

# Chapter 1

## Introduction

The boundaries between domestic and international laws are becoming more tenuous, through processes of construction, implementation, and control of norms. Law is becoming internationalized—spread across different planes. At the international level, this is seen in the densification of traditional sources of law. At the domestic and transnational levels, additional, distinct legal sources are created through direct contact among substate and transnational actors, both public and private. However, these cannot be easily classified as sources of international law.

The internationalization of law is a process of operationalization of the law accomplished by diverse actors in multiple territories. It reveals important outcomes of the contemporary legal system because it carries with it the idea of deterritorialization: various actors constructing the legal order multidirectionally. Evaluating this thesis of the internationalization of law requires reflection on traditional theoretical concepts of international law. First, the possibility of or the limits of conceptualizing law as a system organized in pyramid-shaped, hierarchical, tree-like form, as Kelsen proposed, compared with the notion of constructing legal phenomena in networks.<sup>1</sup> Second is the debate regarding the proliferation of sources of international law. Third is a vision of international law as a fragmented, conflicting, and ineffective collection versus international law as a theory of greater complexity, density, and effectiveness, with new lines of reasoning that give cohesion to and explain international law as a system. Fourth is the propriety of revisiting old ideas, considered outdated, such as a global republic (*civitas maxima*) of *jus gentium*, based on the universalization of values related to core themes (human rights, environmental, humanitarian, economic, penal, financial, and so on), or perhaps only serving as an imperialist expansion of developed-country values throughout the rest of the world.

Various logical frameworks emerge in this evolving context, with different notions regarding the legal system, including cultural and religious conflicts and hegemonic aspirations. Any notion of universality faces obstacles to legitimacy.

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<sup>1</sup> Ost and Van de Kerchove (2002), p. 43.

At the international level, distinct sectoral philosophies develop, such as conflict between human rights and commerce or between humanitarian law and fundamental rights, but so too do bridges of complementarity among different legal subsystems. Legal theory seeks not only a new notion of what “should be,” based on an examination of possible legal frameworks for a new reality, but also to identify that new reality. The task is difficult because this reality has not yet stabilized and because the interactions among all actors involved are already at a maximum. The reality changes more rapidly than the pace to which legal thought is accustomed. Principles and dichotomies in international law—such as autonomy and sovereignty, public and private nationality, state and nonstate, coerced and voluntary actions, territorial limits, and the state’s monopoly on the legitimate use of force—are insufficient interpretative guides for the legal order. The idea of tripartite branches of government, within a state, meshes with the international framework, with an abundance of sources, interpreters, and executors of the law. There are still no new satisfactory concepts accepted by states or international legal theorists to be used to create coherence or legitimacy in identifying a new legal model that can adequately explain current relationships among international actors.

There appear to be two problems. First, the data generated by the legal system gradually lose their predictive value because with each new situation or theme the legal system provides a distinct, dissonant response. Second, legal subsystems begin to take on a life of their own as they manage to fulfill the demands of the other social systems on their own. The subsystem framework begins to conflict with the traditional legal framework itself. Some subsystems are incoherent with one another, opting for different solutions for the same problems, or evolving<sup>2</sup> at their own distinct pace.

Some key terms must be defined at the outset: system, complexity, and “post-national.” There are many definitions for the term “system.” Throughout the past century, jurists have proposed definitions, looking for analogies in mathematics, biology, and the “science of law.” They suggest a notion of a system as a whole, with components operating in harmony. For us, a legal system is a network of processes that create their own characteristic properties, identifiable not only by looking at their components in isolation. This network has the capacity to create its own mechanisms for defining its identity, for regulating itself, and for guaranteeing its relative autonomy with respect to other social systems. The legal system is the outcome of a continuous process, rationalizing and systematizing different forms, whether they are derived from natural law, utilitarian, or positivist principles.<sup>3</sup>

The legal system is a social system, differentiated from other (also abstract) systems by its process of functioning. In an ongoing process of transformation, the legal system receives input from its surroundings—from relationships of power, from economics, from religions—and filters this input in its own manner, returning it to society with outcomes that, in themselves, influence other social systems.

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<sup>2</sup> The term evolution, as used, does not necessarily mean improvement but rather transformation.

<sup>3</sup> Van de Kerchove and Ost (1994), pp. ix–x.

The interaction among these systems takes on a dynamic flow, pushed forward from all sides. No hierarchy exists among these systems. There is no functional primacy, as was thought, in relation to the economic system, because all systems are important and necessary, even if at certain points some systems take precedence over the others. Likewise, it is impossible to deliberately shift the evolutionary boundaries of these systems so as to transform these realities with universal magnitude, whether as high levels of sophistication or power, or simplistic visions, such as rational choice, or a moral-ethical vision.<sup>4</sup> Law provides concepts and structure for dialogue that political and economic actors cannot ignore whenever they please. Law establishes conditions under which an international community may possibly exist, creating and altering the expectations of visions regarding justice and legitimacy.<sup>5</sup>

The concept of the system is related to others, such as “order” or “legal order.” French jurists prefer the expression *ordre juridique*. Anglo-Saxon thinkers prefer the term *legal system*. Some authors, such as Bobbio, criticize these categories as overly broad, proposing instead the term *ordenamento jurídico*.<sup>6</sup> Most authors, such as Kelsen, Romano, and Ost, use these terms interchangeably, as will be done here.<sup>7</sup>

The idea of a system as a collection of elements presupposes their unity, according to some specific identifying characteristics. The word “system” is Greek in origin and means “to place together, at the same time” or “collection of various different parts.” This does not exclude the existence of parts within the system, or in this case legal subsystems, with their own specific characteristics. The legal subsystems can be thought of as parts of the legal system with elements in common, such as the subject matter or functioning process. One of the points to be discussed here is the idea of fragmentation or unity of the legal system as a function of greater specialization of subsystems with the process of globalization. Some authors contend that such specialization has been so significant that the subsystems have gained autonomy from the whole system, resulting in various autonomous international legal systems. Others describe a new complexity of the legal system, with broader bases of identification, capable of including the specificities of the different subsystems.

Another important concept is the idea of complexity, which refers to a strong, yet difficult to predict, interaction among the diverse elements that make up the international legal system. In this case, the complexity of the international legal system predicts greater interaction between traditional sources of public international law (treaties, custom, unilateral acts, and general principles of international law) and other forms of norm creation (substate, public, private, and transnational). Complexity differs from complication, in which there are strong interactions among

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<sup>4</sup> Narrafante, J. T. Notas a la version en español in Luhmann (2006), pp. 16 e 27; Luhmann (2006), p. 408.

<sup>5</sup> Koskenniemi (2005), pp. xiii and 19.

<sup>6</sup> Bobbio (1995), pp. 198–199.

<sup>7</sup> Van de Kerchove and Ost (1994), pp. 3–4.

different elements, but the results of which are predictable; in a *complex* system, this foreseeability is not present.<sup>8</sup>

Complexity also refers to the building of new structures of hierarchy among norms, according to their nature and origin and also their content. It is a new vision of the interaction between national and international laws, with the creation of law in layers, with varying levels of interaction based on the norms' origin (national, regional, or international) and subject matter (human rights, humanitarianism, international business, environment, and so on).

The final key concept is “post-national law.” Although the term has been used for some time, it was popularized by Habermas in the late 1990s to describe the changing concepts of global citizenship, democracy, and governance, apart from the nation-state.<sup>9</sup> Other authors began using the term in a broader sense, pointing out that various political and legal processes are formed outside the influence of the state's central authorities traditionally responsible for contributing to international law. Such formations may involve subnational and transnational actors, both public and private. In this sense, the use of the expression “post-national” does not mean that the state is no longer the center of international law or that nations no longer exist.<sup>10</sup> As used here, the term refers more to a moment of transition than components of a new notion of law.

This work is limited to a specific period of time: the twenty-first century, considered here as beginning with the fall of the Berlin Wall and the end of the Cold War in 1989. The themes in this book are, of course, results of a historical process, one that has intensified in the past 20–30 years. Earlier periods are referred to as follows: the modern period (eighteenth century), the classical period (nineteenth century), and the contemporary period (twentieth century). The focus is primarily on transformations following the end of the Cold War, in a period authors refer to as post-modern (although the concept of post-modernity varies enormously and may encompass different meanings—a debate not entered into here)<sup>11</sup> or as post-national. The earlier periods, full of interesting questions and changes, will be noted on occasion, especially to highlight the novelty or lack of innovation of the current era. It is important to note that many current discussions are merely repetitions of those of the past.

The limitations of this work are in part a reflection of its ambitions. In the course of dealing with such a vast topic and reflecting on fundamental questions of theory, the analysis at times passes over important authors or occurrences. The choice of theories, concepts, time period, and examples was an arduous process, which could certainly be carried out in greater depth. Theses have been developed on each of the

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<sup>8</sup> Van de Kerchove and Ost (1994), pp. ix–x and 32.

<sup>9</sup> Habermas (2001).

<sup>10</sup> I consider this the least inconvenient expression for this purpose. The use of “global law” could lead to a mistaken understanding of the concept as worldwide law, which is not the case. See Krish (2012), p. 6.

<sup>11</sup> Jouannet (2011), p. 224.

processes discussed. Nevertheless, within the context of this work, the goal has been to select issues most directly related to the overall theme and limit discussion to what is reasonably necessary to demonstrate each point and idea, rather than thoroughly engage and explain each subject. The intent is not to suggest a new explanatory theory for the phenomena discussed but only to highlight some aspects of reality.

Part I discusses the factors, actors, and processes of the internationalization of law.<sup>12</sup> Part II discusses the new configuration of international law and how this reconfiguration affects traditional legal concepts. In Part I, I consider that the legal system, facing a new reality, creates new or intensifies old processes of creation, implementation, and control of legal norms and other nonstate regulatory processes. There are new actors and new mechanisms to operate legal phenomena internationally. In Part II, I discuss the characteristics of the legal system in the face of the internationalization of law and ponder whether this reconfiguration casts doubt on classical foundations of the theory of international law.

The first chapter presents some factors of the changes on international law. I highlight among these factors the effects of globalization or “mundialisation” (to use a French expression with a different meaning) on the legal order. The fall of the Berlin Wall created the possibility of building the strength of international law through legal norms, which permitted the emergence of the current post-national law. New technologies have altered notions of space and time. Global problems related to terrorism, health, or the environment create new involuntary communities around the idea of risk. Global crises with broad-ranging effects break through traditional barriers to changes in the legal system.

The second chapter presents the effects on globalization on the traditional processes of the internationalization of law. In international legal relations, understood in international law theory since the modern period, there has been a remarkable “thickening” of law, with more norms, institutions, and subjects. The proliferation of treaties, customs, unilateral acts, and other sources of international law is well-known and is growing in various subject areas: business, finance, human rights, criminal law, labor law, environment, terrorism, money laundering, and diverse others. International law exerts important influence on the national, inspiring laws, favoring the creation of integrating norms, and even imposing legal rules.

The third chapter describes how the process of internationalization is also built through direct interaction among subnational and transnational actors, both public and private, independent of any international coordination or norms. Through this process, various state legal orders reach points of confluence, such as the use of similar administrative practices among state bureaucracies, with or without contact with their foreign counterparts, or an amalgamation of procedural norms for legal

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<sup>12</sup> The methodology for analysis in Part I, divided into actors, factors, and processes, was developed at the *Rede de Pesquisa Figuras da Internacionalização do Direito*, which the author participated in, from 2007 to 2009. The network was coordinated by Mireille Delmas-Marty, Professor at the Collège de France. However, I adapt the methodology for the necessities of the present work, which are substantially different from that collective project.

administration. Such confluences may be seen through the use of similar legal reasoning among national and international courts; cross-fertilization among courts; the creation of extra-state regulations among corporations, with or without dependence on state actors; or even sets of private norms, with the ambition of universality and autonomy.

Building on this context, the second part of the analysis describes the characteristics of an international law and the validity of using certain concepts from traditional legal theory. Part II begins with the selection of a few areas that demonstrate how the methods for creation, implementation, and control within some legal subsystems expand, gain greater density, and create their own operating instruments. These examples are intended to show that law, due to globalization, begins to take on different methods of functioning, developing specialization along with society as society itself transforms. In this sense, I seek to analyze the central elements of international humanitarian law, criminal law, human rights, economic law, and environmental law, although many other subjects could be analyzed in the same way.

Chapter 4 presents a broader discussion about whether these phenomena require new ideas to supplement traditional legal theory or whether they simply require a rehashing of old ideas in light of new facts. The debate over expanding the internationalization of law versus approximating national laws by means of comparative law is not new. Several concepts are revisited by contemporary authors in the light of a new reality. For example, the idea of global law is growing similar to the idea of universal law, though these notions remain distinct.

The fifth chapter analyzes whether particular facts change traditional concepts of public international law. It examines the debate on new sources of international law, the rise of private actors, and nonstate regulatory processes, and the proliferation of international tribunals and other conflict-resolution bodies mean a fragmentation of international law.

To explain a global law or a universal law, some authors relive theories derived from Roman law. Such theories include the idea of *jus gentium* or a new natural law, revised by St. Thomas Aquinas and used in legal theory until the fifteenth century with the School of Salamanca, described by Francisco de Vitoria and rebranded in different forms even today. On the other hand, there is a rereading of legal theory from the eighteenth century to the twentieth century, which by other methods sought a common foundation for the validity of law or to reinforce the idea of universal law, with common rules justified by the primacy of international over national laws.<sup>13</sup>

The last chapter engages current debates about the existence of a single international legal system and the possibility of building a world republic, a democratic

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<sup>13</sup> The concept of “universal law” has several meanings. At the simplest level, it can be understood as a cogent international law, applicable to all countries in the world. At a second level, it is presented as a coherent legal system. At a third level, it is presented as a *bric-à-brac* or loosely connected network of legal norms, to borrow the famous expression of Jean Combacau. See Combacau (1986), pp. 85–105.

and participatory international legal system, or at least a global law. Two main currents of thought prevail on this subject: proponents of an international legal pluralism, some of whom maintain the idea of fragmentation of international law in multiple systems of law, and proponents of a new complexity, who maintain the idea of the unity of the system or international legal order. The ideas of universality, global law, or even law shared in common expressions change as authors appear to move toward an understanding of an increasing complexity of international law, with links to and connections with national laws and among new, different normative subsystems of public and private international laws.<sup>14</sup>

In our view, international law is today constructed through diverse macro- and microprocesses that expand its traditional subjects and sources, with the attribution of sovereign capacity and power to the international plane (moving the international toward the national). Simultaneously, national laws approximate laws of other nations (moving among nations or moving the national toward the international), and new sources of legal norms emerge, independent of states and international organizations. This expansion occurs in many subject areas, with specific structures: commercial, environmental, human rights, humanitarian, financial, criminal, and labor laws contribute to the formation of post-national law with different modes of functioning, different actors, and different sources of law that should be understood as a new complexity of law.

As with all processes of transformation on a global scale, there are moments, spaces, and subjects in which the internationalization process accelerates and others in which it slows down. Precisely because it advances at different speeds, this transformation can create a polychronous (one space, varying velocities) or, at times, asynchronous (multiple spaces, varying velocities) scenario when the tempo for each subsystem differs. The legal system, in the face of globalization, finds its greatest difficulty in the idea of pluralist synchronization, with rules in common that respect cultural diversity while also bringing stability to a fictitious global legal order.<sup>15</sup>

In this scenario, there is a new complexity of the international legal system. The traditional concepts of democracy, subject, source of international law are not able to explain all the changes in the legal relationships. The new concepts, as proposed by multiple authors, as global law, global democracy, universalization, world republic, do not make sense, except if we change their traditional definition. This book tries to contribute to that debate.

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<sup>14</sup> Simma (2009), p. 267.

<sup>15</sup> The phrase is borrowed from Mireille Delmas-Marty, developed in the collection of books, *Les Forces Imaginantes du Droit*. The writings of Delmas-Marty, with whom I maintained a network for discussion of research for 3 years, are fundamental to this work. Other key authors include Gunther Teubner, José Alvarez, Martti Koskeniemi, Hélène Ruiz, Emmanuelle Jouannet, and François Ost, with whom I have established bridges for dialogue in recent years, with conferences and discussions held both inside and outside Brazil. Nonetheless, each of these authors has distinct ideas; this work seeks to carve out its own path, different from these others. The influence of these authors on this work is due, in part, to our direct conversations with many of them.

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<http://www.springer.com/978-3-642-54162-9>

Internationalization of Law

Globalization, International Law and Complexity

Varella, M.D.

2014, XVI, 343 p., Hardcover

ISBN: 978-3-642-54162-9