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**OUTLINE OF A GENERAL THEORY OF SYSTEMIC CONSTITUCIONALISM
FOR WORLD SOCIETY**

ESBOÇO DE UMA TEORIA GERAL DO CONSTITUCIONALISMO SISTÊMICO PARA A
SOCIEDADE MUNDIAL

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ABSTRACT

The present article aims to present to academic community the outline of a general theory of systemic constitutionalism. The method used was the functionalist, based on Niklas Luhmann's theory of autopoietic systems. The instrumental (technical) research procedures used were the literature review, documentary material, categories and operational concepts. The preliminary conclusions were that the theory of systemic constitutionalism has a greater cognitive opening, enabling new observations regarding the reflections produced until then, since it does not work with a specific level of constitutionality, but with multiple levels.

KEYWORDS: Communication. Constitutionalism. Human rights. Systems theory.

RESUMO

O presente artigo visa apresentar à comunidade acadêmica um esboço de uma teoria geral do constitucionalismo sistêmico. O método utilizado foi o funcionalista, baseado na teoria dos sistemas autopoieticos de Niklas Luhmann. Os procedimentos instrumentais (técnicas) de pesquisa utilizados foram a revisão de literatura, material documental, categorias e conceitos operacionais. As conclusões preliminares foram de que a teoria do constitucionalismo sistêmica possui uma grande abertura cognitiva, permitindo novas observações face as reflexões produzidas até então, tendo em vista que não opera unicamente com um nível específico de constitucionalidade, mas com múltiplos níveis.

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PALAVRAS-CHAVE: Comunicação. Constitucionalismo. Direitos Humanos. Teoria dos Sistemas.

INTRODUCTION

Classical constitutional models have not been able to act responsively in the face of social problems that cross borders, from a unsuccessful attempt to promote constitutional reforms, reforms of the ruling sense, reforms in constitutional opening of closing, in addition to State adjectives (overloaded State, Service Dispensing State, active State, economic State, open State, guarantee State, among others).

Problems involving fundamental rights and human rights go beyond all geopolitical limits, not being subject to state, international or private labels. In this context, the maintenance of closed constitutional models ignores the different levels and places of production of constitutionalism, causing a deficit of constitutional reflexivity. Borders were the major producers of their own limitations, pushing aside observations about social reality.

Faced with this, the research problem formulated that starts is the following: how is it possible to describe the constitutional relations of fundamental and human rights at multiple levels in a global systemic unit?

In order to answer this question, the objective of this research is to present to the scientific community the outline of a general theory of systemic constitutionalism. It is a theoretical excerpt elaborated from a doctoral thesis, which aims to provide a new reflection for the description of contemporary constitutional differences operably usable as a systemic unit of global meaning constructed from different levels of intersection.

To comply with the proposal, the method used was the functionalist, with the application of Niklas Luhmann's theory of autopoietic systems as basis theory, developing a primarily qualitative, theoretical and descriptive research. The instrumental procedures (research techniques) used were the literature review (selected, respectively, by the criteria of relevance, accessibility and timeliness), documentary material, categories and operational concepts.

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The article is divided into two sections. First, we present the outline of a general theory of systemic constitutionalism, with the main points that differentiate the new reflection for contemporary constitutionalism: the meaning, the coding / programming, the communication and the observational parallax between center and periphery. Finally, we promoted a discussion about the challenges arising from this new observation, specifically about the communicative improbability between the different normative production sites.

1 OUTLINE OF GENERAL THEORY OF SYSTEMIC CONSTITUTIONALISM

Since the establishment of World Society as a social system³, around the 1800s until the last decades of the twentieth century, constitutionalism serves to differentiate between self-reference and heteroreference in the operations that take place within the legal and political systems.

For the legal system, the Constitution positivizes the law, operationally closing the system, self-determining legal operations. This means that the Constitution itself recognizes the provisions that relate to its alterability or not, through a provision of constitutionality control, dethroning the bases that had been postulated by jusnaturalism, replacing the natural law in its cosmological view, or the rational law in its transcendental bias.

For the political system, on the other hand, it serves to the model of dynamic circulation of power, by means of the growing relevance that the legal/illegal code, of juridical preference, becomes within the political system. Therefore, it is possible to distinguish that power that “naturally” is diffuse and fluctuating, between a licit and an illicit power, that is, only when the code of law is inserted

³ LUHMANN, Niklas. The World Society as a social system. **International Journal of General Systems**, 8:3, 131-138, 1982.

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as a secondary codification of politics (power/not-power) is that the dynamic and generalized circulation of power becomes possible⁴.

With the fall of the Berlin Wall and the communicative expansion of functionally differentiated systems (globalization), the legal system starts to deal with a higher level of complexity and, therefore, needs to develop a new reflection, given that the classic theoretical differentiations of constitutionalism do not offer answers beyond the Constitution, being linked solely and exclusively to it.

"Reflection" indicates a specific form of self-observation that a system can use, characterized by the use of the *system/environment* distinction and, then, to observe the unity of the system as a whole. That is, there is a re-entry⁵ of the *system/environment* distinction within the system itself, leading to two consequences: one is the system's own autopoiesis and its continuity, while the second is the difference itself, leading to a contingent unity with alternative possibilities. This means that "reflection" causes the state of the system to be confronted with different states, questioning the advantages and disadvantages of seeking to transform the system in the most favorable way⁶.

In "reflection", the very differentiation between the system and the surrounding world is at the base, thus fulfilling the characteristics of the systemic reference, where the self-referential operation is imputed to the system itself through the designation that it differs in terms of relation to your surroundings⁷.

In this sense, systemic constitutionalism presents itself as an alternative to the description of the legal system and the Constitution in the face of the various

⁴ NEVES, Marcelo. **Entre Têmis e Leviatã**: uma relação difícil: o Estado Democrático de Direito a partir e além de Luhmann e Habermas. 3. ed. São Paulo: Editora WMF Martins Fontes, 2012, p. 89.

⁵ SPENCER BROWN, G. **Laws of Form**. New York: The Julian Press, 1972.

⁶ CORSI, Giancarlo; ESPOSITO, Elena; BARALDI, Claudio. **GLU**: glosario sobre la teoría social de Niklas Luhmann. Traducción de Miguel Romero Pérez, Carlos Villalobos; bajo la dirección de Javier Torres Nafarrate. Ciudad de México: Universidad Iberoamericana, 1996, p. 137/138.

⁷ LUHMANN, Niklas. **Sistemas sociais**: esboço de uma teoria geral. Tradução de Antonio C. Luz Costa, Roberto Dutra Torres Junior, Marco Antonio dos Santos Casanova. Petrópolis, RJ: Vozes, 2016a, p. 503.

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forms of communicative observations, on multiple levels, centralized or decentralized, in order to enhance the system, enabling an ever-closer approximation of social time and providing a more favorable operability in the (re)production of specialized communications within the legal system.

Faced (with a general theory of) systemic constitutionalism, the production of semantic artifacts as a conceptual elaboration of the systemic unit (self-description) alters the limits of meaning, causing the structure itself to produce new differences as the system becomes operational. This mainly provides an increase in cognitive openness to new legal demands, which have surpassed state constitutional texts, creating new international/regional communications related to economic, environmental, human agreements, among others, increasing constitutional complexity.

1.1 Meaning

Meaning is a fundamental concept of sociology that starts to be treated with relevance from Max Weber⁸. Luhmann⁹ proposes that Meaning is a determined way of difference between *medium* and *form(s)*, something that continuously requires the creation of specific forms. The forms are characteristically created in the middle of the Meaning, but they do not represent the category itself, therefore, the Meaning is produced exclusively by the operations that use it.

The Meaning is a concept devoid of difference that refers to itself¹⁰, but that takes the form of the operation that uses it, allowing the reproduction of communication. This means that it constitutes all social forms and is always under selective pressure between reality and possibility (actuality and

⁸ WEBER, Max. **Economia e sociedade**: fundamentos da sociologia compreensiva. vol. 1. Trad. de Régis Barbosa e Karen Elsabe Barbosa. 3. ed. Brasília: Editora Universidade de Brasília, 2000.

⁹ LUHMANN, Niklas. **Introduction to Systems Theory**. Translated by Peter Gilgen, Malden, USA: Polity Press, 2013, p. 166.

¹⁰ LUHMANN, Niklas, **Sistemas sociais**, p. 81.

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potentiality), being constantly updated and remaining open to a horizon of surplus possibilities of further remission¹¹.

The horizon of possibilities within the system is built from the selective context of relations produced by the recursion of the system's own operations, distinguishing, therefore, between a reduced and structured complexity under particular conditions, from an infinite complexity (of the *environment*), uncontrollable to the system. What determines and delimits the unity of an action is the specification of its meaning¹².

Thus, the system of law obtains its self-reference only when legal operations use this *medium* to conceive the meaning of law, since it is the momentary experience of communication, the way of experimenting the world, “una actualización de sentido referida a um punto en el tiempo”¹³.

New legal cases that occur centrally or decentrally can only be observed, based on systemic constitutionalism, if they have a legal meaning. In this way, differently from what other theorists of contemporary constitutionalism have maintained, it is not for law to solve all social problems; it must have limits, because its operability, function and meaning are specific, although dynamic, reducing social normative expectations, producing itself over time. Still, it is a unit that cannot be fragmented, under penalty of causing an insufficiency of functional differentiation.

The meaning in systemic constitutionalism enables the communicative multiplicity of legal communications that are produced both on the periphery of the system and in the center, paradoxically increasing the complexity of the law, while managing to limit its scope of operative action, maintaining its structure integral and strong for its couplings with other systems in the social

¹¹ MANSILLA, Darío Rodríguez; NAFARRATE, Javier Torres. **Introducción a la teoría de la sociedad de Niklas Luhmann**. México: Herder, 2008, p. 55.

¹² LUHMANN, Niklas. Como é possível ordem social? *In*. LUHMANN, Niklas. **Teoria dos sistemas na prática**: vol. I, estrutura social e semântica. Editado por Leopoldo Waizbort, Tradução de Patrícia da Silva Santos. Petrópolis, RJ: Vozes, 2018, p. 84.

¹³ LUHMANN, Niklas. **El arte de la sociedad**. Traducción de Javier Torres Nafarrate. México: Herder, 2005a, p. 232.

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environment. In this way, it is a mechanism for enriching observational processes, a device to a "device" for increasing the number of possibilities in a strictly real process¹⁴, serving to the firm coupling between cognitive and mundane processes, giving correspondence and reciprocity between events.

1.2 Code and Programs

For there to be a functionally differentiated systemic-constitutional unit, a fundamental structure that is produced through the operations of the system is necessary: the code.

Binary codes are specific schemes of distinction, characterized by strict binarism and the exclusion of third values, acting in a highly abstract way to make clear how the society operations are regulated. These structures are responsible for a drastic reduction of an infinite range of possibilities to two related options through a negation. They are able to observe their own operations and then define their unit, thus allowing the recognition of which of these contribute, and which do not, to the autopoietic reproduction of the system. This binary generalization is responsible for representing the way in which a system treats each possible object, and, therefore, also the communications that belong to other functional systems¹⁵.

It is a two-sided form (*Zwei-Seiten-Form*), a distinction drawn between an internal and an external side, each with a different performance: the internal boundary of the code, which separates the negative value from the positive, should not be confused with the external border, which differentiates the system from its environment¹⁶.

¹⁴ CLAM, Jean. **Questões fundamentais de uma teoria da sociedade**: contingência, paradoxo, só-efetuação. Tradução de Nélio Schneider. São Leopoldo: Editora Unisinos, 2006, p. 157.

¹⁵ CORSI, Giancarlo; ESPOSITO, Elena; BARALDI, Claudio. **GLU**: glosario sobre la teoría social de Niklas Luhmann, p. 40/42.

¹⁶ LUHMANN, Niklas. **A realidade dos meios de comunicação**. Tradução Ciro Marcondes Filho, São Paulo: Paulus, 2005b, p. 38.

It is expected for a code to:

1) corresponder a la función del sistema indicado, es decir, traducir la función en una diferencia directriz; 2) ser completo en el sentido de la definición de Spencer Brown: "Distinction is perfect continence", es decir no sólo distinguir entre bosque y prado, sino registrar en su totalidad el ámbito de funciones para el que es competente el sistema; 3) por tanto, hacia fuera, operar de manera selectiva, y 4) hacia adentro, de manera informativa sin quitar-le al sistema capacidad de irritación; y 5) mantener el sistema abierto a la posibilidad de suplir programas – los cuales pueden ofrecer (y modificar) los criterios de decisión sobre el valor del código que debe distinguirse entre un valor positivo y uno negativo. Con el valor positivo se puede empezar algo en el sistema, ya que por lo menos asegura una probabilidad condensada de aceptación. El valor negativo sirve como valor de reflexión para controlar con cuáles programas se puede canjear la promesa de sentido del valor positivo¹⁷.

The code is the structure that, when operating as the center of gravity of a circular and closed network of systemic operations, ensures, precisely, the recursive self-reproduction originating from the basic elements and the autonomy in face of the other social subsystems¹⁸.

It can be said, in light of this, that they are characterized in three points: (i) they are totalizing constructions, comprehensive, and have no ontological limits, where everything that falls within its domain of relevance is marked with a value or another, with the exclusion third-party values; (ii) totalization leads to a contingency of all phenomena, without exception, that is, everything that appears as a possibility of counter-value, is either necessary or impossible; and (iii) codes are as distant as abstractions, being valid only as the communication enters its domain of application. Therefore, its application is a socially contingent

¹⁷ LUHMANN, Niklas. **El arte de la sociedad**, p. 310/311.

¹⁸ LUHMANN, Niklas. Die Codierung des Rechtssystems, **17 Rechtstheorie**, 1986, p. 171.

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phenomenon, considering that this is the only way to total a scheme that reduces everything to two opposite possibilities¹⁹.

It turns out that, due to the need to reduce social phenomena to a positive or negative value, the binary code, as a differentiated structure, is insufficient to define its own conditions of objective application. It only serves to indicate whether something belongs to the system or not, defining its autopoiesis.

For that, another semantic structure is elaborated in order to include the possibility of accepting or rejecting criteria by means of other criteria, providing an opportunity for de-statisticization / deparadoxization and allowing the system to remain recursive and determined. This additional semantics is called programs. These are like "other points of view" that determine legality or illegality as correct or mistaken, acting as instructions that are sufficiently clear. The codes are responsible for generating the programs²⁰.

It can be said that the programs define the conditions of objective rectitude of the decision²¹, that is, they constitute rules that are responsible for specifying their own conditions of application. In systemic lines, the programs give the aptitude conditions for the selection of operations²².

There are two types of programs: purpose and conditional. In end programs the expected effects are fixed and the action that leads to them is not specifically indicated, but any action is considered correct, which implies the effects fixed by the rule (they are characteristic programs of systems such as politics, economics, among others). Conditional programs, on the other hand, are characteristic of the legal system, since they are responsible for setting certain causes as

¹⁹ LUHMANN, Niklas. **Ecological communication**. Translated by John Bednarz Jr. Chicago: the University of Chicago Press, 1989, p. 38.

²⁰ LUHMANN, Niklas. **O direito da sociedade**. Tradução Saulo Krieger. São Paulo: Martins Fontes, 2016b, p. 250/253.

²¹ LUHMANN, Niklas. **Organización y decisión**. Opladen/Wiesbaden: Westdeutcher Verlag GmbH, 2000, p. 205/206.

²² LUHMANN, Niklas. **Ecological communication**, p. 45.

TONET, Fernando; SOUZA, Matheus Figueiredo Nunes de. Esboço de uma teoria geral do constitucionalismo sistêmico para a sociedade mundial. Revista Eletrônica Direito e Política, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.15, n.1, 1º quadrimestre de 2020. Disponível em: www.univali.br/direitoepolitica - ISSN 1980-7791

producing certain effects with a scheme that establishes that if certain conditions happen, a determined effect will also be produced²³.

What conditional programs do is to establish the conditions that define whether something is legal or not (in the case of the legal system, by the legal / illegal code). These conditions make references to past facts that can be verified today, being decisive that the attribution of what is or is not right depends on what, at the moment of the decision, is considered past. I mean, the law system always acts *a posteriori*.

Based on systemic constitutionalism, it is possible to identify the *constitutional/unconstitutional* binary scheme, which is responsible for filtering communications that occur at multiple levels (in autonomous social regimes and international organizations [polycontext-produced communications]; regional or supranational blocks [communications produced interconstitutionally], nation-states [constitutional communication of a territorially bounded political-legal segmentation], among others), organizing a reflexive network of systemic-constitutional communication of ultracyclic operation and cognition, detached from geographical delimitations and differentiated by its meaning.

The programs, in addition to being generated by the constitutional code, must follow the rectitude to institutionalize fundamental and human rights, that is, they must be established as a normative and factual complex of expectations of behavior that, intertwined with a social role, become current and, in general, they can count on social consensus. Here the symbols of fundamental rights (the words that represent its unity) and the corresponding norms symbolize expectations of institutionalized behavior and serve to mediate their updating in concrete situations. That is why this institutionalization is, primarily, a factual event, to later acquire its normative meaning²⁴. Within the systemic constitutionalism, the formation of the programs becomes possible because the

²³ ALCOVER, Pilar Giménez. **El derecho en la teoría de la sociedad de Niklas Luhmann**. Barcelona: José M^a Bosch Editor, 1993, p. 218.

²⁴ LUHMANN, Niklas. **Los derechos fundamentales como institución**: aportación a la sociología política. Ciudad de México: Universidad Iberoamericana, 2010, p. 85/86.

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different types of legal communication produced in different contexts start from a respect and factual implementation of fundamental and human rights, regardless of geopolitical boundaries.

1.3 Communication

The cybernetic paradigm of the 1950s proposed that information is left by interlocutor one until it is transmitted to interlocutor two, however, it is an inaccurate description, because the communicator does not lose the knowledge in his head.

Based on the concept of observation²⁵, communication is the basic element that constitutes all social systems. Thus, society is the all-encompassing social system, everything that communicates is part of society or is society²⁶.

Communication, therefore, is the synthesis resulting from three specific selections: first, it is necessary to have a "difference that makes a difference"²⁷, that is, the selection of a repertoire to be communicated, an information; the second selection concerns the behavior that will be adopted to make this information known, the act of communicating (*Mitteilung*) - in written form, through gestures, orally, with a certain tone of voice, among others; finally, there needs to be understanding (*Verstehen*), the perception that information and the act of communicating are different selections. Without these three distinctions, communication is not possible.

In the absence of the selection of a content to be communicated (information), the communicative process itself does not materialize, as it serves as the basis

²⁵ Observation is a specific type of operation that designates the handling of a distinction (George Spencer Brown's logical calculation that subdivides the space in two and indicates one side) to indicate one side and not the other of the distinction itself. LUHMANN, Niklas. **Introduction to Systems Theory**, p. 102.

²⁶ ROCHA, Leonel Severo; SCHWARTZ, Germano; CLAM, Jean. **Introdução à teoria do sistema autopoiético do Direito**. 2. ed., rev. e ampl. Porto Alegre: Livraria do Advogado, 2013, p. 62.

²⁷ "A difference which makes a difference is an idea. It is a "bit", a unit of information". BATESON, Gregory. **Steps to an Ecology of Mind**. Northvale, New Jersey: Jason Aronson Inc., 1972, p. 276.

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for the communicative intention itself. Having selected what is to be communicated, it is possible to choose a specific behavior to impart knowledge (act of communicating), which, in turn, leads to another behavior. Finally, for communication to take place, it is necessary to understand that information is a different selection from the act that made it known, being the basis for Ego to select his next behavior²⁸. Therefore, communicative recursion comes from the participation of *Ego* and *Alter* in each communication.

The contemporary problem of communicating new global orders is noticeable. That is to say, since the collapse of the Westfália historical model, which led to the consequent structural separation between State and Law, until contemporary times, an incessant process of decentralization, without specifically state regulation, takes over, which prevents society from managing to channel the exchange of legal and political communications at the global level, creating a multiplicity of civil constitutions (self-constitutions) and legalization of the social sectors themselves.

In this sense, systemic constitutionalism serves to improve the observation (distinction and indication) of the legal system, clarifying which product, the specialized operation that must take place at the constitutional level. That is, today there is no clear and defined form of communication that must take place at the constitutional level in a context of globalization, be it national, supra, inter or transnational.

For example, in national level, the vast majority of cases reaching the Federal Supreme Court of Brazil have little to do with essentially constitutional, human or fundamental rights problematics. Mostly overwhelming, they hover over the review of bank contracts, interest rates, electricity and telephone bills. In a scenario of transnationality, many debates end up revolving around issues of organizational compliance and codes of conduct.

²⁸ LUHMANN, Niklas, **Sistemas sociais**, p. 165.

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It must be made clear that this is not a claim for a global law, with a global Constitution, as this is paradoxically necessary and impossible, due to its structural and operational limitations. On the contrary, it is a networked, ultra-cyclical organization, which is anchored in normative expectations of fundamental and human rights that are symbolically generalized to world society, going beyond geopolitical boundaries and serving to structure and operate the most heterogeneous social spheres.

Communication in systemic constitutionalism starts from a multicentric observation, where each reality is built from the point of observation, and, therefore, can occur at multiple levels. It is distinguished from the *constitutional/unconstitutional* binary generalization, based on the institutionalization of fundamental²⁹ and human rights.

Thus, constitutional law should not be a panacea that seeks to encompass all legal communications. Structurally, it acts as metalanguage (as standardization of normative processes) and object language (when it has clauses that allow the Constitution to be altered).

Now, operationally, it must be delimited, including as a primordial condition for the evolution itself. Otherwise, the self-referential weakness of constitutional communication creates what Luhmann calls "methodological weakness"³⁰: the courts lengthen the duration of proceedings; the excess of processes, due to a lack of constitutionality filter, floods the offices, leading to the loss of dogmatic guidelines, as well as the limits between legislation and jurisprudence come to depend more on the decision paradox, where the obligation to decide ends up being expressed in solutions acceptable, creating a legal chimera without constitutional "substance".

The limits of constitutional systemic communication are defined by the articulation of an ultra-cycle, a fourth degree reflexivity emerging from the

²⁹ LUHMANN, Niklas. **Los derechos fundamentales como institución**: aportación a la sociología política.

³⁰ LUHMANN, Niklas. **O direito da sociedade**, p. 425/426.

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mutual disturbances on fundamental and human rights developed between networks communicatively closed in (*tangled hierarchies*)³¹. Only in this way is there a possibility of articulation over oneself, with the autonomy of constitutional operations at multiple levels symbolized in a unit.

The organization of an ultracycle, to indicate itself as a unit of operations that uses the *constitutional/unconstitutional* disjunction, inevitably involves the self-application of the code to the code (self-reference paradox), which must then be discarded. Self-reference is allowed only within the code, and then operationalized as a denial - this means, therefore, that constitutionality is treated as a denial of unconstitutionality and unconstitutionality as a denial of constitutionality. Only in this way is it possible to define the totality of possibilities that could become relevant to the system. It means, then, that the paradox becomes operationally effective, since the prohibition operation raises the question of when the prohibition is constitutional or unconstitutional³².

1.4 Observative parallax between Center and Periphery

Systemic constitutionalism takes place at an autopoietic level through its operations. The (re)production of its structures takes place within the differentiated system itself, and the fact that there are different operations in the operative closure is not synonymous with degrees of operation. Thus, when the differentiations "center" and "periphery" are sustained in the systemic context, there is no correspondence with the understanding of a more or less autopoietic system, but with different points of observation.

That said, by parallax must be understood the displacement of the object, causing a change in the observation point. In the definition of Žižek³³, the

³¹ HOFSTADTER, Douglas R. **Gödel, Escher, Bach: an Eternal Golden Braid**. Hassocks: The Harvester Press, 1979.

³² LUHMANN, Niklas. Some problems with 'Reflexive Law'. In. TEUBNER, G.; FEBBRAJO, A. (Eds). **State, Law and Economy as Autopoietic Systems: regulation and autonomy in a new perspective**. Milan: Giuffrè, 1992, p. 395/396.

³³ ŽIŽEK, Slavoj. **A visão em paralaxe**. Tradução de Maria Beatriz de Medina. São Paulo: Boitempo, 2008, p. 14.

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existence of identical phenomena of language is maintained, but mutually untranslatable, given that there are different points of which there is no synthesis or possible mediation. In the case of "traditional" constitutionalism, such statements are pertinent, in the sense that observers do not communicate with each other, as there is a previously established schedule.

However, systemic constitutionalism does not have the same premise. In view of the high complexity, the operations allow for multiple observations, capable of the processes of social expectations in contemporary times. In a given constitutional legal case, involving norms produced in an organizational, transnational and supranational manner, there is the possibility of systemic communication, as a dialogic method is used that enables the application of the most appropriate observation to the specific case, regardless the location that originates the normative production, given the lack of a single observation, better or correct, but a multiplicity of observations and self-referential processes.

It is thanks to the differentiated language of systemic constitutionalism, the fundamental medium of communication, constituted in a multiplicity of observation, that the meaning to be communicated must be selected from an infinity of alternatives contained in the systemic unity.

Self-reference, which deserves to be highlighted in the operational bias of constitutionalism, produces a systemic closure in order to allow recursion and circularity. However, it never constitutes itself in a pure form, given the impossibility of absorbing the meaning in a unique way, but in consecutive actions.

The self-referring, self-observing and self-describing operations take place within the system, in the sense of providing an interconnection between all elements, enabling linkage and interconnection of normative productions from the local to the global. Every operation presupposes its own operations, in order to enable operations that will be selected by the system. This is verifiable when a plurality of legal orders involved in a specific conflict of constitutionality, all using their

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normative operations to pre-establish a point of observation in the constitutional dialogue.

However, in this parallax relationship there is no subordination, where elements can be (re) produced from center to periphery, from periphery to center, from center to center, and from periphery to periphery, with observation being the only limiter.

The communicative horizon reconstructed from the plurality of communications and constitutional normative production sites is brought into constitutional reality and captured by central, medial and peripheral observers, interconnected by the same unit of meaning. In Luhmannian lines, it is possible to say that a particular operation can be observed and described in different ways. Pragmatically speaking, a constitutional legal fact can be interpreted differently at each normative production site (local, national, transnational, among others) according to the structures at each of these observation points, however, in all of them lies a unity of meaning to give differentiated treatment in the established normative expectations.

In terms of legal decision-making, as a way of reproducing the legal system, contemporary complexity requires solutions from the constitutional system beyond the classic metrics, since the rational numbers of legal solutions are insufficient, demanding the need to include new possibilities in the equation, as in the return of the twelfth camel³⁴, where the decision involves the introduction of a virtual element³⁵, while expanding the possibility of observing the problem.

³⁴ LUHMANN, Niklas, "A restituição do décimo segundo camelo: do sentido de uma análise sociológica do direito", in Arnaud, André-Jean and Lopes Jr., Dalmir, (Orgs.), *Niklas Luhmann: do sistema social à sociologia jurídica*, Rio de Janeiro, Lumen Juris, 2004, p. 33/34.

³⁵ George Spencer Brown, in the preface to the first American edition of the book "*Laws of Form*" provides a clear example of this situation. It proposes to consider the following formula: $x^2+1=0$. Hence it results $x^2=-1$, where when dividing both sides by x , has $x=-1/x$. To escape the paradox, the british mathematician introduces a fourth class of number, called *imaginary*, so that the power sought in the proposed equation is $\pm i$. In the same way, Clam argues that rational numbers are unable to offer solutions to higher level equations. See SPENCER BROWN, G., **Laws of Form**. CLAM, Jean. **Questões**

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The parallax of the judicial decision depends on whether the analyzed legal object/case is observed from the center or from the periphery, as the contingencies can be numerous if they were at one or another point of observation, but, when there are multiple points, there can only be predictability by the historicity of constitutionalism, which, analyzing its own assumptions, can offer systemic referential foundations for decision or, paradoxically, change the whole decision, but without changing its autopoietic structure.

2. DISCUSSION: CHALLENGES ABOUT THE IMPROBABILITY OF COMMUNICATION

Although systemic constitutionalism is aimed at the cognitive opening of normative production sites, for the construction of a differentiated dialogue and operational unit about human and fundamental rights, it is known that there are a variety of elements that decrease the likelihood of success in communication, especially given the peculiarity of a wide periphery that produces decentralized norms and a rigid formal center in normative production.

As much as there is a variable observative parallax according to the point you are at, each observer processes the information according to their own structures, with a certain temporalization for the reduction and internal structuring of complexity, processing and condensation of meaning and semantics distinct from each other, potentiating the intrasystemic communicative improbability between the different levels.

The communicative hyper cycle in systemic constitutionalism serves to articulate elements referring to human and fundamental rights, distinguished by the constitutional/unconstitutional binary coded structure, determining the basic language of intrasystemic communication. The ultra-cyclical organization, on the other hand, concerns the articulation of the different hyper-cycles, produced on the periphery or in the center, interpenetrating each other, which serves not only

for communication/mutual disturbance, but also for the use of different multilevel complexities in the reconstruction and resolution of complexity and internal problems, as long as the conceptual (semantic) heritage is respected, as well as the processing time and condensation of meaning to reduce the complexity of each of these forms of organization.

In this sense, *at first*, it can be seen that the social demands in order to reduce the complexities linked to constitutional normative expectations are more disturbing on the systemic frontier, that is, on the periphery of constitutionalism. Given that the periphery is close to the external borders of the system with the other social dimensions, and that it is marked, for the most part, by an informality regime, the problem of structuring complexity and its consequent reduction to the interior of the organized plexus is solved more quickly over time, even allowing the condensations of meaning and semantic constructions to adapt more quickly, thus conferring the perceived dynamic and volatile character.

This is because the decentralized standards are dynamically constituted to comply with the requirements. On the other hand, when central constitutionalism is taken, the problem of reducing complexity to the interior of the system, through the structure, takes longer in relation to meeting expectations, considering the level of formality (which is understandable, since most of these structures were acquired evolutionarily throughout history, such as, for example, the Constitution itself) of the processes, which must be fulfilled as a means for their alterability.

Another factor that contributes to the high formalism in the center is the interpenetration space that the Constitution provides to the political system and the necessary responsiveness of it. With the end of stratified organized social systems and the rise of the rule of law as a consequence of the separation and non-subordination of law to politics, the Constitution created a space of interpenetration that interconnects both systems and allows a political response to the problems of legal referentiality, and a legal response to the problems of political referentiality. This means that the rule of law, essential to the form of central constitutionalism in the contemporary world, implies the subordination of

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political decisions to law, at the same time that legal production cannot renounce legislation that has been politically deliberated³⁶, which leads consequent increase in formalism.

In a *second moment*, constitutional norms, whether national, supranational, transnational, or originating from autonomous social regimes, among others, belong to the same system, requiring a considerable internal effort in the communicative ultra-cycle of ego and alter, in the sense that each of these, although it has the same constitutional structure, it applies its semantic observation in different ways to constitutional facts.

Systemic constitutionalism establishes new systemic structures to process its operations, involving the first and second moments, with the objective of defining a representation in the recursive context of constitutional operations. The constitutionality creation processes are fluid and dynamic, but, at the same time, structured in a multicultural constitutional history.

The stability of structures in constitutionalism is shaped to the extent that the observer can (re)use operative structures in other legal cases. Thus, the communicative product is epigenetic, since it consists of hereditary changes, within its own autopoiesis. Paradoxically, the structure therefore restricts systemic operations while articulating new communicative possibilities.

As there are communicative levels in constitutionalism, whether peripheral/peripheral, central/central, peripheral/central or central/peripheral, structures must act as a contingent enabler between ego and alter, insofar as they inform and enable the acceptance or denial of information.

However, there is a limitation in the level of observational structures, in the construction of semantics as a systemic heritage that gives meaning to self-referential concepts, in order to enable a communicative reserve for the emission of the communication itself. This is due to the necessary adaptation of internal to

³⁶ NEVES, Marcelo. **Entre Têmis e Leviatã**: uma relação difícil: o Estado Democrático de Direito a partir e além de Luhmann e Habermas, p. 89/90.

TONET, Fernando; SOUZA, Matheus Figueiredo Nunes de. Esboço de uma teoria geral do constitucionalismo sistêmico para a sociedade mundial. *Revista Eletrônica Direito e Política*, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.15, n.1, 1º quadrimestre de 2020. Disponível em: www.univali.br/direitoepolitica - ISSN 1980-7791

external complexity, and the systemic sense is prone to changes over time, as the environment forces the system to selectively pressure.

Since Ashby and Parsons, complex systems find their problems in time-related issues. This is because they cannot rely exclusively on one-on-one relationships between events that happen internally and externally. Complex systems, which exist alongside complex environments, need time to process information and provide answers³⁷. Thus, time determines the structuring of constitutionalism, insofar as its self-reproduction is guided by the historical semantics of the producers of constitutional normativity. Time institutionalizes systemic relationships in intrasystemic communicative observation.

Time is a connector of synchronization of self-referential semantic communicative senses of systemic constitutionalism that allows the selective understanding of information through the ability to reproduce operations in temporal continuity. Each system develops in its own time. In systemic constitutionalism, the issue becomes more complex, since self-observations are produced at different points in the system, from which temporality is also distinct, requiring a highly complex semantic connector, capable of interconnecting diverse temporalizations.

The semantics at the level of constitutional orientation must be symmetrical, aiming particularly at the (non) hierarchical reproduction of constitutionalism, in which decentralized and centralized constitutional norms have the same importance in constitutional dialogue, constituting fundamental and human rights, regardless of the place of normative production, using the plurality of information, communications and observations to constitute the unit of the system.

In Neves³⁸, semantic delimitation is used between symmetry and asymmetry, the former being linked to autopoietic processes as a necessity, in the sense that

³⁷ LUHMANN, Niklas. **Complejidad y modernidad**: de la unidad a la diferencia. Madrid: Editorial Trotta, 1998, p. 72.

³⁸ NEVES, Marcelo. **Constituição e direito na modernidade periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: Martins Fontes, 2018, p. 113/114.

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there is no hierarchy in the (internal) operative reproduction of the system. The second, on the other hand, would be asymmetric, since on the cognitive plane it needs differentiations to articulate its learning with the environment.

Semantic changes are behind structural changes at a considerable distance, just look at social events in which constitutional laws are no longer applicable, because they fall out of use, either because they have lost their object or because they are out of sync with contemporary social perceptions.

Even though systemic constitutionalism is extremely close to social concerns, due to its own question of autonomy and constant need for evolution, it never reaches its end, as it continually modifies its structures, changing its semantic perceptions over time, modifying constitutional history in each operation.

In the temporal dimension of systemic constitutionalism, its guarantee of autonomy depends on the entry and exit of information. The Luhmannian temporal dimension is the condition of the system's autonomy, in the sense that its self-programming depends on the temporal administration of sufficient time to apply the system's internal programming. In other words, there is a time for reflection in each specialized system; each system needs its temporal autonomy to meet social expectations.

Only in the temporal dimension can the observer carry out an operation in a concrete way, in sync with the semantic sense of the system itself, since all observation (re)uses the distinctions between what is in the system and what is not. Its selection is always simultaneous with the observation itself; only the observer himself can make distinctions.

Autonomous social regimes observe the constitutional normative requirements for a temporality more linked to social synchrony, due to its decentralized character, whereas supranational blocks observe the same requirements for another temporality, given its formalized structure.

The (complex) relationship between the semantic meanings produced at peripheral or central observation points and their evolution, are proportionally

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linked to the development of means of disseminating communication and to the mutation of the structure of society: when there is a variation in the social structure, there is a further variation in the relationships between communications, changing selectivity and contingency levels. Semantics is linked to the meaning produced, as these are condensed and become reusable when available for the communication issue. In this way, it is possible to differentiate between a "border semantics" and a "central semantics", because in view of the degree of structural rigidity that determines formality or volatility, the condensation of meaning in each of these regions happens in different ways and at different times.

The transformation from unstructured complexity to organized complexity and the condensation of structures in the region that fulfills the peripheral function happen more quickly, precisely because of the proximity that this region has with other types of communications, of the other constructions of meaning of the autonomous systems, among others. This causes variation, selection and (re) stabilization to be processed in a more agile manner, consequently leading to changes in the relationships between communications, changing the levels of contingency and selectivity. The constitutions of meaning and the conceptual heritage of the periphery are as dynamic as their evolution process.

At the center of the system, due to the typical formality and rigidity, in addition to the need to comply with processes as a means for structural alterability, a region is more plastered than the periphery. This reflects directly on its semantics and the meaning it carries. For example: in central constitutionalism, classic categories, such as people, sovereignty, government, are still overvalued, to the detriment of the region beyond the boundaries of formalism, which already deals with categories linked to phenomena such as transnationality, governance, global citizenship/hyper-citizenship, among others.

Because of this problem of temporal organization of structured complexity, typical of (hyper) complex systems, the "frontier and central semantics" often do not find correlations of meaning between them. This explains why the peripheries insist on a discourse that the State is fragmented in the face of an endless

process of globalization, at the same time that the State, in the middle of the 21st century, has difficulties in recognizing social discourses as active contributors in the construction of rationality of legality of the system of law as a whole. It is also worth mentioning that, without the existence of a sphere that allows dialogue through "translation" of the condensations of frontier and central sense, there is a great possibility that ego and alter may not recognize themselves as sides in the same way, excluding mutually, leading to so-called *constitutional autism*³⁹.

Within systemic constitutionalism, there may be temporal contradictions between the operative semantics of ego and alter, as it is possible that they observe the same constitutional problem in different temporalities. In this sense, the general theory of systemic constitutionalism allows for a broad observation of constitutional times, as it acts in a polycentric / centralized way at the same time, intertwining the dialogues and the multiple constitutional histories in the same systemic unit.

When time, in systemic terms, is defined as an observation between the past and the future, the system assumes the role of a historical machine, an incalculable and unpredictable historical structure, with only a memory of the continuous learning processes, facing the same codes and the system connects event to event through its specialized information that imposes the semantic limits of the system itself

In systemic constitutionalism, time is the most important vector in constitutional reality in the realization of the past structured in its memory and the future in contingent possibilities. Only with a semantics established in the constitutional sense of fundamental and human rights can it be self-referenced, allowing the

³⁹ This phenomenon can manifest itself in accordance with the three constitutional communicative levels: when the state law excludes decentralized forms of production (center excludes peripheral manifestations); when state law excludes international or other state orders with which it shares the same political space (center excludes other central manifestations); or when a peripheral form does not recognize other decentralized productions (periphery excludes other peripheral manifestations).

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reorientation of normative plurality in the constitutional autopoietic systemic unit.

FINAL CONSIDERATIONS

The arduous path of systemic constitutionalism runs between Cíla and Caríbdis. From above, international constitutionalism uses its various arms to act, ignoring borders, imposing its strength and disrespecting all epistemological forms of communication. From the depths, classic constitutionalism criticizes the new constitutional theories for not having come up with the Constitution, for a mere question of temporality, which supports its constitutional rules in the fact that they were created before.

The constitutional theoretical manifestations outside the systemic standards suffer from a great deficit of constitutional reflexivity, without compromising with the high complexity demanded by contemporary society, much less with the multiple constitutional cultures that surround the different constitutional normative problems. Such problems are dynamic, constantly changing the points of irritation, intensifying the observational complexity in the form of parallax. This means that even the general theory of systemic constitutionalism recognizes its limits in relation to the proposed objective.

It is due to the ability to delimit its scope of activity that systemic constitutionalism has greater cognitive openness, learning capacity and constant evolution, surpassing the observations hitherto scientifically delineated, insofar as it does not work with a specific level of constitutionality, but with multiple levels.

The differentiation of systemic constitutionalism is established from the organization of an ultra-cycle: a fourth degree reflexivity, which communicatively organizes the different levels of constitutionality (national, supranational, transnational, among others) in a structurally closed network of operations. What makes this possible is the institutionalization of human and fundamental rights, which occupy a prominent place in the internal operationalization at each of these levels. From this, these rights confer a communication, codes, programs

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and meaning that are different from other legal communications, and that can be organized under a global unity.

Bearing in mind that comprehensive research was developed at the doctoral level, this article presents a theoretical and methodological approach that made it possible to comply with the proposed objective, that is, to present the outline of the general theory of systemic constitutionalism, based on the topics essential to the differentiation of classical theoretical observations, as well as those that already exist, also with a systemic matrix.

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