



HiiL

National law in a global society

HAGUE INSTITUTE FOR THE INTERNATIONALISATION OF LAW

HiiL Research Programme

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1. INTRODUCTION

The *Hague Institute for the Internationalisation of Law* is an international research institute that has as its objective the study of the internationalisation of national law in a world where national borders in the traditional sense are eroding, and where the inter-connectedness of societies across state borders is becoming a fact of life.

This inter-connectedness of societies is the result of globalisation: the ideologically and technologically driven process through which geographical distances become less relevant for economic, political and social-cultural relations. The Institute aims to add to the increasing body of knowledge regarding globalisation by studying the consequences of globalisation for national legal systems.

In this regard national legal systems are understood to consist of the law itself (statutes, case law, procedures), institutions (legislature, courts, and other legal bodies), and the relevant actors (judges and other relevant (legal) actors).

National legal systems are becoming less autonomous. The problems confronting them increasingly transcend national boundaries, either because the problems do not lend themselves to solely national regulation or because they involve the interests of the international community as a whole. In this new environment the traditional areas of national law, that is, private law, criminal law, administrative law and constitutional law, acquire an increasingly internationalised character, while the regional (e.g. European) and global legal orders are becoming more and more dependent on the functioning of national legal orders.

These developments have fundamental consequences for the process of national lawmaking, and the interpretation, implementation and enforcement of national law. They also bring to the forefront important questions relating to the legitimacy and coherence of law in general. By examining these developments in a comprehensive manner, from a multi-disciplinary perspective, including both legal and social science perspectives, the Institute hopes to contribute to a better understanding of the functioning of national legal systems in an emerging international legal and social setting.

The *Hague Institute for the Internationalisation of Law* invites the scientific community to submit proposals for research projects on the fundamental questions raised in this research programme.

The structure of the programme is as follows. First, there is an introduction to the process of globalisation, in which the background to the main research question is presented. This is followed by an analysis of the possible consequences of globalisation for the functioning of national legal systems. Finally, these consequences are elaborated upon in relation to three themes: 1. Unification and differences between and within national legal systems; 2. The unity and coherence of the national legal system; and 3. The rule of law and accountability.

2. GLOBALISATION OF SOCIETY

It is not easy to encapsulate the notion of globalisation in a simple phrase. Something on which almost all would agree is that the notion contains a process of increasing inter-connectedness of people and societies across the globe.

A facet of globalisation is the massive increase in the movement of people based on unprecedented technical developments such as the growth of air travel, the spread of multi-national corporations, and the increasing volume of the cross-border flows of goods, services, people, information and capital. The information technology revolution and the easy connections which it has created between communities and people across the planet are described as something which is part and parcel of the process of globalisation.

The process of globalisation is, however, not new and has reached peaks before. What we are experiencing today is sometimes called the 'second heyday' of globalisation. In this context, the 'first heyday' of globalisation refers to the process of (economic) integration during the second half of the 19th century and the beginning of the 20th century that was interrupted by the First World War and the decades thereafter. The process of globalisation did not regain momentum till after the Second World War.

The course of increasing cross-border interdependence and inter-connectedness among economic, political and social actors and units was intensified with the changes in the communist bloc during the 1980's and the 1990's. The economic liberalisation in China, the revolution in Eastern Europe and the collapse of the Soviet Union meant that in many countries barriers to the cross-border flows of goods, services, people, information and capital were lowered or dissolved. This resulted, *inter alia*, in more liberalised markets, more deregulated economies and more privatised state firms. Nowadays almost the entire world has adopted the fundamental elements of a market economy, including private ownership, a currency convertible for international trade and shared standards for commercial transactions. Consequently, the aforementioned cross-border flows have reached unprecedented heights. This is also true for the social-cultural aspects of globalisation. Key indicators of social exchange across borders, like tourism and international telephone calls, all show the same upward trend.

Although the adherence to the standard of the market economy and other neo-liberal principles produced new economic opportunities, it has also resulted in new tensions. Neo-liberal ideology is centred around the concept of democracy, which has the nation as its basic political entity. From this perspective, the state is perceived to be the exclusive

political authority within specific territorial borders, with its legitimacy of authority based upon a constitution and the *trias politica*. However, while people, companies and organisations are increasingly acting on a cross-border scale, the state remains bound to its territory. This results in a mismatch between the operational scope of these actors and the ability of the state to influence their behaviour. As a consequence, the state has become less capable of fulfilling its traditional national tasks, such as securing social order and property rights, redistributing wealth, protecting the environment and fighting (international) crime. Although this is the consequence of a relative loss of control capabilities brought about by globalisation, it is also the result of changing perceptions regarding the role of the state, leading to different objectives and the use of different policy instruments. A third reason appears to be that the criteria by which citizens evaluate their governments have altered as a result of improved access to information, as well as immigration and the concomitant introduction of new values.

One result of the perceived decrease in the ability of the state to fulfil its traditional tasks is the erosion of its legitimacy. Ironically, while the idea of democracy increasingly has gained adherence on a global scale, the disaffection and frustration of citizens within the 'old' and prosperous democracies is on the rise. Not just because governments are thinking differently (neo-liberally) about their function or are finding it difficult to perform their old tasks in an increasingly interdependent world, but also because improved access to information, as well as immigration and the competition and introduction of new values associated with it, have altered the criteria by which citizens judge their legislatures. The ensuing decline of citizens' trust in politics, politicians and political institutions is frequently considered to be a serious problem, especially since it is thought to affect the levels of trust between citizens themselves, threatening the social fabric and the rule of law.

Globalisation can thus be regarded as empowering societal actors but also as enhancing inequalities and underlining differences. It expresses a wholeness (the globe), leading in turn to a need to articulate particularities (the national, the local, the individual) within that whole. This can, for instance, lead to a strengthened collective identity awareness in different, sometimes religious, forms; group thinking and nationalism; 'anti-globalism', anti-modernism, anti-Americanism and terrorism. It also leads to a growing role for (trans-national co-operation between) NGOs.

Another consequence of globalisation has been an increased effort to order existing trans-national social relationships and interests at the international level, *inter alia* through the development of international institutions. Although European states sought to enhance their mutual cooperation after the Second World War through the establishment of the Council of Europe and the predecessors of the European Union (EU) primarily in order to avoid further armed conflict, increasing cooperation in Europe can also be regarded as an attempt to address the consequences of globalisation. In this sense, cooperation on the one hand compensates for the loss of power of individual states due to globalisation, while cooperation on the other hand is intended to prevent competition based on national comparative advantages and the ensuing 'races to the bottom'. The present EU could therefore be regarded as both an effect of and a response to globalisation. Other international and trans-national forms of cooperation, including the United Nations, could be regarded in the same vein.

The transfer of public powers to international institutions remains problematic, also in Europe. This is especially the case since perceptions and expectations regarding democracy and the related notions of constitution and *trias politica* are not easily transferred to the international level of decision-making. The result is that institutions operating at the international, including European, level tend to lack legitimacy. This development is particularly apparent in the EU, where at least for the time being, citizens do not appear to identify themselves with the institutions at the supranational level of governance. Furthermore, it remains to be seen to what extent further European integration will be pursued, and to what extent integration will be adopted as a policy by third states in other regions and on a global scale.

The basic organisational unit of international society as we know it, the state, has become subject to increasing pressures as a result of the process of globalisation. Some may argue that it is becoming fragmented because of the influence of cross-cutting international as well as sub-national networks (private and public), while others may put forward that what we are witnessing is better portrayed as society (re)constituting, or (re)defining, itself and its institutions under the pressures of globalisation. Be that as it may, law has a role to play in these developments and that role may possibly be fundamentally different from the role of law in the state as traditionally conceived. National law will have to accommodate to the process of globalisation. The research agenda of the *Hague Institute for the Internationalisation of Law* focuses on the changes national legal systems are undergoing.

3. CONSEQUENCES FOR NATIONAL LEGAL ORDERS

3.1 *Decreasing Autonomy*

The globalising society has consequences for both the concept and the functioning of national legal systems. Throughout many generations, the enactment, implementation and interpretation of national law has been the prerogative of national legislators, the executive branch and courts. This basic principle is now subject to challenges, which has consequences for the way in which private law, criminal law, administrative law and constitutional law operate.

As the autonomy of states to mould their own national legal system diminishes, the aforementioned disciplines lose much of their independence because many of the problems they seek to regulate transcend national boundaries. When trade, crime, environmental problems, human rights, and health care become international questions, the law has no choice but to follow that development. This means that national law can no longer be understood as an isolated system of rules built only from within a state. On the contrary, national law becomes part of a cross-boundary system of rules.

The consequences are far-reaching. Among other things they entail that the laws of the land can no longer be considered as a singularly national heritage because other states and non-state actors from other states also have an interest in the enactment,

interpretation, implementation and enforcement of the laws in the states concerned.

This transition from national law as a closed system, governed by a rather finite definition of national sovereignty, to an open system in which it is moulded into and becomes part of an international system, raises fundamental questions regarding the role, the position and the function of the different branches of national legal systems. It would be an oversimplification to say that legal systems were once completely closed and immune to their international context. The past spread of, for example, the common law tradition through the British colonial empire is an historical example of the influence of the international context. But it is clear that, nowadays, the nature of that international context, or perhaps its intensity, has changed dramatically.

How do states deal with that international context? What is the role and the meaning of national legal institutions, including the national legislature, executive and judiciary? What is their relationship with international institutions and how do they deal with the rules that these bodies create? How do parties deal with this enfolding legal-pluralistic environment? And what changes should the national legal system undergo to keep functioning effectively within an internationalising context?

These questions are particularly complex because of the two basic kinds of pressure that globalisation puts on national legal systems: top-down and bottom-up. The top-down pressure is the result of the growing transfer of the right to make and apply law to the regional (including the European) and international level, as a consequence of or a reaction to globalisation. Regimes or structures are created that work downwards through to the national level.

The EU is the most developed example of the establishment of such an international regime, with an actual transfer of powers to a supranational authority of which the decisions are not only directly applicable in the national legal orders, but even have precedence over conflicting national rules. In the EU member states the impact of European law on the creation, interpretation, application and enforcement of private law, criminal law, administrative law and constitutional law is incomparable to the influence of other international or foreign law. Many of the current practical problems in these areas of national law follow from the complex relation they have with European law. But there are many other examples of international organisations or other regimes that establish and apply rules, and that have over the past decades also led to the proliferation of international judicial bodies.

The bottom-up kind of pressure on the national legal system results from the globalisation of society. In contrast to the top-down movements described above, these movements have a more horizontal character. Individuals and organisations are less and less hampered by national borders in their relations. This, for instance, opens new perspectives for choices regarding the kind of law that parties may wish to (and can) apply. Consequently, national lawmakers have to take into account what rules apply elsewhere: they can no longer ignore the realities of the surrounding world. At times, competition between national legal systems drives adaptation of national rules; otherwise large enterprises or other subjects of law might shun a state which enacts laws that are

seen to hamper business, thus damaging the state's interests.

Trans-nationalism thus results in a number of developments. First, in addition to the usually used formal processes of lawmaking and of harmonisation, one increasingly witnesses a choice for more informal processes of lawmaking and of harmonisation. Great influence may be exercised by models or principles elaborated by international experts, even though they are technically not binding. Second, statutes or case law enacted or developed in another national jurisdiction may be applied, resulting in a quest for a *ius commune* in a particular legal area or discipline. The United States, for instance, shows that a large degree of unity in law can be created through horizontal tuning at the level of individual states. Third, there is a shift between the public and the private domain. Private actors have started to perform what traditionally would be seen as public functions. International enterprises become parties to international agreements regarding the settlement of disputes or professional standards (*cf.*, the development of the so-called '*lex mercatoria*' on international economic relationships). The distinction between 'private' and 'public' changes, and may even disappear when both private and public actors are involved in the formulation of international rules.

It is thus becoming increasingly difficult to draw clear lines of separation between the national legal order and the international (including the European) legal order, as well as between public and private spheres and competences. In the social sciences, the phenomenon of interacting and partially overlapping competences is often referred to as multilevel governance. 'Multilevel' then refers to a variety of forms of decision-making, authority, policy-making, regulation, organisation, ruling, steering and enforcement. 'Governance' is used to indicate a less hierarchical form than 'government'. Multilevel governance is characterised by a complex interweaving of actors operating at different levels of formal jurisdictional or administrative authority (global, regional, national and sub-national and within both what were traditionally considered to be the private and the public sphere). It is clear that these phenomena involve important questions concerning the location of power, the sharing of responsibility, the legitimacy of decisions, decision-making processes and decision-makers, and accountability to citizens and organisations in different national and international settings.

These developments cause old and trusted concepts of law, with their clear definitions and known effects, to lose meaning. What is the meaning of the *trias politica* at the national level in a world where national law and international law interact so strongly and where, at the international level, the *trias politica* is non-existent? What does that mean for the rule of law? What consequences does the fragmentation of sources of law have for the coherence and unity of law, so closely guarded at the national level through a hierarchical structure with a supreme lawmaker, executive and adjudicator, all three non-existent at the international level?

3.2 The Continuing Relevance of the National Legal Order

It might be suggested that a possible solution to all these problems could be found in the establishment of supranational arrangements bearing many, if not all, the characteristics

of a sovereign state. Indeed, it is sometimes argued that with the EU some steps seem to have been taken in that direction. However, at least in the short term, it appears unthinkable that even the EU could be shaped along the lines of the national model. Even in the EU, the efficiency, effectiveness, equity and legitimacy of the legal order is still largely dependent on the efficiency, effectiveness, equity and legitimacy of the national legal systems of its members. It is precisely for that reason that the EU requires candidate member states to meet certain requirements in the field of democracy, the rule of law and justice, which, according to liberal ideology, imply the existence of an effective national (legal) order. In other words, an effectively functioning supranational European legal order cannot exist without its constituent members having an effectively functioning legal system as well.

This point is not limited or particular to European states. Given that there is no 'world law-maker', no 'world legislature' and no 'world judiciary', *i.e.*, 'no world government', the above made point is equally applicable to the international legal order as such and thus applicable to any (group of) state(s) forming part of that order. To a large extent, the effectiveness of international law as a system of legal rules and principles depends on its implementation at the national level. It is difficult to perceive of an effectively functioning international legal order if its principal subjects, states, are unwilling or unable to comply with the legal norms and principles constituting the international legal system. In that respect it should be kept in mind that quite a variety of states exist and that not all of them are always capable of contributing to the full extent (*e.g.*, the least-developed and 'failed' states) to the international legal order.

The remaining relevance of the national legal order is, however, undisputed. It forms the principal locus of the changes at the international level. For, insofar as law is concerned, it is in the creation, interpretation, application and enforcement of national private law, criminal law, administrative law and constitutional law that the effects of or reactions to globalisation emerge. At the same time the socio-political organisation of peoples into states is still seen by many as one of the highest and most sophisticated forms of organisational structure to which people can relate and through which identity, culture and history are expressed. The national legal system remains the most important and potentially effective arrangement through which (certain) human behaviour can be regulated and organised. While other systems have been imagined, ranging from de-territorialised and overlapping systems of alliances and concomitant legal systems to world government, a leading question remains how existing national legal systems adapt to the changes involved.

The emerging paradox is that, at least for the time being, the success of efforts to find solutions to problems that cross state boundaries is largely dependent on the presence of strong and effective national legal systems.

3.3. Overall Research Question

Against this background, the overall research question of this research programme can be phrased as follows:

How and to what extent are national legal systems affected by the fact that they form part of a globalising society, how do or should they react to this development and what are the consequences for the trias politica and its actors?

With no intent to be exclusive, the next section will further develop the research question on the basis of three inter-related principal themes.

4. THREE PRINCIPAL THEMES

Many of the problems of globalisation and its pressure on national legal systems flow from differences in the pace of change. The fight against crime can serve as an illustration of this phenomenon. Many researchers think that the increasingly unhindered flow of goods, persons, services and capital opens windows of opportunity for (organised) criminals who move faster than criminal justice systems are able to move in responding to them. The discrepancy in criminal action and the (legal) reaction to it can result in legal, institutional and behavioural practices that may question the unity and coherence of the national legal system, for instance when criminal justice officers cross national borders in their pursuit of criminals.

However, problems like these are not universal. The kinds of problems that globalisation brings about differ from one national legal system to the other, and the same applies with respect to the severity of these problems. For a large part this appears to be the result of marked differences in the cause, that is, the 'gap' between the pressure on the national legal system that globalisation brings about on the one hand, and the response of the national legal system to this pressure on the other hand. The extent to which this discrepancy burdens the unity and coherence of the law appears to be of major importance in this context, as are the broader consequences of the way the national legal system deals with it. This is more extensively looked at below.

Regarding the pressure that globalisation brings about, the size of the national economy and its position in the world economy and world society are of major importance. Some countries are, for instance, more able than others to influence the course that the internationalisation of law takes, the influence of the Anglo-Saxon national legal systems regarding international contract law being a case in point. Another example concerns the fact that in the developing world economy some countries are net importers of labour while other countries are net exporters of labour, causing different migration-related pressures on their national legal systems.

The way in which the national legal system responds to the pressure caused by globalisation is another important aspect, irrespective of the content of that response (whether or not to adapt national law, whether or not to attempt to influence the development of international law). This response may, for instance, be related to the degree to which the national (economic and social) systems are opened to the outside world, the nature and workings of the national legal system, the role of ordering mechanisms other than law in influencing behaviour of actors (*i.e.*, social norms and

networks), the national strategy chosen to respond to the pressures of globalisation and/or other national traits (*i.e.*, range of the 'shadow of the law'). Furthermore, it could also be the result of national (historically grown) preferences regarding parts of national law that governments prefer to keep unscathed. Finally, a reaction to the pressure of globalisation may be inadequate. In this context it should be noted that the 'gap' between the pressure on the national legal systems and the reactions of these systems to this pressure are changing over time, partly as a result of policy reactions. This means that national legal systems are taking aim at moving targets. Reactions could have been adequate at an earlier moment in time, but may not be sufficient any more at a later stage.

The kind and extent of the problems that the pressure-reaction 'gap' engenders appear especially related to the extent to which the unity and coherence of the national legal system is burdened. Without unity and coherence in national legal systems, unequal application and upholding of the law looms ahead. This means that judicial decisions and activities of law-enforcing agencies could become unpredictable, which affects the behaviour of legal bodies, parties and societal actors in all kinds of ways. Nowadays it is not uncommon for cases to be governed by legal rules originating at different levels of governance (the national, the regional (including the European), and the global level), without rules regarding the hierarchy between those different levels. Depending on the degree of incoherence and the choices of judges regarding the law they apply, there is a threat of fragmentation of the legal system and hence of degradation of some of its most fundamental principles.

Regarding the broader consequences of the way the national legal systems react (adapt) to the pressure-reaction 'gap', it appears that especially the rule of law and accountability are burdened. The transfer of competences from the national level to international organisations, or the creation of new competences at the international level, do not always run parallel to a transfer of the checks and balances that traditionally exist in national legal systems. At the same time, the application of 'foreign' rules or the enforcement of rules by foreign officials seem to increase, for instance regarding anti-terrorism measures. This has led to questions regarding democratic control, accountability and the application of the rule of law.

The differences set out above translate into three themes, each taking the national legal system as the principal point of departure. In this regard it will be recalled that national legal systems are understood to consist of the law itself (statutes, case law, procedures), institutions (legislature, courts, and other legal bodies), and the relevant actors (judges and other relevant (legal) actors).

In writing research proposals, researchers may use these themes for inspiration. It is not an absolute requirement that proposals fit into one of the themes; proposals may cover different aspects of the themes or add new dimensions.

1. Unification and differences between and within national legal systems. The influence of the process of globalisation is discernable in most national legal systems even if to varying degrees. Possibilities for (further) internationalisation seem to depend on

national (legal) cultural preferences and possibilities. What methods of internationalisation (including harmonisation) are appropriate for the different areas of national law, what are the advantages and disadvantages of each, and what are, if any, the limits of integration?

Another question is: in what way are these differences related to the kind and extent of pressures that national legal systems endure and to national (cultural, legal) particularities regarding the functioning of the national legal system (including ordering mechanisms other than law and the sphere of action of the 'shadow of the law')? What does this mean for the course that harmonisation might follow and what risks and consequences will that entail for (the effectiveness of) the national legal system?

2. The unity and coherence of the national legal system. We are used to a national legal system with a clear division of competences and a clear normative hierarchy. However, the internationalisation of law challenges and promises to further challenge the unity and coherence of the national legal system. How do national legal systems cope with the processes of globalisation and with what type of problems are they confronted in terms of the unity and coherence of their system?

3. The rule of law and accountability. National legal systems are built around a system of checks and balances, in which the rule of law is one of the basic principles. What are the effects of processes of globalisation for the national legal system on questions related to the rule of law (including human rights), legal protection and legal accountability?

These three themes are elaborated upon in more detail below.

4.1 *Unification and Differences Between National Legal Systems*

The influence of the process of globalisation is discernable in most national legal systems even if to varying degrees. Possibilities for (further) internationalisation seem to depend on national legal cultural preferences and possibilities. The underlying research question of this theme can be phrased as follows: What methods of internationalisation (including harmonisation) are appropriate for the different areas of national law, what are the advantages and disadvantages of each of them, and what are the limits of integration?

It has already been stated that the process of globalisation forms an incentive to further internationalise national law. After all, international commercial ties are facilitated through uniform rules, air traffic would be seriously impeded if each state had widely divergent safety requirements, and criminals would benefit from the absence of international judicial cooperation. Indeed, legislators and judges can no longer afford to take only national preferences and experiences into account in the enactment, application and interpretation of law. At the same time this tendency is confronted with an opposite development, in which the governments of states resist further international integration with the effect that diversity in law may continue to exist. Reasons for this resistance may be found in a variety of considerations, such as the effects on national sovereignty and the rule of law as well as national preferences and experiences. The latter are often built up over many

years and form part of the cultural history of a state, and are, therefore, not easily given up. Governments do think twice before making their national legal system too much dependent on extra-national sources as they realise that possibilities for change become less flexible.

This may result in questions regarding the desirability of further internationalisation of national law. The debate on harmonisation is highly influenced by the political nature of the issues, and arguments related to national sovereignty tend to play a substantial role in this area. Governments may therefore choose to leave some parts of national law untouched when the debated issues have a marked (national) cultural dimension. This could, for instance, be the case regarding certain acts governed by criminal law, such as euthanasia, abortion and some sexual offences (prostitution). This may also apply with respect to constitutional law dealing with the fundamental relationship between citizens and the state. Some governments may choose to keep the basic rights (the civil and political rights as well as the social basic rights) untouched while others may decide to harmonise these parts of national law too.

If internationalisation is chosen, it may come in different shapes and forms. In the context of the EU there is still a preference for top-down or vertical solutions, in which the specific characteristics of the instruments (Regulations, Directives) play an important role. At the same time, the use of Framework Directives in the EU comes closer to the system in the United States, where uniformity is achieved through more bottom-up, horizontal means (albeit within a federal framework). It is clear that those solutions differ enormously: flexibility, room for maintaining (some) national preferences, efficiency and effectiveness in the administration of justice and the uniformity that is reached, are dependent on the method that is used.

Choices in this regard often depend on (legal) cultural factors. Deeply felt convictions which can be reflected in the law often resist harmonisation. But legal traditions or legal culture are important too. For instance, different court procedures may make the harmonisation of substantive rules unworkable. On the other hand: a common (legal) culture may have a strong harmonising effect by itself, making binding rules superfluous.

It should, however, not be overlooked that cultural and historically grown preferences are not the only causes for different attitudes of governments regarding the question whether or not to further internationalise national law. At least as important is the fact that the kind and extent of the challenges that states face due to globalisation differ. On the one hand these differences can be related to the top-down kind of pressure, for instance the degree to which states are able to influence the content of the law that is made at the international level. On the other hand it can be the result of the bottom-up kind of pressure, for instance whether or not the national infrastructure is facilitating international trade streams; whether or not the government chooses to accept immigrants and whether or not these immigrants have to meet certain requirements. The resulting effects for national legal systems are potentially numerous and may range from questions regarding the degree of harmonisation and the equality of the application of the law for the legislature and judiciary to different kinds of law that parties may wish to and do apply.

Legal research should profit from the views and experiences in the various fields of national law: private law, criminal law, and administrative and constitutional law. In addition, interdisciplinary cooperation is essential for many aspects of the questions raised. Economic analysis (*e.g.*, costs and benefits of unification) and analysis from social, political and cultural perspectives (both normative and empirical) are also required. In addition, not only should the content of harmonisation be studied, but also the effects of harmonisation. To name one example: in what way and to what extent will harmonisation of penal law in the EU influence the effectiveness, efficiency, efficacy and legitimacy of the fight against crime and terrorism at the national level?

4.2 Unity and Coherence of the National Legal System

In short, the underlying question of this research dimension is: how do domestic legal orders cope with the processes of internationalisation and globalisation, and with what type of problems are they confronted in terms of the unity and coherence of their system?

In a formal legal sense, the sovereignty of states makes them free to decide on the relationship between their own national legal order and any other legal order. But irrespective of the starting point they choose (a monist or dualist system), the process of globalisation has increasingly confronted them with 'extra-national' norms and rules. The reason is threefold: over the past decades states have increasingly accepted international norms (by concluding treaties and acceding to international organisations); the competences of (some) international organisations have developed in such a way as to deprive states of their exclusive national jurisdiction; and at the same time we are getting used to the application of foreign law in our own legal system. In other words: there seems to be a proliferation of legal sources in all legal systems.

Unity and coherence are often portrayed as the bedrock of a legal system, without which there would be no equality in the application of the law and no predictability of judicial decisions. It is increasingly common for situations to be governed by rules originating from different levels of governance, without any indication as to the hierarchy between the levels in question. It is often the case that none of the lawmaking authorities has final responsibility for the whole, with ensuing confusion for legal subjects, risks to the perception of law as a useful tool, and consequences for basic principles such as the principle of equality and of legal protection. This may result in a decreasing predictability regarding judicial decisions as the question could arise which kind of law judges are going to apply. As a result, this may have consequences for the effectiveness of law, the functioning of courts and the trust of citizens in their national legal system.

The unity and coherence of a national legal system may first of all be affected through the influence of international rules. While in some (exceptional) cases international rules may have a positive effect on the coherence of law (the best example being the need for EU-law conform| interpretation), these rules may also disturb and even uproot national paradigms and systems, and cause a fragmentation of the national legal order. In addition, when subjects of law invoke international rules, national judges or prosecutors will have to find ways to apply them in a specific national context. It is possible that the national legal

system is confronted with international rules that conflict with or contradict existing national rules, and which perhaps require an adaptation of the techniques of finding and interpreting the law. How can the normative coherence of the law be maintained when legal orders continue to value the results of a codification process but at the same time are confronted with the dynamics of internationalisation? Is striving for unity of law within a national legal system through codes and the hierarchical organisation of national courts no longer adequate to preserve unity in the present situation? Furthermore, the effect that the striving for unity of law under varying conditions may have on the content of the law and the functioning of the national legal system is of importance here too, especially since it may influence the considerations regarding the desirability of harmonisation per se or the harmonisation technique chosen.

Secondly, problems of coherence arise when subjects of one state invoke precedents or interpretations of law originating in other national legal orders or when national legal principles (such as the principle of equality) are challenged because of different interpretations of international or foreign rules. With trans-nationalism new questions emerge in the direct relations between sub-national levels.

Thirdly, the shift from public to private arrangements may add a challenge to the unity and coherence of the national system. The tendency in some states to move traditional public tasks to the private sector (*e.g.* mediation, private covenants, self-regulation) may have consequences for the legal system as a whole.

Lastly, international influences – not necessarily legal ones – may require sudden adaptations of national law thereby raising fundamental questions of coherence. The rather abrupt need for changes in national legislation as a result of the 11 September terrorist attacks is a case in point.

The legislative, executive and judicial branches each have a role in upholding the coherence and unity of domestic legal systems. Internationalisation may affect those roles. What can be done in the formulation of policy, the drafting of laws, and the adoption of judicial decisions to ensure that the national legal order communicates well with the international environment and at the same time is able to continue to function effectively as a coherent whole, serving the needs of society?

4.3 *The Rule of Law and Accountability*

The underlying research question of this theme could be phrased as follows: what are the effects of processes of internationalisation and globalisation on the national legal system and on questions related to the rule of law, legal protection and legal accountability?

Although nominally states retain a legal claim to effective supremacy over what occurs within their territories, this is significantly compromised, to varying degrees, by the development of international governance and the constraints of, as well as the obligations derived from, international law. In compromising the principle of self-governance, globalisation strikes at the essence of democracy, a cornerstone of the rule of law.

Democratic government assumes a direct correspondence among state, territory, nationality, sovereignty, and legitimacy. There is, however, a growing asymmetry between the global and trans-national scale of contemporary social life and the territorial organisation of democratic accountability.

In other words: transfers of competences from the national level to international organisations (or the creation of new competences at that level) do not always run parallel to a transfer of the checks and balances that traditionally exist in national legal orders. At the same time, the application of 'foreign' rules or the enforcement of rules by foreign officials seems to become more accepted.

In a world in which global warming appears to connect the long-term fate of many Pacific Islands to the actions of tens of millions of private motorists across the globe, the orthodox state-centric model of democratic accountability appears outdated. This assumes a world of territorially bounded communities in which citizens hold their governments directly accountable. Globalisation, however, disrupts this neat theoretical correspondence with the leaking of power across territorial borders, often beyond the democratic reach of the affected communities.

The rule of law is a two-edged sword; it is both a safeguard against arbitrary government (a government by law not by men) and a concept for the legitimisation of governmental action (*nulla potestas sine lege*). In liberal democracies the rule of law principle is linked to the principle of democracy in the sense that law, in one way or another, originates from the will of the people. It is the people who ultimately decide upon the content of the law, albeit within constitutional boundaries. In most continental systems these boundaries are constitutionally embedded expressions of *Rechtsstaat* principles: legality, separation of powers and human rights. Thus, in traditional liberal democracies, the principle of the rule of law and the principle of democracy fix the parameters for lawmaking.

As we have seen, globalisation features the horizontal relocation of authority – for instance, from public to private agencies. Juxtaposed with this horizontal relocation, globalisation also features a vertical relocation of authority between the various layers or infrastructures of governance (sub-state to supra-state). In addition, the last two decades have witnessed a trend towards regionalism and its deepening. These developments raise serious issues concerning democratic as well as legal accountability and the rule of law.

Against this background several questions come to the fore: what is the relevance and meaning of the principles of the rule of law and democracy (especially public accountability) in multilevel legal orders with 'mixed', national and international (including European), law and mixed jurisdiction? How and to what extent are the principles of the rule of law and public accountability themselves affected by mixed law and mixed jurisdiction in multilevel legal orders? What are the effects of this trend on the functioning of the national legal systems on the one hand and the behaviour of citizens regarding, for instance, the degree to which they put trust in their national legal system on the other hand?

A special aspect of the question of the rule of law is the following. The effectiveness and

fairness of the national legal order is of fundamental importance to the effectiveness of the international legal order. This thought lies behind the primacy and direct effect of EU legislation as well as the obligation to interpret and apply national law in conformity with European law. Similar examples can be found in other areas as well. Thus, the further development of international criminal law relies on the ability and willingness of States Parties to the International Criminal Court to prosecute at the national level persons who have committed international crimes. Conversely, the domestic application of the rule of law increasingly depends on its application at the international level and in other domestic legal systems. It is for this reason in particular that international institutions, such as the World Bank, invest in 'good governance', including transparency, the rule of law and accountability at the national level. This raises questions regarding, for instance, the criteria for determining the existence of 'good governance' and the rule of law, about the possibilities and methods for promoting and bringing in the rule of law from outside or preventing its collapse, and with respect to the responsibility of the international community regarding the national legal order within a country. Moreover, as with respect to the EU, questions regarding the legitimacy of that legal order itself arise.

5. HIIL AND THE INTERNATIONALISATION OF LAW IN A GLOBALISING SOCIETY

Internationalisation of law can only be fully understood if the national legal systems are viewed as functioning in a multilevel and multi-actor system in which the different sub-systems are in constant interaction, even if that interaction may vary in intensity depending on the specific area of law. This interaction confronts law-makers, the executive, courts and tribunals and other legal actors at all levels with a large number of comparable problems. These problems, in turn, challenge researchers to identify and analyse the problems both in order to generate scientific knowledge and also, importantly, to provide insights into how such problems may be dealt with in practice. This is important for governments, governance, and organisations active in developing approaches to the multifarious challenges that globalisation poses to national legal systems. This is true for developed countries as well as for developing countries. In the latter, the knowledge produced could also help to foster the rule of law and justice.

The acceptance of a multilevel legal order in which national, regional (including European) and international law are presented as forming part of an ever-closer unity thus calls for an integration of research themes both vertically (national, regional, global) and horizontally (across disciplines and international/comparative).

For national legal systems, the future will, no doubt, be different from the past. The top-down and bottom-up pressures of globalisation, the effects of the growing transfer of the right to make and apply law to the international level on the one hand, and the effects of the development that individuals and organisations are less and less hampered by national borders in their mutual relations on the other, will necessitate accommodation by the national legislative, executive and judiciary bodies. In the context of national legal systems law can no longer be understood as the law that was formed within the national state. Because other states have a voice in its content, in particular through decision-

making in international (including European) organisations, national law is changing from a closed, nationally defined legal system to an open system that is part and parcel of a globalising society. For the executive and judiciary as well as parties to legal conflicts this has many potential effects and consequences, deserving the attention of a new international research institute.

The study of the combined effects of globalisation on national legal systems calls for a multidisciplinary approach, merging legal and social science research, including economics. In this way, knowledge can be produced with scientific as well as practical relevance.

HIL invites the scientific community to submit proposals for research on the terrain outlined above.