005: 45. In the original text: "Rechtssystem selbst gehört nur eine code-orientierte Kommunikation, nur eine Kommunikation, die eine Zuordnung der Werte» Recht« und »Unrecht« behauptet; denn nur eine solche Kommunikation sucht und behauptet eine rekurrente Vernetzung im Rechtssystem; nur eine solche Kommunikation nimmt den Code als Form der autopoietischen Offenheit, des Bedarfs für weitere Kommunikation im Rechtssystem in Anspruch. Das kann im täglichen Leben aus den verschiedensten Anlässen geschehen". LUHMANN, Niklas. Das Recht der Gesellschaft. Frankfurt: Suhrkamp, 1995, p. 67.

[32] Maingueneau, 1997: 39-50.

[33] Maingueneau, 1997: 44.

[34] Maingueneau, 2008: 39.

[35] Maingueneau, 2008: 39.

[36] Maingueneau, 2008: 37.

[37] Maingueneau, 2008: 37.

[38] Maingueneau, 2007a, p. 33.

[39] Maingueneau, 2007a, p. 35.

[40] Maingueneau, 2007a, p. 37.

[41] Maingueneau, 1997: 113.

[42] Maingueneau, 2008: 37.

[43] Luhmann, 2007: 29.

[44] Maingueneau, 2008: 26.

[45] Maingueneau, 2005a: 93.

[46] Maingueneau, 2005b: 39.

[47] Maingueneau, 2005a: 61.

[48] Maingueneau, 2005a: 52-56; Maingueneau, 2005b: 21-25.

[49] Maingueneau, 2005a: 56-57.

[50] *Relator* is the reporting justice or rapporteur, to whom the process is distributed for describe the case and pronounce your opinion in the court hearing.

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