

MODERN PROHIBITION OF NON LIQUET AND THE EXCEPTION: CONTINGENCY FORMULA FOR DECISION AND DEVELOPMENT OF THE PARADOXES OF THE LEGAL SYSTEM¹

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ABSTRACT

This article argues that the modern prohibition of *non liquet* operates as a semantic contingency formula through which the legal system manages the paradox of decision and preserves its functional differentiation. Grounded in a pragmatic-systemic methodological framework and drawing on Niklas Luhmann's theory of autopoietic social systems, the study maintains that courts occupy a structurally exceptional position because they are obliged to decide even where legal determination appears impossible. This obligation transforms undecidability into institutionalized decidability, converting paradoxical indeterminacy into communicative continuity. By revisiting the historical evolution of *non liquet*, from Roman law to modern codifications, and engaging contemporary debates on exceptionality, the article demonstrates that exception is not merely a political category but an operative presupposition of judicial decision-making. The prohibition of denial of justice thus functions as a mechanism that invisibilizes paradox while reinforcing organizational autonomy and systemic closure.

Keywords: Prohibition of *non liquet*; Legal system; Paradoxes; Judicial Decision; Luhmann's theory.

RESUMO

Este artigo sustenta que a proibição moderna do *non liquet* opera como uma fórmula semântica de contingência por meio da qual o sistema jurídico administra o paradoxo da decisão e preserva sua diferenciação funcional. Fundamentado em uma abordagem metodológica pragmático-sistêmica e apoiado na teoria dos sistemas sociais autopoieticos de Niklas Luhmann, o estudo argumenta que os tribunais ocupam uma posição estruturalmente excepcional, pois estão obrigados a decidir mesmo quando a determinação jurídica se apresenta como impossível. Essa obrigação transforma a indecidibilidade em decidibilidade institucionalizada, convertendo a indeterminação paradoxal em continuidade comunicativa. Ao revisitar a evolução histórica do *non-liquet*, do direito romano às codificações modernas, e ao dialogar com debates contemporâneos sobre excepcionalidade, o artigo demonstra que a exceção não é apenas uma categoria política, mas um pressuposto operativo da decisão judicial. A vedação da denegação de justiça funciona, assim, como mecanismo de invisibilização do paradoxo, reforçando a autonomia organizacional e o fechamento sistêmico do direito.

Palavras-chave: Proibição do *non-liquet*; Sistema jurídico; Paradoxos; Decisão judicial; Niklas Luhmann.

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INTRODUCTION

The limits and expansive tendencies of autopoietic social systems, particularly the legal system and its institutional organizations, have become central concerns in contemporary socio-legal theory. Within the framework of systemic pragmatism and Luhmannian systems theory, renewed attention has been given to the structural conditions under which judicial decision-making operates in contexts of increasing social complexity.⁴

Against this backdrop, several fundamental questions arise: Do courts decide according to autonomous systemic criteria, or do they risk functional overlap with politics and other social systems? Are there structural limits to judicial action? Does the growing elasticity of judicial intervention signal functional differentiation, de-differentiation, or the stabilization of exceptionality within law itself?

These questions have acquired particular urgency in contemporary debates, especially in jurisdictions marked by strong judicial protagonism.⁵ These concerns surface strongly in the international literature and, especially, within the Brazilian context.

In this sense, it is worth highlighting how issues such as *fake news* and the subsequent judicial inquiries have intensified debates surrounding the limits of judicial decision-making⁶.

⁴ Special emphasis on: PINTO, João Paulo Salles. *O Guardiã da Exceção: perspectivas em Carl Schmitt, Giorgio Agamben e pela Teoria dos Sistemas Sociais Autopoieticos*. 1. ed. São Paulo: Dialética, 2026; ROCHA, Leonel Severo; PINTO, João Paulo Salles. Fake news and the improbability of communication through the communication of exception. *Sequence of Political Legal Studies*, vol, 44, n. 93, 1–28, 2023. Available at: https://www.researchgate.net/publication/373484940_Fake_news_and_the_improbability_of_communication_through_the_exception_communication. Accessed on April 5, 2025; TEUBNER, Gunther. **Constitutional Fragments: social constitutionalism in globalization**. São Paulo: Saraiva, 2016.

TEUBNER, Gunther. THE LAW BEFORE ITS LAW: FRANZ KAFKA ON THE (IM)POSSIBILITY OF LAW'S SELF REFLECTION. *Direito. UnB - University of Brasilia Law Journal*, v. 1, n. 1, p. 12-31, January 1, 2014, p. 19. Available at: <https://periodicos.unb.br/index.php/revistadireitounb/article/view/24620>. Accessed on: May 4, 2026; TEUBNER, Gunther. Dealing with paradoxes of law: Derrida, Luhmann, Wiethölter. In: TEIXEIRA, Anderson Vichinkeski and OLIVEIRA, Elton Somensi (org). *Contemporary currents of legal thought. Barueri: Manole, 2010*; TEUBNER, Gunther. How the Law Thinks: Towards a Constructivist Epistemology of Law. *Law e Society Review*, 1989. Available at: http://www.fd.unl.pt/docentes_docs/ma/amh_ma_9533.pdf. Acesso em: 01 de jan de 2026

⁵ SIMIONI, Rafael Lazzarotto; PINTO, João Paulo Salles. Paradoxes in the self-description of the legal system: systemic corruption and judicial activism. *Electronic Journal of the Law Course at UFSM*, Santa Maria, RS, v. 14, n. 2, e30746, May./Aug. 2019. ISSN 1981-3694. Available at: <https://periodicos.ufsm.br/revistadireito/article/view/30746> Accessed on: April 6, 2023;

PINTO, João Paulo Salles. *Systemic Corruption and Human Rights: The Place of Paradox in the Self-Description of Law*. Curitiba: Juruá, 2018.

⁶ PEREIRA, Joaquim Eduardo; VIEGAZ, Osvaldo Estrela. DISSOLUTION OF THE LEGAL SYSTEM IN THE DOUBLE CONTINGENCY OF EXCEPTION – CONVERSATION BETWEEN NIKLAS LUHMANN AND GIORGIO AGAMBEN. *Revista Pensamento Jurídico*, v. 15, n. 2, 2021; LORENZETTO, Bruno Meneses; PEREIRA, Ricardo dos Reis. The Supreme Sovereign in the State of Exception: the (dis)application of the law by the STF within the scope of the “Fake” Investigation News” (Survey No. 4,781). *Sequence (Florianópolis)*, p. 173-203, 2020. Available at: <https://www.scielo.br/j/seq/a/3rd8dS8fb5j5pVH4rBbsfbB/abstract/?lang=pt> Accessed on January 5, 2026; LEMOS, Aana Claudia Secundo da Luz. The Limits of Law: Observations on the Role of the Brazilian Supreme Federal Court in the Judicialization of Public Policies. In: *Rafaele De Giorgi and the Observers*. Jonas Lemos: Luciano Nascimento Silva (org.). 1st ed. Campina Grande: PB- Plural, 2022, p. 54-55. DE CHUEIRI, Vera Karam; DE GUALANO GODOY, Miguel. *Brief essay on the Judiciary and the Executive in the pandemic: the exception, the rule or the exception as a rule*. ACADEMIA. EDU, 2020; COSTA, José Lucas Lima da; SANTOS, Wigna Beatriz Silva dos. FAKE NEWS SURVEY THE DANGER OF CREATING A NEW INSTRUMENT OF SOCIAL CONTROL. In: *Conexão Unifametro 2020 - Fortaleza- CE*,

These developments have substantially revived discussions regarding the scope and meaning of judicial power, systemic boundaries and legal functionality.

This article advances systems-theoretical scholarship by reframing the prohibition of *non liquet* not merely as a procedural guarantee or historical doctrinal artifact, but as a structural semantic device through which the legal system stabilizes its own paradox of decision.

While existing readings within Niklas Luhmann's framework emphasize the inevitability of decision under conditions of contingency, they do not fully explore how the categorical obligation to decide functions as a contingency formula that transforms undecidability into operational continuity.

By conceptualizing the ban on *non liquet* as an internal mechanism of paradox invisibilization, this study extends systems theory beyond descriptive reconstruction and proposes a refined understanding of judicial exceptionality as a permanent structural condition rather than an episodic disruption. In doing so, it offers a conceptual bridge between systemic closure, functional differentiation, and the institutionalization of decision under conditions of structural indeterminacy.⁷

Although Luhmann⁸ did not formulate a specific theory of exception, his analysis of the differentiation between center and periphery in *Das Recht der Gesellschaft* allows for a reinterpretation of judicial exceptionality. Courts, as central organizations of the legal system, are placed in a structurally distinct position: unlike peripheral legal actors, they cannot refrain from deciding⁹. This prohibition of *non liquet* reveals a paradoxical condition, courts must decide precisely where decision appears impossible.¹⁰

2020. Available at: <https://www.doity.com.br/anais/conexaounifametro2020/trabalho/169084>. Accessed on: March 17, 2026.

⁷ PINTO, João Paulo Salles; ROCHA, Leonel Severo. PARADOXES, DECISION AND INDETERMINATION: AN ATTEMPT TO APPROACH NIKLAS LUHMANN, GUNTHER TEUBNER AND GIORGIO AGAMBEN. In: ROCHA, Leonel Severo; COSTA, Bernardo Leandro Carvalho. (Org.). *The future of the Constitution: Social constitutionalism in Luhmann and Teubner*. 1st ed. Porto Alegre- RS: Editora Fi, 2021, v. 1, p. 1-638.

⁸ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993. LUHMANN, Niklas. *The Society of the Society*. Translated by Javier Torres Nafarrate, Editorial Herder, S. de RL de CV, 2006. LUHMANN, Niklas. *The Law of Society*. Translated by Saulo Krieger. New York: Routledge, 2016. LUHMANN, Niklas. *Organization and decision making*. Trans. Giancarlo Corsi. Milano: Bruno Mondadori, 2005. LUHMANN, Niklas. *Sociology of Law*. Vol. 1. Rio de Janeiro: Tempo Brasileiro, 1983; LUHMANN, Niklas. The third Question: The creative use of Paradoxes in Law and Legal History. *Journal o law and Society*, 1998, p. 153-165. Available at: <https://steffenroth.files.wordpress.com/2014/04/1410051.pdf>. Accessed on: March 1, 2026;

⁹ In this sense, in our translation: "First of all, we repeat: neither laws nor contracts are under the obligation to decide. The validity of the law can change - or be changed - with the selection of these forms. In this regard, only the courts live in an exceptional situation (*Nur die Gerichte have in this Hinsicht eine Ausnahmestellung*). It is possible that, for political or economic reasons, a decision is required of laws and contracts. But in this case, the constraints are of a different nature, and in the face of them the legal system is free to decide whether they are legally relevant. Only they are responsible for handling the paradox of the system - regardless of how one wants to call it concretely. Only they must, where it is necessary, transform indeterminacy into determination (*Nur sie müssen, wo nötig, Unbestimmbarkeit in Bestimmbarkeit transformieren*). [...] The paradox, however, is the sanctuary of the system (*Heiligtum des Systems*), and its divinity (*Gottheit*) is offered in multiple configurations. [...] Therefore, the question of the unfolding of the paradox is the key to the problem of differentiation, and it is from the form of differentiation that it is regulated which semantics acquires or loses plausibility (LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p. 320.

¹⁰ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p. 320

By revisiting the historical evolution of *non liquet*, from Roman law to modern codifications, and by engaging critically with contemporary discussions on exceptionality, particularly those associated with Giorgio Agamben¹¹, the article demonstrates that exception should not be understood solely as a political category. Rather, exceptionality emerges as an operative presupposition of judicial decision-making within functionally differentiated society.¹²

From this starting point, and employing pragmatic-systemic methodology, one can at least reconsider the theme by observing how the presupposition of an “exceptional experience” within courts authorizes, and obliges, them to decide, even when faced with high levels of complexity and irritability.¹³

In the chapters that follow, we argue that Luhmann’s description of the courts enables a response that links the presupposition of exceptionality to the semantic formulas used to manage paradoxes (i.e., moments of improbability). Consequently, this process is closely connected to the preservation of the legal system’s functional differentiation within contemporary society.

Accordingly, the conclusion proposed here, drawing from a pragmatic-systemic methodological approach, is that the mandatory *de-paradoxization* (*Entparadoxierung*¹⁴) experienced by courts, despite their heightened sensitivity to environmental complexity, allows for a mode of autonomous semantic respecification. Through the presupposition of

¹¹ AGAMBEN, Giorgio Stato di eccezione e guerra civile. *Quodlibet*, 2022. Available at: <https://www.quodlibet.it/una-voce-giorgio-agamben> Accessed: 28 jan 2026; AGAMBEN, Giorgio. *Biosicurezza e politica. Quodlibet*, 11 mai. 2020. Available at: <https://www.quodlibet.it/giorgio-agamben-biosicurezza>. Accessed: 30 jan. 2026; AGAMBEN, Giorgio. *State of Exception*. Lisbon: Editions 70, LDA, 2010.

¹² LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p. 319-320

¹³ In this sense, the author even goes so far as to say that, in our translation: “How could other sources of delimitation be thought of? If we take as a basis an expanded concept of system, in the sense of a construct of autopoiesis, we can envision quite distinct sources of delimitation of the room for maneuver in decision-making - precisely organization and profession. [...] Being a member of an organization also means that interactive behavior has limits, the transgression of which allows for a complaint regarding the service. Organization means that errors must be kept within the framework of what is legally accepted. Some may rebel against the prevailing opinion, challenge the higher courts, but always with acceptable arguments (going forward, we see here a mutual and necessary cooperation between organization and profession). [...] Finally, the organization wants to decide that there are different positions, different salaries, that is, careers. And, when it comes to a career, a lot depends on where and how decisions are made - each move always requires cooperation between self-selection and heteroselection. “From the point of view of the questions: how do we arrive at the limitations of the margin of possibility by determining the possibilities that allow combining 1) independence, 2) dependence on the legal text (binding by the law in force) and 3) the prohibition of denial of justice, so that organization and profession are functionally equivalent? This makes it understandable that a regional comparison is made between very different forms of organization and expressions of professionalism. [...] Certainly the function referred to the courts has two faces, and the second is becoming increasingly important. On the one hand, jurists (lawyers, but also judges) prepare the formal decision for the dispute; on the other, in the context of precautionary practice, they are concerned with formulating the legal instruments in such a way that the dispute can be avoided. [...] Here, paying attention to the operational side of the autopoiesis of the legal system and not so much to the institutional side, the organizational and professional influence with regard to what is communicated or not communicated stands as a borderline zone circumscribing the true legal activity. Protected by organization and professionalization, the court presents its own decision as an interpretation of current law and application of current law that transforms current law.” (LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 444).

¹⁴ LUHMANN, Niklas. A Restituição do Décimo Segundo Camelo: do sentido de uma análise sociológica do direito. In: ARNAUD, André-Jean; LOPES JUNIOR, Dalmir, (Org.). *Niklas Luhmann: do sistema social à sociologia jurídica*. Rio de Janeiro: Lumen Juris, 2004, p. 56-57

exceptional experience, paradoxical indeterminacy can be transformed into decisive determination, reinforcing the autonomous functional differentiation of law.

The semantic formula that enables this management of paradoxes in relation to exception is described here as the “*prohibition of non liquet.*” Within a systemic perspective, this notion of exceptionality plays a crucial role in identifying and defining judicial organizations, shaping their dynamics and their interactions with the broader social system of which they are part.

Function And Decision: Courts As A Central System Of Law

Although a wide range of studies examine the role of courts in contemporary society, authors such as Niklas Luhmann¹⁵ offer a unique theoretical contribution to understanding their function within the autopoietic legal system. From the methodological premises of the pragmatic-systemic approach¹⁶, an essential question arises regarding the function, structure and selectivities inherent to judicial activity within legal communication. This analysis is carried out from the standpoint of a second-order observer.

For this purpose, it is possible to note that social systems, such as law, have historically benefited from concrete organizational premises to establish their relationship with the environment of variety. This observation is made taking into account the aforementioned observation style that “a legal system only allows itself to be differentiated as an internally differentiated system.” (Luhmann, 2016, p. 396).

According to the author, the concept of “internal differentiation” means that, from the point of view of the social system, everything that is not part of its own self-reflections is considered environment. Consequently, from Luhmann's perspective : “it is important to verify, first of all, the positioning of the courts as a partial system differentiated from law”¹⁷.

In other words, the aim is to describe the courts based on the following score: “what form of differentiation is imposed on the legal system when it is forced to differentiate in courts?”¹⁸

¹⁵ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993. LUHMANN, Niklas. *The Society of the Society*. Translated by Javier Torres Nafarrate, Editorial Herder, S. de RL de CV, 2006. LUHMANN, Niklas. *The Law of Society*. Translated by Saulo Krieger. New York: Routledge, 2016. LUHMANN, Niklas. *Organization and decision making*. Trans. Giancarlo Corsi. Milano: Bruno Mondadori, 2005. LUHMANN, Niklas. *Sociology of Law*. Vol. 1. Rio de Janeiro: Tempo Brasileiro, 1983; LUHMANN, Niklas . *The third Question: The creative use of Paradoxes in Law and Legal History* *Journal o law and Society* , 1998, p. 153-165. Available at: <https://steffenroth.files.wordpress.com/2014/04/1410051.pdf>. Accessed on: March 1, 2026;

¹⁶ ROCHA, Leonel Severo; PINTO, João Paulo Salles. Fake news and the improbability of communication through the communication of exception. *Sequence of Political Legal Studies*, vol, 44, n. 93, 1–28, 2023. Available at: https://www.researchgate.net/publication/373484940_Fake_news_and_the_improbability_of_communication_th_rough_the_exception_communication Accessed on April 5, 2026. ROCHA, Leonel Severo. *Legal problems : a transdisciplinary introduction*. Porto Alegre: Sergio Antonio Fabris Editor, 1985; ROCHA, Leonel Severo. *Legal Epistemology and Democracy*. 2nd ed. São Leopoldo: UNISINOS, 2006; ROCHA, Leonel Severo. *Paradoxes of Self-observation: paths of contemporary legal theory*. 2nd ed. rev. and updated. Unijui , 2013

¹⁷ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 399

¹⁸ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 400.

The systemic methodology seeks to describe the issues through an operational and, consequently, *heterarchical approach*. In this sense, Luhmann dispenses with proposing an institutional hierarchical contribution of a semantic or syntactic nature.

Based on an operational difference between the center and the periphery, the position of the courts becomes explicable. Considering this observational perspective, one can describe the courts as the epicenter of the system, since a decision is constantly expected from them. In other words, the courts have an obligation to make decisions.

“The operational closure of the system and its displacement of any and all direct participation in the environment corresponds to the need, internal to the system, to have to decide”¹⁹

The term "decide", therefore, refers to the action of making a determination or choosing an option in relation to a specific situation or problem. In the mentioned context, decision observation can be understood as the process of analyzing and perceiving how a choice is made or a resolution is reached.

As for Luhmann's perspective on decision-making as a concrete unfolding of the paradox of law, he argues that the possibility of making a decision only arises when it is not possible to decide clearly and definitively. In other words, decision-making becomes necessary when a situation presents complexity, uncertainty or conflict, and there is no clear or predetermined answer.

This paradoxical view of decision-making suggests that decision-making is a contingent response to complex circumstances, where there is no option written into the system. Therefore, decision-making emerges as a process that deals with tensions and contradictions inherent in law.

In other words, the permissibility of decision only arises because, therefore, it is not possible to decide, “Even because the decision cannot be confused with the alternatives to be chosen”²⁰. In this way, it is considered from “the difference that constitutes the alternative or more precisely, it is the unity of this difference. Therefore, “a paradox”²¹. [...] “The fact that the courts see themselves as having the obligation to decide is the starting point for the construction of the legal universe, for legal thought and for legal argumentation”²².

Precisely, the function of the courts to make decisions in situations where it is not possible to avoid the need to decide is what makes them the center of the legal system. They assume this central role due to their responsibility to deal with complex and controversial (paradoxical) cases, in which the application of existing laws may not be sufficient to resolve in a clear and direct way, “since otherwise the decision would already be decided, and it would only be a case of recognizing it”²³.

¹⁹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 410

²⁰ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 411.

²¹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 410-411.

²² LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 423.

²³ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 411.

According to the Luhmannian view, courts play a significant role in operationalizing the paradox of the legal system. They act as decision-makers in the face of complex communication with the environment in which they are inserted.

In another perception, such functional distinction between periphery and center allows, in the same aspect, a certain place for a temporalized investigation of the decision. “An extension of time is only possible if the present is inserted as a distinction, as a unit of difference between past and present, [...] the decision operates within the scope of its own construction, which is possible only in the present”.²⁴

Thus, in addition to the responsibility of making decisions, courts need to establish guidelines for the future, even if decisions always occur in the present and the future remains uncertain. [...] “the decision has consequences for those present in the future”²⁵.

Luhmann’s pretext for outlining, “That the courts have to deal with the issue of building stability in instability”, in view of consolidations of meaning such as “justice”, for example²⁶.

Likewise, this generates significant concern regarding consequences, as well as an illusion built around the term "procedure", since the consequences of decisions, although they can be discussed, cannot be completely known.

“Taking all this into account, the decision is a paradox that cannot be thematized, but at best, only mystified”²⁷. “Authority, decorations, all of this occupies a place that prevents the paradoxical nature of decision-making from appearing as a paradox”²⁸, as well as “denouncing that the reason that legally decides on what is legal and illegal is also a paradox, and that the unity of the system can only be observed as a paradox”²⁹.

However, it is a fact, as suggested by Luhmann, that regardless of the situation that arises, the courts must make decisions and this undoubtedly represents the way in which jurisdiction frees itself completely from political control.

What allows judges, in this sense, to admit the impetus to decide? Thus, “Looking back, one has the impression that the risk of decision-making inherent in all law had to be distributed across two instances (jurisdiction and legislation) in order to become tolerable.”³⁰

From the observed perspective, the courts present themselves as the central organization of the legal system because they do not have the option of refraining from making decisions. This differs from the periphery of the organizational system, where there is no such obligation, and these elements play an important role as contingent cognitive support.

²⁴ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 412-413.

²⁵ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 413.

²⁶ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 414.

²⁷ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 413.

²⁸ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 413.

²⁹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 413.

³⁰ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 403.

“Precisely for this reason the periphery serves as a contact zone with other systems of functions in society - be it the economy, domestic family life or politics”³¹

The Prohibition Of *Non-Liquet*: “Exception And Management For Responding To Paradoxes And Maintaining Functional Differentiation

“The norm that corresponds to this central situation is that the denial of justice is prohibited” (modern prohibition of *non liquet*)³². In this way, Luhmann observes that the issue of exceptionality operated through the concept of *non liquet*, that is, the prohibition of the impossibility of deciding³³, places a demand on the legal system for a universal competence capable of deciding on all cases that reach the center of the system.³⁴

“First of all, we repeat: neither laws nor contracts are under the obligation to decide. [...] In this regard, only the courts are in an exceptional situation” (*Nur die Gerichte have in this Hinsicht eine Ausnahmestellung*)³⁵. It is precisely this problem of the relationship between universality and decision-making capacity that explains the prohibition of the denial of justice. In legal system, an imperative norm continues to be valid even in counterfactual situations.

Consequently, the issue of the prohibition of denial of justice leads to the system self-describing persisting theoretically with this fundamental installation of the function of the courts, especially in view of the issue of interpretation.

In the meantime, this is where the importance of principles or even hard cases becomes evident, for example. “Therefore, these are cases in which knowledge of the law in force is not enough to indicate who is in possession of the right [...] nevertheless, the courts must decide on these cases”³⁶.

“This is how the paradox of undecidable decisions must unfold in one way or another”³⁷. Here the difference and importance of an observation focused on the non-paradoxical legal operations of the courts becomes evident.

In short, it can be described that the paradox of decision always seeks to find acceptable forms of concealment. However, this question raises another question: where is the paradox made invisible? Luhmann observes that it is, above all, in the jurisdiction that this occurs.³⁸

³¹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 430.

³² LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 414.

³³ In this sense, in Brazil, there is an express legal provision that states: “Art. 4 When the law is silent, the judge will decide the case in accordance with analogy, customs and general principles of law”. (BRAZIL. Law 12,376, of December 30, 2010. *Law of Introduction to the norms of Brazilian Law*. Brasília: Planalto, 2010.)

³⁴ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 414.

³⁵ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p. 320.

³⁶ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 419.

³⁷ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 419.

³⁸ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 427.

“Therefore, the question of the unfolding of the paradox is the key to the problem of differentiation [...] thus the need to replace the hierarchical model – jurisdiction and legislation – with a differentiation between center and periphery is imposed”³⁹.

Luhmann emphasizes that: “the problem is not in the process of differentiation, but in the contingency of the already differentiated system that, nevertheless, reacts to the distinction between legislation and jurisprudence”⁴⁰

“All of this brings us the suspicion that takes us deeper and dissolves the level of discussion that has been reached so far”⁴¹

Luhmann⁴² also notes that these central organizations responsible for dealing with the paradox are describable in other social systems of meaning. In the economic system, for example, we can see that banks stand out as organizations that deal with communication complexities.

Same aspect, the State is observed as an organization of the political system, because it has a decisive role in maintaining collectively applicable decisions, independent of the consensus discussions that occur on the periphery of the system, that is, in the legislative sectors.

Precisely, the organization and professionalization of skills play a crucial role in this regard. The operational differentiation corresponding to the system makes it possible to deal with the risks of activities, including the calculation of the consequences involved. In this sense, it is possible to observe that only in the center of the system are other differentiation configurations notable, such as segmentation and a certain hierarchy.

These characteristics are more prominent in the center, where functions and responsibilities are distributed in a more specialized and organized way. “Only the courts constitute a hierarchy, only they differentiate themselves horizontally according to the distinct spatial or professional competences”.⁴³ For example, a hierarchical court, such as the Supreme Federal Court in Brazil, allows itself to interpret issues based on its own decisional recursion.

Indeed, when we consider the operative conception of the autopoiesis of the legal system, it is notable that the influence of organization and professionalization plays a central role in true legal activity.

More than just semantic issues, the way in which the legal system is organized and professionalized is fundamental to its functioning.⁴⁴

“Protected by organization and professionalization, the court presents its own decision as an interpretation and application of current law that transforms current law”⁴⁵

³⁹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 428

⁴⁰ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 403.

⁴¹ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 414.

⁴² LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 446

⁴³ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 432.

⁴⁴ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 444-445

⁴⁵ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016

As a result, the observed operative differentiation between “center and periphery” instead of the conventionally made distinction between “legislation and jurisdiction” allows a new perspective to analyze the circularity or institutional dimension in which the legal debate is normally situated. This places the position of the courts and their presumed exceptionality as a fundamental condition for concretely dealing with the paradox of law.⁴⁶

The distinction established between organization and system, as well as between center and periphery, allows, however, the self-observation that the courts play a fundamental role as a central operational apparatus that has the presupposed decisive exceptionality, being responsible for establishing a communicative relationship between the legal system and the environment in which they operate.

There is, as can be seen, a transformation in the pretext that since the jurist and judge Roman Aulus Gellius [*Aulus Gellius*] (123–165) meant *Non Liquet* [more specifically, *non liquere*] (*unclear*).

*Sed maius ego altiusque id esse existimavi, quam quod meae aetati et mediocritati conveniret, ut cognovisse et condemnasse de moribus, non de probationibus rei gestae viderer; ut absolverem tamen, inducere in animum non quivi et propterea iuravi mihi non liquere atque ita iudicatu illo solutus sum.*⁴⁷

In our translation:

But I thought it was greater and more grievous than befitting my age and mediocrity, that I should be seen to be known and condemned by character, and not by the proofs of acts; to acquit myself, however, I did not refuse to bring it to my mind, and therefore I swore to myself that it was not clear, and so I was freed by that judgment.⁴⁸

The premise that the Roman judge could fail to decide when it was not “clear”, or even that of appealing to the emperor to resolve the controversy, already in the so-called imperial era of *cognitio extra ordinem*⁴⁹, in which the process was centralized in the institutional

⁴⁶ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993. p. 320

⁴⁷ GELLIUS, Aulus. *Noctes Atticae*. Liber XIV, 25. Available at: http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Gellius/14*.html Accessed on: August 5, 2026.

⁴⁸In the same sense:

Non Liquet. Lat. is not clear. In the Roman courts, when any of the judges after the hearing of a cause, were not satisfied that the case was made clear enough for them to pronounce a verdict, they were privileged to signify this opinion by casting a ballot subscribed with the letters 'NL' the abbreviated form of the phrase *non liquet*.” (BLACK, Henry Campbell. *Black’s law dictionary*. 4th ed. St. Paul: West Publishing Co., 1951. Available at: <https://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf> Accessed on: August 19, 2025). Also in our translation: *Non Liquet*. Lat. not clear. In the Roman courts, when any of the judges, after hearing a case, was not convinced that the case was clear enough to pronounce a verdict, they had the privilege of expressing this opinion by means of a ballot inscribed with the letters 'NL' the abbreviated form of the phrase *non liquet*. Nevertheless, even due to the scarce genealogical research on this topic in Brazil, we highlight the study by: MARMELSTEIN, George. Buridano's donkey, the non liquet and the katchangas. *Direitos Fundamentais.net*, 2009. Available at: <http://direitosfundamentais.net/2009/01/07/o-asno-de-buridano-o-non-liquet-e-as-katchangas/>. Accessed on: August 10, 2025. However, one work seemed fundamental to us in reading, it is: RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.

⁴⁹That is how it is, according to several authors, who here, out of respect, we will not cite, erroneously seen as the end of *Non Liquet*. See in this sense: RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 22. Available at:

figure of the judge⁵⁰ and, therefore, a public sentence from him was expected⁵¹, was only effectively resolved in 543 AD when Justinian published novel 125, “*De Iudicibus*”⁵².

In this, the emperor highlighted the prohibition of the practice, stating that judges should: *perfecte examere causam et quod sibi iustum atque legitimum visum sit iudicare* (examine the case with the greatest care and pronounce themselves according to what seems fair and legitimate to them⁵³).

Thus, as Rabello highlights: “the certain assumption may thus be made that the Novella 125 of Justinian actually lays down the same rule as later adopted by modern legal systems, by imposing upon the judges the duty to pronounce judgment in all cases”⁵⁴.

In this way, it is a “not clear (*ex-capere - non liquere*)” as a constituent field of a decision and exception (the prohibition of *non liquet*) that is created (“according to what seems fair and legitimate to them”).

Authors such as Agamben have already made it quite clear in their historical study of the issue that the issue of *non liquet* has to do with the exception in an evolutionary sense. See:

According to some authors, in a state of necessity “the judge elaborates a positive law of crisis, just as, in normal times, he fills the gaps in the law” (Mathioti, 1956, p.424). In this way, the problem of the state of exception is related to a particularly interesting problem in legal theory, that of gaps in the law. At least from art. 4 of the Napoleonic Code (“the judge who refuses to judge, under the pretext of silence, unclear meaning or insufficiency of the law, may be prosecuted as guilty of denial of justice), in most modern legal systems the judge is obliged to pronounce a judgment, even when faced with a gap in the law. [...] But, in fact, what does the gap in question consist of? Is it really something like a gap without its own meaning? It

<https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.

⁵⁰See in this sense: See in this sense: RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 21. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026. p. 21.

⁵¹See in this sense: RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 21-22. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.

⁵² RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 21-22. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.

⁵³The translation is made by Alfredo Mordechai Rabello himself: “... to examine the case with the Uttermost care and to pronounce in accordance with what appears to them fair and legitimate”. It will be recalled that around that time a theory of evidence was being formulated, providing the judge with additional criteria of judgment. On this point see GG Archi, “La Prova nel Right del Basso Impero,” 1961, 12 *lura* 1 et seq.; *Idem.* “Les Preuves in the Law of Bas Empire” (RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 23. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.

⁵⁴In our translation: “Thus it may be assumed that Justinian's Novella 125 actually establishes the same rule that was later adopted by modern legal systems, by imposing on judges the duty to pass sentence in all cases.” (RABELLO, Alfredo Mordechai. Non liquet: from modern law to Roman law. *Ann. Surv. Int'l & Comp. L.*, v. 10, p. 1, 2004, p. 21-23. Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/abs/non-liquet-from-modern-law-to-roman-law/39A39129D985C841515540EEFF78F841> Accessed on: Mar 02, 2026.)

does not refer, here, to a deficiency in the text that must be repaired by the judge; it refers, rather, to a suspension of the current order to guarantee its existence. Far from responding to a normative gap, the state of exception as the opening of a fictitious gap in the order, has the objective of safeguarding the existence of the norm and its applicability to the normal situation. The gap is not internal to the law, but concerns its relationship with reality, the possibility of its application. It is as if the law contained an essential fracture between the establishment of the norm and its application and that, in extreme cases, it could only be filled by the state of exception, that is, creating an area where this application is suspended, but where the law, as such, remains in force.⁵⁵

Luhmann says that:

During the transition to modernity, it was taken for granted that any demand would be met with a decision, even if this was not provided for by law (for example, the famous art. 4 of the Napoleonic Civil Code. [...] According to the text: “the judge who refuses to judge, under the pretext of silence, obscurity or insufficiency of the law, may be prosecuted as guilty of denial of justice”. Only with this measure that stipulates the need to grant jurisdiction its own responsibility did the judge emancipate himself from the old imperial control of politics. Only then does it seem sensible to gradually extend this judicial competence to public legal matters.⁵⁶

Thus, rather than being reducible to a mere question of “judicial rights,” within a functionally differentiated society marked by escalating complexity this perspective situates courts as organizational sites where the autopoiesis of the legal system confronts its own paradox of decision. It underscores the specific systemic irritations that compel courts to operate under conditions of operational closure while simultaneously managing structural openness to the environment, and clarifies the contingency formulas through which undecidability is transformed into communicative determination under the presupposition of structurally exceptional conditions.

Luhmann, therefore, used the prohibition of *non liquet* to visualize this issue of the invilization of “the paradoxical impossibility of deciding and not deciding” and, consequently, observe the condition of necessity of the decision, of the difference and operability of the courts in all aspects.⁵⁷

From a pragmatic-systemic perspective, based on the empirical application of the precepts of the theory of autopoietic social systems (including communication, second-order observation and deparadoxization), it is possible to see that the exception can be seen as an evolutionary element in the legal functional differentiation of society.

This phenomenon is observed both in a broader context and in specific cases, where it manifests itself in an increasingly striking and dispersed way in multiple operational and decision-making contexts. In this approach, as can be seen, the analysis of the exception is not limited only to the political issue and power, as is common in many traditional analyses⁵⁸.

⁵⁵ AGAMBEN, Giorgio. *State of Exception*. Lisbon: Editions 70, LDA, 2010, p.48-49.

⁵⁶ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 415-416.

⁵⁷ LUHMANN, Niklas. *O Direito da Sociedade*. Tradução de Saulo Krieger. São Paulo: Martins Fontes, 2016, p. 416-417

⁵⁸ LUHMANN, Niklas. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p.333-337

On the other hand, this approach also reveals that the constructive autonomy of the legal system does not authorize an uncritical potential that leads to "constant expansions of arbitrariness".

Thus, the function of the courts, in the context of the non-paradoxical communication to which the legal system is linked, faces certain barriers that force it to submit to the demands of the social responsibilities to which it is subject. For example, the competent treatment and protection of human rights as a transnational and constitutional issue, as well as the exercise of theoretical criticism, as previously demonstrated⁵⁹.

Therefore, the insightful connection between social semantics and functional differentiation recognizes, even in the selective unfolding of the paradoxes of law, an attempt to produce operations in which decisions can always be questioned.

In this sense, courts remain structurally differentiated from direct political observation and other external attempts at capture, such as economic instrumentalization, precisely because they operate under conditions of operational closure within a functionally differentiated society. Their decisional autonomy derives not from isolation, but from their role in sustaining the autopoiesis of the legal system through the continuous obligation to transform environmental irritations into legally coded communication. Such autonomy, however, does not entail immutability, since judicial decisions remain recursively open to revision within the self-referential operations of the legal system.

CONCLUSION

The contribution of this article lies in reinterpreting the *prohibition of non liquet* not merely as a normative duty, but as a structural semantic device that stabilizes the paradox of legal decision and reinforces functional differentiation.

For everything that has been discussed so far, legal positivity implies that it is, above all, the decisions that validate the legal norm in order to be validated.

In this way, the law is operationally closed in its meaning, creating a version of reality in which legal practice (the decision), as Teubner⁶⁰ always highlights, needs to continually creatively operationalize its paradoxes.⁶¹ Paradoxes, therefore, even allow themselves to be thematized by the self-description (theories, philosophy of law, sociology of law, etc.) of the

⁵⁹ ROCHA, Leonel Severo; PINTO, João Paulo Salles. Human rights as contemporary (de) paroxal semantics of the self-description of the legal system. *QUAESTIO IURIS JOURNAL*, v. 14, p. 1001-1038, 2021.

⁶⁰ TEUBNER, Gunther. *Constitutional Fragments: social constitutionalism in globalization*. São Paulo: Saraiva, 2016. TEUBNER, Gunther. THE LAW BEFORE ITS LAW: FRANZ KAFKA ON THE (IM)POSSIBILITY OF LAW'S SELF REFLECTION. *Direito.UnB - University of Brasília Law Journal*, v. 1, n. 1, p. 12-31, January 1, 2014, p. 19. Available at: <https://periodicos.unb.br/index.php/revistadedireitounb/article/view/24620>. Accessed on: May 4, 2026. TEUBNER, Gunther. Dealing with paradoxes of law: Derrida, Luhmann, Wiethölter. In: TEIXEIRA, Anderson Vichinkeski and OLIVEIRA, Elton Somensi (org). *Contemporary currents of legal thought*. Barueri: Manole, 2010.

⁶¹ TEUBNER, Gunther. Dealing with paradoxes of law: Derrida, Luhmann, Wiethölter. In: TEIXEIRA, Anderson Vichinkeski and OLIVEIRA, Elton Somensi (org). *Contemporary currents of legal thought*. Barueri: Manole, 2010; TEUBNER, Gunther. How the Law Thinks: Towards a Constructivist Epistemology of Law. *Law e Society Review*, 1989. Available at: http://www.fd.unl.pt/docentes_docs/ma/amh_ma_9533.pdf. Acesso em: 01 de jan de 2026.

legal system⁶², but the communication of law requires that they be operationalized, under penalty of showing the paradox on which it rests and, thus, not hiding it and making it susceptible to paralysis.

As we have shown in the items above, the paradoxical obligation to decide and the position of the courts allows observation through communication of exceptionality, because the legal system opens, in the need for jurisdiction, this effective examination of the paradoxical incoherence of the law itself. It is necessary to decide; the improbability of communication consequently generates the exceptional probability of communication.

Certainly, this brings a high probability of risk when considering the judicial function, but also the permissibility of observing communicational relations between decision and exception. Thus, in the way Luhmann works, the *issue of the experience of the decisional exception* and its relationship with the prohibition of *non liquet*, in law's system, dazzles a distinct evidentiary point and a possibility of theorizing, however, different, starting from the problem that is generated from there.

In the same way that he describes the mandatory nature of a judicial decision as a coercion that transforms into freedom through exceptionality, indeterminacy into determinacy, Luhmann provides a description that allows us to initially state a systematization of this from an *organizational and professional perspective*.

It can be observed that the Courts institutionalize the exceptionality they structurally presuppose it continually assumes, shaping it in a way that safeguards the expansive power of the judicial function through an organizational and professional logic that clearly anticipates assurance procedures.

Thus, the courts as the center of the legal system, first of all, are organized by constituting forms of hierarchy, superiority and inferiority in appeals and decisions, spatial competences, competition in the face of the effective (Bar Associations (OAB), Legislative Branch, Public Prosecutor's Office and the like), professional competences, review instances, centralized control procedures that range from jurisprudential-summary to institutional.

From this systemic perspective on the courts, it becomes evident that organizational and professional structures ensure that both the experience of presumed exception and the judicial function remain within the boundaries of what is legally acceptable- a condition that, therefore, generates controversy in situations involving suspension. In this context, one may say that social systems have become so specialized in their decisional centers, particularly through the operability of presumed exception, that it becomes increasingly difficult to meaningfully question the functional differentiation of the system. The *systematization of the experience of exception*⁶³ it is also conjectured by the courts to justify its excessive and

⁶²We show this in our book: PINTO, João Paulo Salles. *Systemic Corruption and Human Rights: The Place of Paradox in the Self-Description of Law*. Curitiba: Jurúá, 2018. See also in this sense: TEUBNER, Gunther. *Constitutional Fragments : social constitutionalism in globalization*. São Paulo: Saraiva, 2016. TEUBNER, Gunther. THE LAW BEFORE ITS LAW: FRANZ KAFKA ON THE (IM)POSSIBILITY OF LAW'S SELF REFLECTION. *Direito.UnB - University of Brasilia Law Journal*, v. 1, n. 1, p. 12-31, January 1, 2014,

⁶³ LUHMANN, Niklas . *Das Recht der Gesellschaft* . Frankfurt am Main : Suhrkamp , 1993, p.320; See our thesis in this regard: PINTO, João Paulo Salles. *O Guardião da Exceção: perspectivas em Carl Schmitt, Giorgio Agamben e pela Teoria dos Sistemas Sociais Autopoieticos*. 1. ed. São Paulo: Dialética, 2026

decisive center, so that only in this way can it combine: independence; reference to current law and prohibition of denial of justice (modern prohibition of non liquet).

Therefore, it is concluded that the *operationalization of the exception* by central organizations (in the case of law's system, by the supposed modern prohibition of *non liquet*) reinforces the assumption of the autonomous specialization of social systems in limiting cases, which makes it really difficult to pose these questions on the fields of debates of “ functional dedifferentiation” and the like.

The prohibition of non liquet is not merely a historical rule of judicial obligation; it is the structural mechanism through which law's system transforms undecidability into communicative continuity.

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