

THE NATURE OF THE INTERNATIONAL LAW SYSTEM AND ITS SYSTEMIC CONSEQUENCES

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ABSTRACT

INTERNATIONAL LAW IS A SYSTEM. DEPENDING ON THE TYPE OF SYSTEM, VARIOUS MANIFESTATIONS AND CONSEQUENCES MAY APPEAR. POSITIVISM, ALTHOUGH ITS SCOPE IS ENSURING THE PREDICTABILITY OF NORMS AND THE SECURITY OF THE LEGAL RELATIONS BETWEEN SUBJECTS OF LAW, SHIFTS THE ATTENTION FROM SYSTEM ANALYSIS TO THE CONSEQUENCE OF THE SYSTEM. A QUESTION THAT NEEDS TO BE PUT FORWARD IN THIS CONTEXT IS “WHAT MAKES THE INTERNATIONAL LAW SYSTEM ROBUST?” THIS ARTICLE AIMS TO SHIFT THE PERSPECTIVE FROM CONSEQUENCE ANALYSIS GENERATED BY THE POSITIVIST MOVEMENT, TO SYSTEM ANALYSIS OF INTERNATIONAL LAW, AND EXPLORE SOME MAIN CHARACTERISTICS OF SYSTEMS THAT MIGHT HELP ONE UNDERSTAND WHAT ARE THE COMPONENTS OF THE SYSTEM THAT MAKE IT ROBUST.

KEY WORDS: SYSTEM, INTERNATIONAL LAW, CUSTOM, NOMOS, ROBUSTNESS.

I. INTRODUCTION

This article aims to determine robustness of the system of International Law (IL), by means of systems theory. Using the lens of system analysis, IL is not seen through its finality, but rather through its inception. By stressing the question of “What is the inception of the international law system?”, one stumbles upon its scope, which is reflected (or rather should be reflected), in its prime components, that is, its sources. It is this ‘should be’ which poses the problem of robustness.

The scope of positivism is ensuring the predictability of norms and the security of the legal relations between subjects of law, by focusing on the “law as it is” and not on the “law as it ought

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to be”². The direct effect is that the positivist paradigm does not permit systems theory to make its entrance into the realm of law.

Systems theory applied to IL shifts the attention toward its scope, which aids in determining the system components that give IL a robust character. Thus, the first part of the article shall focus on the problem, by exposing the main drawbacks of positivism and presenting the benefits of systems theory. The second part of the article will be a practical application of systems theory to IL, to determine what type of system it is and finding its main components that give the system a robust character.

II. PRELIMINARIES

A. Legal positivism and its drawbacks

A new perspective on a subject matter should assume presenting the present perspective. For this reason, a short introduction into the positivism paradigm is appropriate.

The positivist line of thought presents itself as the incipient effort of utilitarianism, with Bentham and Austin as its founding fathers. The premise of positivism is the separation between law as it is and law as it ought to be (i.e. *lege lata* from *lege ferenda*, or law from morals). Common law, which has its basis in equity, is constructed bottom - up, forming abstract norms by considering every judgement pronounced and applying its logic to similar cases (the rule of precedent). On the other hand, civil law is constructed top - down. There is an abstract authority (i.e. the legislator) that sets the content of abstract norms, trying as best as possible to cover all possible *de facto* situations. Thus, common law makes it impossible to create an absolute separation between law and morals having equity as its basis of formation, while civil law makes this separation with great ease, because its basis is merely imposing various behaviours on the subjects of law. In both cases though, the prime motive for separating law from morals lies in the fact that they represent different dimensions of society, and a confusion between the two may generate instability in relations between subjects. Consequently, the scope of positivism is ensuring the security of legal relations between subjects of law and the predictability of norms. For securing such legal relations in international law for example, State parties to a treaty have the possibility of invoking *rebus sic stantibus*, in cases where the original circumstances that led to the signing of a treaty have been modified in such a way that compliance with the clauses of the treaty has become very costly.³ Also, for guaranteeing the predictability of norms, the international community has set out on a quest for the codification of customary international law.⁴

The drawbacks of positivism are numerous. Some of these drawbacks deserve attention in this context. Firstly, as a consequence of positivism in civil law, the scope of the legislator is to adopt norms that cover every possible *de facto* situations also taking into consideration the moral dimension of law. For this reason, a judge should base his solution only on the content of *lex lata*, not taking into consideration the morality of *lex lata* in that particular case. A judge should only *apply* the law, not judge its content. It is very difficult for a norm, as abstract as it is, to cover all possible factual consequences, due to the fact that a society is a complex system with many

² Raymond Wacks., *Understanding Jurisprudence. An Introduction to Legal Theory* (Oxford University Press, New York, 2012) 57-60.

³ Valentin Constantin, *Drept Internațional* (Universul Juridic, Bucharest, 2010) pg. 161.

⁴ Valentin Constantin, *Drept Internațional*, 111-115; Malcolm D. Evans, *International Law* (Oxford University Press, Oxford, 2003), 134-136.

interacting components that sometimes produce unpredictable consequences. For this reason, a judge should substitute the legislator in case there is a danger of pronouncing a *non liquet*. This is forbidden in civil law due to its very roots.

Secondly, some norms tend to fail in reflecting the empirical. Legal doctrine⁵ classifies sources of law in formal and material sources. Traditionally, the *formal* sources of law are those generally accepted sources from which arise binding norms, while the *material* sources represent the ensemble of states' actions that lead to the creation of formal sources. So, formal sources confer upon the rules and obligatory character, while the material sources comprise the actual content of the rules.⁶ In other words, while material sources represent the spark, formal sources provide the fuel that, together "ignite" a norm into existence. Examples of material sources include, and are not limited to, unilateral state actions (such as recognition of states), resolutions of major international organizations, United Nations General Assembly Resolutions, etc. The supra-positivist line of thought tends to ignore these material sources, considering them of limited applicability, and of therefore, importance. What positivists oversee is the fact that these material sources represent the bridge between the empirical and the law. If that bridge is not used, then no communication is established between norms and society.

Thirdly, positivism can legitimize atrocities. In contrast to Kelsen's arguments, totalitarian regimes, such as the Nazi regime, found their form of manifestation because of the separation between law and morals.⁷ It is also worth mentioning an apparent paradox in the Nazi regime's legal dimension. Carl Schmitt makes use of naturalism to legitimize the national-socialist doctrine.⁸ It is apparent, in that Schmitt does not make use of the moralist doctrine that naturalism predicates.

Finally, there is light at the end of the tunnel. Customs are bottom - up norms (i.e. from concrete to abstract) that will forever reflect the image of the society while in effect. If their utility is lost, they even have "auto-destruction" mechanisms, such as desuetude, that permit them to disappear and may be replaced by another custom. They will always keep intact that component of morality that positivism tries to separate from law. In international law, customs, as opposed to treaties, are shielded from any finite scopes, due to the fact that there are no determinate parties to a custom, but rather the international society as a whole.

B. A brief summary of systems theory

Systems theory is designed to analyse phenomena that are taking place around us and see them as a whole. "The whole is more than the sum of its parts", goes the expression. As trivial as it sounds, this saying has deep implications in the mind of the system analyst, because the *elements* of a system added up alone, do not constitute the system. There are also the *interactions* between the elements that make up that system and bestow life to that system.⁹ This leads the systems

⁵ Valentin Constantin, *Drept...*, pp. 101-102; Vladimir Hanga, and Liviu Marcu, *Istoria dreptului românesc, Vol. I* (Editura Republicii Socialiste România, Bucharest, 1980), 203.

⁶ Malcolm Shaw, *International Law, Seventh Edition* (Cambridge University Press, 2014), 51.

⁷ HLA Hart, "Essay 2, Positivism and the Separation of Law and Morals" in *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford 1985), 72-75. It is to be mentioned that this position is not originally from Hart himself, it belongs to Gustav Radbruch, who renounced the positivist tradition after his experience in the Nazi regime.

⁸ Karl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, New York, 2006).

⁹ Ludwig von Bertalanffy, *General Systems Theory* (Braziller Publishing, New, York, 1968), 55-56.

scholar to understand that all systems function with *stocks* and *flows*. Stocks are accumulations of material or information that have been built up in a system over time (its elements), and flows are materials or information that enter or leave a stock over a period of time (its interactions).¹⁰ One can thus see the simplest phenomena as an accumulation of stocks and flows (such as a bathtub filled with water, that drains over time), all integrated within a system (the bathtub system), or more complex phenomena, such as social systems (such as the economy, the various systems of law, etc.).

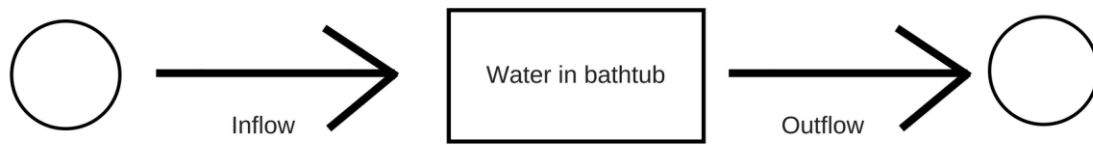


Figure 1. The structure of a bathtub system.¹¹ Author: Cantemir Pacuraru.

The stock is represented by the amount of water present in the bathtub, and the flows are represented by the arrows. In this system, we have two flows, one inflow representing the amount of water that fills the bathtub, and one outflow representing the amount of water drained from the bathtub. The circles stand for wherever the flows come and go. In this figure, the first circle represents the faucet, while the other, the drain.

This simple design is presented to illustrate the basic components that constitute any system, be it simple or complex. The systems scholar can detect through this simple figure, a series of behaviours: there is water flowing in the bathtub, because the faucet is, or was turned on, and that there is water flowing out of the bathtub, because it is equipped with a drain pipe, because of the existence of gravity, etc.

Of course, the interactions between stock and flows do not stop here. Constant behaviours and patterns can be observed over periods of time (these periods depend on the complexity of the system, as we will later see). Such patterns and behaviours can be hints for the existence of *feedback loops* which are mechanisms (be them rules, information flows, or signals), that permit the modifications in a stock to also affect a flow into, or out of that stock.¹² There are two types of feedback loops, one that is designed to balance, to stabilize the stock level, and therefore the system itself, and another that is designed to reinforce, to amplify the system's stock level. The former is termed *balancing* feedback loop, while the latter, *reinforcing* feedback loop.¹³ An oversimplified

¹⁰ Donella H. Meadows, *Thinking in Systems. A Primer* (Earthscan Publishing, London, 2009), 187-188.

¹¹ This Figure is inspired by Meadows' representation of systems. I have used her method of illustration because it is very simple to understand. See Donella H. Meadows, *Thinking in Systems*, part I.

¹² Donella H. Meadows, *Thinking in Systems*, 25; 187.

¹³ For a general introduction into these types of loops, see Donella H. Meadows, *Thinking in Systems*, 27-34.

illustration of the systems of population dynamics may be useful to illustrate how these two types of feedback loops behave.

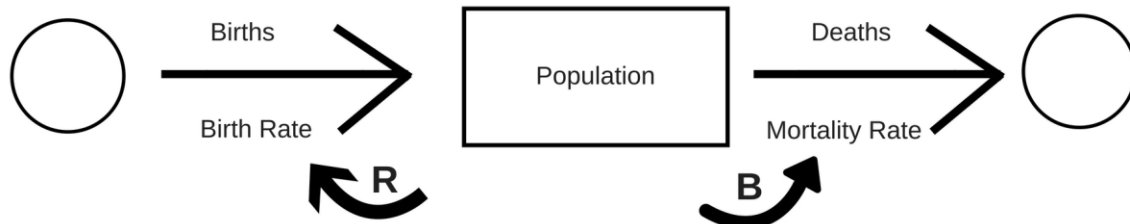


Figure 2. The basic feedback loops that govern population dynamics. Author: Cantemir Pacuraru.

The population system is characterized by the ratio between the birth rate and the mortality rate (inflow and outflow). If the birth rate is higher than the mortality rate, then the population increases (the stock). Vice versa, and the population decreases. We can observe that the stock has an in-built reinforcing feedback loop (R), that boosts that stock through the inflow, i.e. the birth rate. In addition, that same stock has an in-built balancing feedback loop (B), ensuring thus that the population will not grow too much, too fast. By analysing these two loops, the systems scholar can discover patterns and behaviour within the system. If these two loops are equal (they are not, of course), than the system manifests simple behaviours (it is linear). If not, then the value of the stock will change and fluctuate (depending on the dominant feedback loop), determining the behaviour of the system to be non-linear. For example, in 2017, the global birth rate was 1.86%, and the world mortality rate was 0.78%, amounting to a total growth rate of 1.06%.¹⁴ We can observe thus, that the reinforcing feedback loop dominates the system.

Through the lens of systems theory, positivism can be understood as a reinforcing feedback loop that shifts the analysis from the initial scope of the legal system to its consequences in society.

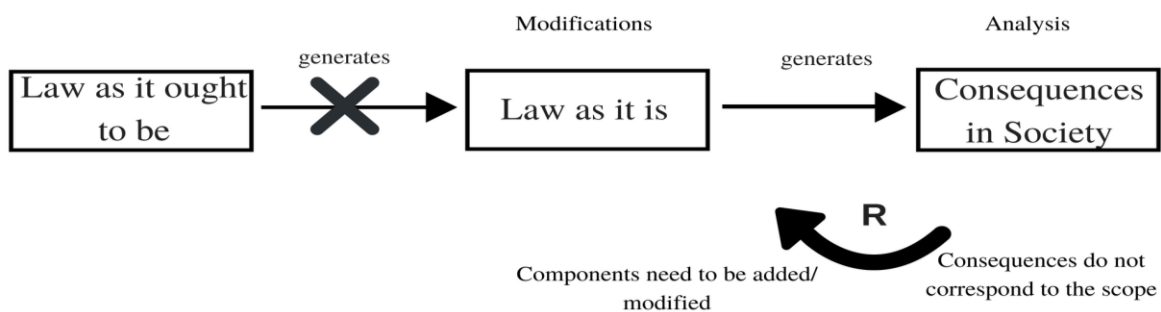


Figure 3. Positivism ignores the law as it ought to be, in the light of its scope.

¹⁴ This data represents the 2016 estimates, published by the CIA World Factbook, last accessed: 07.08.18. <https://esa.un.org/unpd/wpp/DataQuery/>

Positivism sacrifices the analysis of law as it ought to be (i.e. morals) from law as it is (i.e. law in itself), by seeing the consequences of the law as it is upon the society. If the consequences do not correspond to the scope of the system (i.e. the predictability of norms and the security of the legal relations between subjects of law), then intra-system components (such as legal norms) are added or modified. This system tinkering is in itself faulty, due to the fact that consequence analysis creates a reinforcing feedback loop that perpetuates the problems. This explains why States with a large number of legal norms have faulty legal systems.¹⁵ This also explains why many laws change in very short periods of time.¹⁶

There are two last important attributes that are common to every system, which are worth mentioning here.

Firstly, depending on the complexity of the system (such as the number and value of the stocks and feedback loops and the level of flows), the reaction time of a system can suffer delays. The Functional Indeterminacy Theorem (F.I.T.) in systems theory says that “in complex systems, malfunction and even total non-function may not be detected for long periods of time, if ever.”¹⁷ Following this line of thought, any feedback from complex systems may not be detected for long periods of time, if ever. There is an old Romanian proverb that states “The counting at home does not fare well with that at the fair”. Corollaries in English include “don’t count your chickens before they are hatched” or “best-laid plans of mice and men oft go astray”. Delays in response are common knowledge even in everyday life. Forgetting to take into account these delays in response is very common with policy makers, especially in the economic sector. Even in law systems, evaluations of impact concluded by policy makers rarely take into account this important factor.¹⁸

The second attribute is the resilience of the system, i.e. its ability to survive and persist within a variable environment.¹⁹ Resilience evaluates the robustness of systems, and is developed through the existence and/or creation of feedback loops. This attribute of systems makes them immune to some unpredictable events. This brings us to the last and most important characteristic of *some* complex systems: self-organization. The ability of systems to structure themselves, to create new structures, to learn, diversify and complexify,²⁰ is the attribute that gives systems their characteristic of *antifragility*.²¹ An antifragile system is one that can *benefit* from unpredictable events, not only be robust. This concept of antifragile was introduced in systems theory by Taleb, forming thus a triad to characterize systems as being fragile-robust-antifragile. Of course, the latter

¹⁵ Presently, there are 233 normative acts adopted in the Romanian Parliament only in 2018. I did not even consider the secondary norms, such as administrative acts, which may even be ten times as numerous. Last accessed: 26.08.2018. http://www.cdep.ro/pls/legis/legis_pck.lista_anuala?an=2018&emi=2&tip=1&rep=0&nrc=1.

¹⁶ Between its initial adoption in February 2014 and August 2018, the Romanian Criminal Procedural Code has undergone at least three major changes, and around 10 other minor changes.

¹⁷ John Gall, *How Systems Work and Especially How They Fail* (Quadrangle/ The New York Times Book Company, Inc., New York, 1977), 55; 91.

¹⁸ Of course, there are exceptions. The Romanian Criminal Code of 1936, adopted under the rule of Charles II, is a collection of norms borrowed from other criminal codes in Europe (especially the Italian one), and tinkered to reflect Romanian society at that time. The evaluation of impact was done by studying the Italian Criminal Code and its impact upon the Italian society, also taking into account the fact that the criminal code had been in force for more than five years. This study in the delays of response gave birth to one of the best criminal codes Romania ever had.

¹⁹ Donella H. Meadows, *Thinking in Systems*, 76; 188.

²⁰ Donella H. Meadows, *Thinking in Systems*, 81.

²¹ Nassim Nicholas Taleb, *Antifragile. Things that Gain from Disorder* (Penguin Group, London, 2013), 5.

is the most efficient characteristic of systems, although it could have catastrophic consequences if the system's initial scope is not met.

Resilience and self-organization have in common the same unfortunate fate. Due to the complexity of systems, and especially social systems, delays in response exist. Those same policy makers that do not take into account this factor, sacrifice the system's resilience and its self-organization for short term solutions in the name of productivity and stability that only fragilize the system, and sometimes even leading it to total collapse. This is one of the main arguments against legal positivism; the pursuit of ensuring the predictability of norms and the security of the legal relations between subjects of law often leads policy makers to adopt norms that serve as short-term solutions to long-term problems.

C. Benefits of applying systems theory to international law

When referring to various dimensions of law, everyone tends to refer to them as *systems*. The civil law system, the common law system, the international law system. This is not done by accident. Every one of these three dimensions of law are separated into systems, and perform under the same theorems as any other system, be it the society, be it the human body, etc.

And like any other system, the IL system has a scope. The problem with complex systems, such as IL, is that too much attention is given to a small part of that system. Positivism does just that. One systems theorem, the Fundamental Law of Administrative Workings (F.L.A.W.), states in Corollary Number 2 that "to those within the system, the outside reality tends to pale and disappear".²² This 'outside reality', as we will see, is the element which gives the system of law its scope. The more complex the system is, the less information may be processed accordingly, and therefore the easier it is to lose focus of the ultimate scope.

Shifting the attention from positivism to the entire IL system (ILS), one may observe that international law also has an inception and a *raison d'être*. Also, one may observe what type of system IL is, be it an open system or a closed system, and also what flows, stocks, and feedback loops are built in its structure. This, of course has deep implications regarding the various factors that might influence the IL system and pull it into one direction or another. In the next part of the article, attention will be given to the characteristics of international law seen as a system, and the consequences of those characteristics.

III. THE SYSTEM OF INTERNATIONAL LAW

A. International Law: open or closed?

"International law is often, in fact off-handedly, called a system. If we take seriously this proposition that it constitutes a system, we just might change forever the way we think about international law and the role it plays in international relations."²³ The first step is indeed thinking about international law as a system, the next step is to identify the type of system international law is. I will first delimit what part of the ILS I will be referring to throughout the rest of the article, and proceed to analyze it.

²² John Gall, *Systemantics*, 39-41; 89-90.

²³ Anthony D'Amato, *International Law as a Unitary System* (Northwestern School of Law, Public Law, and Legal Theory Series No. 08-02), 5. Accessible here: <http://www.long-damato.northwestern.edu/Adobefiles/SSRN-int-law-Unitary-sys.pdf>

Every system is created to serve a purpose. The problem is that every system, also creates its own goals,²⁴ which can cause damages, not to the system itself, but to the the subjects of the system (i.e. living or non-living entities). To bypass this problem, one must search once more for the initial scope of the system. For that, searching into the law forming mechanisms of the ILS is a good start. Thus, I will be referring to the sources of international law, with special attention to customs and the collective conscience that confers legitimacy upon them and works to perpetuate the system.

There are many classifications of systems, but for the purpose of this article, I will only be referring to one: closed systems and open systems. Ludwig von Bertalanffy is one of the first to propose the study of a general systems theory, and classifies systems as being either open or closed. Open systems are “systems exchanging matter with their environment.”²⁵, while closed systems are “systems which are considered isolated from their environment.”²⁶ This means that one of the key elements that differentiate open systems from closed systems is communication. Bertalanffy describes conventional physics as a closed system where the “final state is unequivocally determined by the initial conditions.”²⁷ It is a common example that of the calculations and predictions made in planetary movements. This is why we can predict the next 100 lunar eclipses. This means that conventional physics is sufficient in itself, and does not necessitate inputs and outputs (i.e. communication) from other systems. Open systems, on the other hand, receive input from other systems and generate, through their internal mechanisms, output to other systems. Examples include living systems (such as animals and plants), and every social system (such the economy, history, politics, law). Of course, this makes open systems infinitely more complex than closed systems, due to the fact that, not only do the intra-system components interact with each other, they also interact with other systems’ intra-systems components.

The ILS can be described as an open system.²⁸ This is the generalized premise which I extract from the analysis of custom, and from the characteristic of systems as being fractal.²⁹ From these two initial suppositions, I extrapolate my argument that the ILS in its entirety is an open system. I later hope to apply the method of falsification to the rest of the ILS.

This view, of course, has its opponents, be it, specifically the ILS, or law systems in general. Valentin Constantin, referring to the ILS, describes it as being a closed system, and at the same time, permeable.³⁰ Constantin argues that the system became a closed one, from the moment when a general accord in the international community had been reached about the valid formation of international norms, because this way, the system can only refer to itself.³¹ Later on, he argues for the permeability of the system, in that it possesses secondary norms that ensure the effectiveness

²⁴ John Gall, *Systemantics*, 59-60; 91-92.

²⁵ Ludwig von Bertalanffy, *General Systems*, 32.

²⁶ Ludwig von Bertalanffy, *General Systems*, 39.

²⁷ Ludwig von Bertalanffy, *General Systems*, 40.

²⁸ There are also some who voice this opinion. See James Carwford, *International Law as an Open System* (Essay 1, Cameron May, London, 2002); Anthony D’amato, *International Law as an Autopoietic System* (Rüdiger Wolfrum & Volker Röben, Max Planck Institut für ausländischen öffentlichen Recht und Völkerrecht Beiträge, 177) pp. 335-399.

²⁹ Donella H. Meadows, *Thinking in Systems*, pg. 80. For more details about systems as being fractal, see Benoit Mandelbrot, *The Fractal Geometry of Nature* (W.H. Freeman and Company, New York, 1977).

³⁰ Constantin, V., *Drept...*, 36; 83.

³¹ Constantin, V., *Drept...*, 36.

of the norms in other systems.³² As we will see, custom, as a formal source of international law, communicates with the international society, to form valid norms.

Gunther Teubner, referring to law systems in general, argues that they are closed, by applying the theory of autopoiesis.³³ According to Teubner, legal systems are self-organizing systems, and at the same time autonomous. Self-organizing, in that they are self-constituting, self-referring, and self-describing.³⁴ These three characteristics of self-organization, Teubner claims, makes the system autonomous. Continuing this line of reasoning, if the legal system is organized autopoietically, then it does not directly regulate social behaviour,³⁵ but what it does is create legislative goals, that change social behaviour so as to reflect the system, and not the other way around.³⁶ This is what happens in consequence analysis, done through the lens of positivism, when the needs of society are neglected. Law should reflect society, not the other way around.

B. Customary Law and its Interactions

Throughout time, different peoples have felt the need, generally for trading rationales, to establish various concrete conducts so that commercial exchanges could be done without the outbreak of a conflict. One example, that in the “mythology” of international law is said to be the beginning of the system, is documented by Herodotus.³⁷ Around the VIth Century B.C., Carthaginians engaged in the practice of ‘silent trading’ with a tribe from northern Africa. The Carthaginians, once at the shores of the tribe, would pile their goods on the beach and return to their ships. In exchange, the tribe members would take the goods and pile an amount of gold in their place. The Carthaginians would return to shore, inspect the amount of gold left in return, and if satisfied would take the gold and leave. If not, they would return to the ship without the gold, and the tribe members would return and add to the initial amount. This practice took place until both sides were satisfied.

From practices similar to the one mentioned above, the first customs were formed,³⁸ and along with them, international law. Anthony D’Amato argues that the term customary law is misleading, and that the appropriate name is general international law. Customary international law has been borrowed from Pitt Cobbett in 1890, which invented a saying that remained: customs

³² Constantin, V., *Drept...*, 83, and afterwards, in a footnote, acknowledges the fact that the ILS is an open system, in so far as it can incorporate norms from other systems or can maintain other relevant relations. A system cannot be open or closed, depending on where one places the lens of system analysis. Even if, at present, the system can be dubbed self-referential, the theory is falsifiable from the moment an unpredictable event will occur and challenge the system’s auto-sufficiency. The invasion of Crimea, hybrid wars, and cyber attacks are relevant examples of the need for systems to find external mechanisms.

³³ Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blackenburg* (Law and Society Review, volume 18, number 2, 1984, pp. 291-301), 293: “Self-referential systems, as closed systems of self-producing interactions, are necessarily, at the same time, open systems with boundary trespassing processes”, quoted from Peter Hejl, *Die Theorie autopoietischer Systeme: Perspektiven für die soziologische Systemtheorie* (Rechtstheorie, volume 45, number 13, 1982).

³⁴ For a harsh critique of Teubner’s theory of autopoiesis, see Anthony Beck, *Is Law an Autopoietic System?* (Oxford Journal of Legal Studies, Volume 14, Issue 3, 1 October 1994, 401–418).

³⁵ Gunther Teubner, *Is Law...?*, 297.

³⁶ Gunther Teubner, *Is Law...?*, 298.

³⁷ Evans, M.D, *International Law*, 32-33.

³⁸ Taking into account the formal requirements of today for the formation of custom, and seeing that those practices cannot be deemed likewise, we shall name them *proto-customs*.

are like footsteps across a common that eventually becomes a path habitually followed by all.³⁹ One more reason for my extrapolation to the whole of the ILS is the fact that customary law is actually general international law.

Customary law is seen as an attempt to create normative structures and rules to constrain and evaluate the conduct of states, but these structures and rules are, *themselves*, drawn from the conduct of states,⁴⁰ while custom is defined as a “spontaneous, natural, and informal mode of creation of a legal norm, that reflects the force of tradition.”⁴¹ Basically, customary law is formed through a norm that needs time to transform into a legally binding rule in international law, apropos of delays in response within systems. From a systems point of view, customs are components of the ILS, that communicate with external sources. From the point of view of the United Nations, customs are formal sources of international law that the International Court of Justice can apply in any case brought before it; “the Court [...] shall apply: [...] b. International custom, as evidence of a general practice accepted as law.”⁴²

The creation of a custom in international law is dependent on two conditions to be fulfilled: the material fact and the existence of *opinio juris*. Many positivists regard custom formation with suspicion, mainly due to *opinio juris*. The material fact does not pose great problems, for it necessitates empirical evidence for the existence of a custom, in that State practice has to be general, uniform, public, frequent, etc.⁴³ On the other hand, *opinio juris* is the psychological component of a custom, meaning that States have to conscientiously exercise the custom, knowing that their action has legal consequences. States are said to be acting with *opinio juris* in the exercise of a custom. Clearly, States do not possess a conscience, and thus *opinio juris* cannot be proved. Positivists argue that one only has to look at the actual practice of the States, meaning the material fact, to determine the formation of a custom.

This criticism in relation to custom formation is precisely the positivist attitude that severs the relation between law as it is and law as it ought to be. It automatically isolates the law system from social reality, and leads to faulty and extreme interpretations of law systems, such as Teubner's. It is evident that States are artificial constructs, and therefore they cannot possess beliefs. But States possess a general course of action, which can be seen by the material fact, throughout the course of time. So, *opinio juris* is dependent on the material fact, and on the passage of time. In addition, custom, i.e. the material fact plus *opinio juris*, is dependent on the social reality, and this is the prime interaction between this formal source of law and the outside world of the ILS. In legal doctrine, this is known as the material source of law.⁴⁴ For example, the necessity of commercial exchanges is what determined the proto-custom of silent commerce to form between the Carthaginians and the African tribe. From a metaphysical perspective, what is beyond the ILS and what determines custom formation is the *nomos*.

The *nomos* is defined as not only referring to explicit laws, but also to moral rules that people expect in their everyday activities.⁴⁵ “It would therefore probably be nearer the truth if we

³⁹ Anthony D'Amato, *International Law as...*, pg. 2, citing Pete Cobbett, *Leading Cases in International Law* 5 (4th ed. 1922)

⁴⁰ Başak Çalı, *International Law for International Relations*, (Oxford University Press, 2010), 123.

⁴¹ Valentin Constantin, *Drept...*, 104.

⁴² Statute of the International Court of Justice, article 38.

⁴³ Malcolm Shaw, *International Law*, 54-58.

⁴⁴ For more details, see *supra*. 2-3.

⁴⁵ F.A. Hayek, *Law, Legislation, and Liberty*, Vol. 1, (Routledge, London, 1993), 96-97.

inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law [...] in the sense that authority commands obedience.”⁴⁶ Authority is legitimised through law, and at the same time enforces law. This means that ‘law’ has an a priori existence, and not be wholly dependent on the existence of an authority. This is, I believe, the essence of the nomos. Whether we term these a priori phenomena ‘law’ or ‘social rules’, is a matter of terminology, that has an importance only if we see the system through the positivist lens. Thus, customs interact with society through the nomos.

One can see in this respect, that the intra-system goal of the ILS is to reflect society. The nomos only works to shape the systems so that it corresponds to the social reality. What is essential, is that the scope for which the ILS has been created and perpetuated (i.e. to maintain international peace and security)⁴⁷, is in accord with the intra-system goal.

C. The Influence of the Nomos on the ILS

As formal sources, customs cannot exist in the absence of pre-existing social conducts, or social norms, or social laws. In other words, the nomos is what determines customs to exist in the ILS. It is the outside flow that constantly feeds into the ILS, shaping custom formation. Thus, we can identify a balancing feedback loop between the nomos and the ILS.

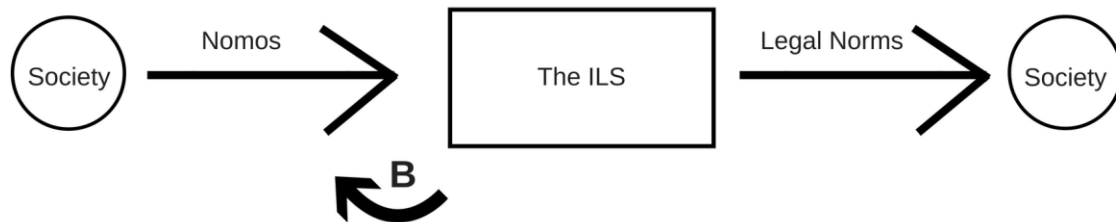


Figure 4. The ILS is an open system that interacts with, and is influenced by the international society, through the nomos. Author: Cantemir Pacuraru.

In respect to international law, society is understood as being the international society, meaning the corpus of States and State to State relations. The ILS is the main stock in the illustration, and the nomos is the main inflow, which facilitates communication between the international society and the ILS. The result of the interacting components of the ILS are the legal norms which represent the outflow, and produce consequences upon the international society. Thus, one can observe from this simplified illustration, that the ILS is an open system that constantly communicates with the international society and its subsystems.

Another consequence of separating law from morals is that, in the process of law making, the actors may easily forget the existence of the nomos or, being aware of its existence, ignore it. This is the case with voluntary norm creation, such as laws passed in Parliament or contracts between parties, in the case of domestic legal systems, or treaties, as in the case of international law. The formation of customs is a natural one, since it is shielded from the actors’ bounded

⁴⁶ F.A. Hayek, *Law, Legislation...*, 95.

⁴⁷ Article 1 of the United Nation Charter.

rationality.⁴⁸ The provisions of a treaty may very well reflect the interests of the parties, but they are unlikely to take into consideration the interests of society. On the other hand, custom is dependent in its formation on the good and the interests of all actors simultaneously, and thus it constantly communicates with the international society by way of the nomos. The balancing feedback loop that is created from the stock of ILS through the customs' communication with the nomos, works to balance out the system. In this respect, custom ensures the survival and perpetuation of the ILS, and bestows upon it the characteristic of resilience, making the system robust.

IV. CONCLUSION

International law is an open system. Like all systems, the ILS manifests some common patterns, such as self-organization and resilience. These two attributes are seen at a later time, due to the complexity of the system that manifests delays in response. This is why, in domestic legal system, policy makers who do not understand this fact, end up incorrectly modifying intra-system components. The ILS is fairly shielded from this, due to the fact there is no central policy maker.

International law is a fairly decentralized,⁴⁹ open system, whose formal sources are treaties, customs, and general principles of law recognized by civilized nations.⁵⁰ Being an open system, the ILS communicates with other social subsystems. One of the main inflows is represented by the nomos, which can be equated to some respect with the material sources of law, which reflect the norms of society; that 'law' which has an a priori existence, necessary for the legitimization of authority. The nomos is important, because it represents the intra-system scope of the ILS. If that scope is not respected, the survival of the system is endangered, and the system will kick back. The actors of the ILS (i.e. principally states), rarely take into account the nomos, due to bounded rationality. On the other hand, components such as customs, are a product of the nomos, and their communication acts in this respect as a balancing feedback loop that ensures the survival and perpetuation of the ILS, making it robust to unexpected events that might occur.

⁴⁸ Bounded rationality refers to the decision-making process of an actor as being based on the available information, which is unlikely to be perfect. For more information on bounded rationality, see Herbert Simon, *Theories of Bounded Rationality*, apud. Donella H. Meadows, *Thinking in Systems*, 106.

⁴⁹ Malcolm Shaw, *International Law*, pg. 3; Valentin Constantin, *Drept...*, 39.

⁵⁰ Article 38 of the Statute of the International Court of Justice.

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