FRAGMENTATION OF GLOBAL LAW: A COGNITIVE SUGGESTION ON HOW TO LEAD WITH MIRACULOUS NORMATIVE PARALELL UNIVERSES

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ABSTRACT: This paper investigates the cognitive challenges that global law is possibly facing in postmodern context. It addresses questions relating to the acceleration of social life and the propensity that all dimensions of law, such as national orders, international law, regional law and so on, have to abrupt changes and transformations in the globalized world. The decisionism behind the abrupt deformation of consecrated policies not always ensure legal coherence; it is likely to promote normative parallel universes. Such permanent decisionism is held, in this paper, as miracles, in a reference to Schimitt's work. For leading with such questions, it is sustained that there is an emergent cognitive paradigm, which is appropriated to avoid knowledge compartmentalization and to avert legal fragmentation, or at least to empower people to have a position over the miraculous measures. It seeks the articulation of all knowledge fields and the production of general understandings on social life. For that purpose, complexity must be considered as a basic scientific assumption: it refuses classical scientific method, which is inspired by the reducement of the study object and the understanding that reality is made of linear causality relations between the smallest possible pieces of a phenomenon. The challenges treated in this paper requires a new role to researchers and universities.

KEYWORDS: Postmodernity; Global law; Fragmentation; Decisionism; Complexity.

TABLE OF CONTENTS

1. INTRODUCTION

2. WHAT IS POSTMODERNITY?

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3. THE DEBATES ON THE FRAGMENTATION OF PUBLIC INTERNATIONAL LAW AND NORMATIVE CONFLICTS

4. FRAGMENTATION AS A CONCERN TO GLOBAL LAW: THE BRAZILIAN MIRACLE AS AN EXAMPLE

5. CONCLUSION

REFERENCES

DOCUMENTS

CASE LAW

FRAGMENTATION OF GLOBAL LAW: A COGNITIVE SUGGESTION ON HOW TO LEAD WITH MIRACULOUS NORMATIVE PARALELL UNIVERSES

1. INTRODUCTION

There is much of evidence that global law faces a cognitive challenge. First, because there is a widespread questioning of predominant scientific paradigm as a whole, which is particularly persuasive in social areas. According to such perspective, reducement and specialization are not capable to explain the concerned object, at least considering its complexity. Second, because current claims of democratization of global law has led to criticism on its western features and the changing of power and economical structure makes a new perspective, sensitive to cultural differences, a matter of survival for international law. Third, because recent debates have been demonstrating that international law fails to be described as a hierarchical and unified order, whereby classical methods of leading with normative conflicts are not useful when applied to dynamic normative clusters.

The arising scientific society of bourgeoisie revolution has created methods for perceiving natural phenomenon through its transformation, aiming its control, in spite of perceiving it through mere observation as ancient theorists used to do. For a successful result, scientific approaches should decompose the concerned object into its particles, which should be the smallest possible. Scientific concerns consisted in an operation of atomization, well represented by Descartes method and his four logic guidelines[3]. Inasmuch as such paradigm has been developed and implemented throughout history,

[3] "(...) So I thought that in place of the large number of rules that make up logic I would find the following four to be sufficient, provided that I made and kept a strong resolution always to obey them. (1) The first was never to accept anything as true if I didn't have evident knowledge of its truth: that is, carefully to avoid jumping to conclusions and preserving old opinions, and to include in my judgements only what presented itself to my mind so vividly and so clearly that I had no basis for calling it in question (…) (2) The second was to divide each of the difficulties I examined into as many parts as possible and as might be required in order to resolve them better. (3) The third was to direct my thoughts in an orderly manner, by starting with the simplest and most easily known objects in order to move up gradually to knowledge of the most complex, and by stipulating some order even among objects that have no natural order of precedence. (4) And the last was to make all my enumerations so complete, and my reviews comprehensive, that I could be sure that I hadn't overlooked anything" (DESCARTES, René. *Discourse on the Method of Rightly Conducting one's Reason and Seeking Truth in the Sciences*. Jonathan Bennett (Early Modern Texts), 2007. Available in: http://www.earlymoderntexts.com/assets/pdfs/descartes1637.pdf. pp. 8 – 9.

much effort has been done by all knowledge fields to comply with it, including social studies, which meant to understand society in a positivist light.

One of the main features of such paradigm is to seek predictability. It means to assume that between particles of the decomposed study object shall be established linear standards of causality relations, so if the theorist faces certain cause it becomes easy to estimate the consequence. Moreover, scientific society requires specialization, in a way that knowledge must be separated into circumscribed thematic fields, from which highly specialized theorists can absorb and improve their own rationalities. Therefore, such paradigm also resorts to the so-called knowledge compartmentalization.

The weakness behind such paradigm is to isolate all social perspectives, as if they had no possible interaction, from what specialists pertaining to one area ignore the works produced within other area. Consequently, there is no seeking for dialogues and the production of general senses on humankind's behavior, activities and system of values, economic and political conditions.

By virtue of proclaiming a new cognitive framework, certain scholars have stood that such paradigm is not able to understand natural and social phenomenon accordingly to their interactivity. Opposing to simplification through atomization, the incipient approach vindicates the understanding of phenomenon relating it to wider contexts. It presupposes replacing simplicity to complexity, which, according to Edgar Morin, does not mean completeness; it means the consideration, for example, that if human being's behavior is a result of biological, social, psychical and cultural aspects, the complexity approach will logically seek for the articulation of all the aspects. Having complexity as a premise commits the observer with multifactoriality as a way to conceive and explain the study object, refusing simplification and the establishment of linear standards of causality. It accepts incompleteness, but denies the mutilation of knowledge caused by simplification and separation of the fields of knowledge[4].

In the same vein, the arising paradigm also resources to the idea of disorder and fortuity, opposite to the assumption that all phenomenon can be understood by causality and assurance, as well as following such paradigm scholars shall refuse knowledge compartmentalization to produce transdisciplinary analyses.

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[4] MORIN, Edgar. *Ciência com Consciência*.. Maria D. Alexandre e Maria Alice Sampaio Dória (trans.). Rio de Janeiro: Editora Bertrand Brasil, 2005. pp. 175 – 178.

According to Maria José Esteves de Vasconcellos, the main features of the ancient paradigm are: 1) simplicity, as the activity of fractionating the study object and seeking linear relations of causality between the smallest possible fractions; 2) stability, whereby scholars assume that linear causality relations necessarily leads to the same results; 3) objectivity, from which there is a belief of scientific neutrality. Such paradigm is under reform, being replaced to a new paradigm, characterized by: 1) complexity to replace simplicity, refraining from linear causality and fractionation, and relating the study object to wider contexts; 2) instability to replace stability, acknowledging fortuity and the impossibility of controlling every phenomenon; 3) intersubjectivity to replace objectivity, from the acknowledgement that a study is a consequence of the relation that the observer holds with the object[5].

The second evidence consists in the plea for democratization of global society by means of considering transcivizationality in international law. Yasuaki Onuma, in a work recently translated and published in Brazil, challenges the westcentric character of international law. Its criticism points a series of western cultural convictions rooted in such legal dimension, from the proper sense of state and citizenship – which is by virtue of occidental social processes strongly connected to the idea of territory, differently of other cultures in which the citizenship connectivity is associated to the sense of pertaining to a common religious system of values –; until human rights, excessively centered on the idea of liberty whereas nonwestern countries conserve a sense of human rights based on collectivity. At the author's work, abolishing occidental bias is not an utopia, but a necessity derived from the changing of power and economic structure, inasmuch as the world has been led into multipolarity[6].

Finally, the third point is that normative conflicts solutions are difficult in international law, because of its organization into regimes, which mean cluster of treaties thematically circumscribed. Regimes incorporate particular social rationality and they are self-proclaimed autonomous relating to general international law, by virtue of aiming to furnish exhaustive intelligibility on certain issue. Regimes are evidences of what has been named as fragmentation of international law and, at least to some degree, undermine the

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[5] See VASCONCELLOS, Maria José Esteves de. *Pensamento Sistêmico: o novo paradigma da ciência*. 10th Edition. Campinas: Editora Papirus, 2013.

[6] See ONUMA, Yasuaki. *Direito Internacional em Perspectiva Transcivilizational – Questionamento da Estrutura Cognitiva Predominante no Emergente Mundo Multipolar e Multicivilizacional do Século XXI*. Belo Horizonte: Editora Arraes, 2017.

possibility of assimilation of normative relations according to traditional methods of normative conflicts solution. As it will be examined, there is a debate on the international legal system's coherence, opposing the ones who see it as an united legal system, those who see it as suffering a process of dispersion and others who see pluralism and differentiation as natural and healthy. If the idea according to which separation of international law into regimes is so strong that undermines its understanding as a legal system, there would be many concurrent international legal systems.

All these three evidences composes a scene commonly referred to postmodernity and this paper, by associating and contextualizing the debates, seeks to demonstrate that discussing postmodernity shall clarify why fragmentation of global law is an issue. Further, it intends to investigate whether peripheral countries are particularly threatened by it and, as a conclusion, it seeks to propose some cognitive alternatives on how to lead with the "miracles" of decisionism and the consequent normative parallel universes.

2. WHAT IS POSTMODERNITY?

Jean-François Lyotard sees the postmodernty as the erosion of metanarratives. It is to say that in postmodern context there is a skepticism on narratives constituted by great heroes and risks, under which the metanarratives find their legitimation. According to him, it represents metaphysical philosophy crisis. By contrast, in postmodern context, metanarratives are decomposed into pieces of languages, each of them conserving pragmatical rationalities. At such framework, persons absorb pieces of perception not necessarily communicable. In addition, metanarratives are supported by a sense of universalization while pragmatical approaches are not[7].

Differently of ancient features of inequality among states of global society, founded on territory possessions, postmodern context has uprisen knowledge as the main factor of power. Therefore, the theorist predicts that countries inequality tends to be accentuated along time. Knowledge, however, is no longer useful if it cannot be comprised and translated into informational machines. This is the reason why postmodernity is an informational era. The author sustains that science is not the only sort of knowledge, concurring with narratives. The distinction is that over scientists is in

[7] LYOTARD, Jean-François. *O Pós-moderno*. 4th edition. Ricardo Corrêa Barbosa (trans.). Rio de Janeiro: José Olympio editor, 1993. Introduction.

course a process of demoralization: scientists are not supposed to conceive an ideal of life and welfare, but to convert pragmatic realities into comprehensive informational codes. Then, Lyotard's understanding of postmodern social processes seeks to abstain from picking a mainstream assumption to analyze society between viewing it as an organic body or through its division into social classes and their respective crashes. Postmodern society is constituted by technical decision makers managing organized social bodies, replacing political parties and their collective political purposes to be a guide for national aims. In such context, high national collective purposes has been melt by individual's decision on the best path to go on. Society is, moreover, characterized by atomization where there are variables webs of informational flows[8].

Science has found its legitimation on philosophic principles before. In german idealism, as exemplified by Lyotard, the university has been authorized to produce what would be identified as science based on the idea that such activity fosters humankind liberty and emancipation. Then, the narrative based on philosophical ideal has been the factor of legitimation of science. Philosophy has been, furthermore, responsible to reconnect all segments of science production, establishing an overall sense for knowledge, according to the author. Contemporary context, otherwise, has collapsed metanarratives as the factor of legitimation, which circumstance is explained by technical development from Second World War or by the rising of welfare state conception to be an alternative to the contradiction between capitalism and communism, at the author's opinion. It has met a realistic maturity, whereby legitimation is no longer encountered on narratives, but in the proper pragmatic language interaction. So on, contemporary science finds its legitimation on performance, not on values[9].

Postmodern society, as Lyotard views it, is akin to the maxim, commonly attributed to ancient hawaiian civilization, as the core of current science paradigm: efficiency is the measure of truth. Even interdisciplinarity is encouraged by the author as a way to optimize performances. Science legitimation is enforced by its discourse on its own rules; efficiency is solely a confirmation, verified through the interest of sponsors.

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[8] LYOTARD, Jean-François. *O Pós-moderno*. 4th edition. Ricardo Corrêa Barbosa (trans.). Rio de Janeiro: José Olympio editor, 1993. pp. 3 – 31.
[9] LYOTARD, Jean-François. *O Pós-moderno*. 4th edition. Ricardo Corrêa Barbosa (trans.). Rio de Janeiro: José Olympio editor, 1993. pp. 32 – 87.

Consequently, postmodern science is also an activity of self-reference[10]. It represents the radicalization of what has been said to be, in the introduction, the old scientific paradigm.

Therefore, Lyotard's perception upon science reality is relatively in tune with Edgar Morin. The difference is that Morin is strongly contrary to such reality and struggle to conceive a new epistemic framework. Morin stands that current context leads to knowledge compartmentalization and fragmentation, whereby knowledge is no longer debated, but comprised and cumulated in database profitable to manipulative bodies. Knowledge specialization does not empower people to reflect upon great social dilemmas, but it is all led to specialists who are not able to produce general understandings, because of lacking time and conceptual base.[11]

Postmodernity is, as it was demonstrated, generally described as the absence of great purposes of humanity, derived from the fall of communism as an alternative to capitalism. It coincides the breakage of bipolarized discourses division with the eruption of several social demands, since the environment protection until the struggle with combating minorities' oppression. There are axis of social conflicts, not necessarily associated to the conflict among social classes: nationalists are confronted to transnationality apologists; feminists are confronted to male chauvinism reproducers; environmentalists are confronted to all views aiming to conform environmental exploitation; and so on[12]. A person can support one or many of such claims, not necessarily bound to an assumption able to orient all supporters. Occasionally, the lack of coherence is a possibility. Arguably, in postmodern context people transit through ideological parallel universes.

One can correctly state that fractionated pieces of language are also materialized into visible things. A person, in São Paulo, can make a time travel, transiting from colonial narratives until modern narratives. Different social narratives are also

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[10] LYOTARD, Jean-François. *O Pós-moderno*. 4th edition. Ricardo Corrêa Barbosa (trans.). Rio de Janeiro: José Olympio editor, 1993. pp. 87 – 114. Boaventura de Sousa Santos wonders whether current times contains realities transformations faster than theorization. If realities got ahead of theories, reality has become self-theorized (SANTOS, Boaventura de Sousa. *Pela Mão de Alice: O social e o político na pós-modernidade*. São Paulo: Cortez Editora, 1995. p. 18).

[11] MORIN, Edgar. *Ciência com Consciência*. Editora Bertrand Brasil. Maria D. Alexandre e Maria Alice Sampaio Dória (trans.). Rio de Janeiro: 2005. pp. 16-18.

[12] Boaventura de Sousa Santos argues that Marx's prediction on the intensification of social classes' crashes has not occurred. Instead, in central and peripheral countries social conflicts have been starred by not necessarily classists social movements. The author, further, makes reference to feminists criticism on Marx's exclusion of other forms of social oppression like sexual discrimination (SANTOS, Boaventura de Sousa. *Pela Mão de Alice: O social e o político na pós-modernidade*. São Paulo: Cortez Editora, 1995. pp. 40 – 41).

encountered and expressed through architecture; transiting in a city is an experience to have the variation over time and different social positions as visible. According to David Harvey, postmodernism, in architecture, means the refusal of large-scale plans for urban projects. It vindicates the emancipation of difference forces that shape the city. However, postmodernism is not only the accumulation of different architectural expression throughout history, but an emergent style, which is not only fragmented, but cultivates a preference to fragmentation[13].

Modernism was already refusing world's simplification face to the concepts of disorder, anarchy and despair from Nietzsche, and the arising importance to psychological influences derived from Freud, according to David Harvey. It maintained the realities' description following a single and universalistic trend, but acknowledged the necessity to understand a study object according to multifactorial and complex assumption[14].

Nevertheless, the existence of apparent incommunicable pieces of language, and perhaps this is the most important argument of this paper, does not mean that they cannot be comprehended into a systemic manner. In this case, obviously, the incommunicability is only appearance, which imposes a difficulty to perceive interactions. Different, and eventually conflictive, narratives are, in fact, part of the same reality. The mutual existence of different identities has a third identity: an identity that the central feature is the antagonism between the two former identities. This is, basically, what the new cognitive supporters have sustained.

Such third identity is not the accumulation of the former ones. Generally, systems cannot be viewed as a mere aggregation of elements, inasmuch as their interaction shapes their singular forms. This is the reason why theorists, such as Pedro Demo, have been standing that the whole is more than the sum of parties[15]. If, for example, São Paulo maintains colonial and modernistic architecture, it is useful to produce detailed description of each one separately. However, the city's reality is not just

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[13] HARVEY, David. *The Condition of Postmodernity – An Enquiry Into the Origins of Cultural Change*. Blackwell Publishers, 1989. pp. 66 – 98.

[14] HARVEY, David. *The Condition of Postmodernity – An Enquiry Into the Origins of Cultural Change*. Blackwell Publishers, 1989. pp. 28 – 29.

[15] DEMO, Pedro. *Praticar Ciência: Metodologias do Conhecimento Científico*. São Paulo: Editora Saraiva, 2012. p. 42.

the sum of colonial and modernistic detailed description: reality is also to say how is to live in a city that embraces features derived from different historical backgrounds.

However, how is postmodernity assimilated and conceptualized by international legal scholars? At Onuma's work, the expression has not received much relevance. He argues that there are three perspectives, which we assume conscious or unconsciously, on international law: international, transnational and transcivilizational. International perspective relates to modern relations among states and the correspondent law, it has states as the core of international law; transnational perspective relates to the increasing of non-state activities and the flows of human interactions out with official state's commandment. The association of both predominant perspectives is mentioned by Onuma as to be called modernity or postmodernity. The third perspective, transcivilizational, is held by the author as a way to supply what the formers perspectives have neglected: the existence of a cultural pluralism. It means to have cultural difference as an assumption when rules will be construed and enforced[16]. Paulo Borba Casella, similarly, points the arising of new agents, beyond states, such as the international organizations and individual, favoring fragmentation and apparent disconnection among them, in international system. International law is required to govern a social system still under construction[17]. So on, postmodernity in international law is generally seen as the impossibility to maintain state-centrism in a context of extreme dynamic interaction among transnational agents and activities.

Addressing the postmodern context and its effects on private international law, Erik Jayme has formulated his relevant method of the dialogue of sources. However, his reflection on postmodernity is profitable to the study of its impact on public international law. Inasmuch as postmodern is a cultural mainstream, it affects all cultural segments, including law. Jayme highlights antagonisms since the boost into economic integration and the preservation of cultural identity as a social demand. If postmodernity is held in art as characterized by eclecticism, he identifies four general elements of it: pluralism, communication, narrative and a return of feelings. Postmodernity contains a variability of styles and values, so as to be considered pluralistic on such sense; in private

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[16] ONUMA, Yasuaki. *Direito Internacional em Perspectiva Transcivilizational – Questionamento da Estrutura Cognitiva Predominante no Emergente Mundo Multipolar e Multicivilizacional do Século XXI*. Belo Horizonte: Editora Arraes, 2017. pp. 22 – 53.
[17] CASELLA, Paulo Borba. *Fundamentos do Direito Internacional Pós-Moderno*. São Paulo: Quartier Latin, 2008. p. 18.

international law, it means the existence of a plurality of conflicts solution methods. Postmodernism accepts to solve conflict of law solution according to a mixture of methods, renouncing dogmatism, at Jayme's work. Communication, for its part, is taken as the rapid contact people from different countries can have through technologies, including news. There is an intercultural communication, according to Erik Jayme. It affects law since the collaboration of judges until the widespread duty to provide information from the increasing of transnational activities. Moreover, postmodern context has created the narratives norms, whereby they are not binding, but aimed to convince on the necessity of its adoption. At last, the return of feelings means for law the expression of values conservation, materializing claim for cultural identity conservation[18].

3. THE DEBATES ON THE FRAGMENTATION OF PUBLIC INTERNATIONAL LAW AND NORMATIVE CONFLICTS

At the end of 1980's and during 1990s, there was a new theoretical stream concerning the unity of international law. The hypothesis consisted in the fragmentation international law was perhaps facing. The issue is not new, considering that some theorists had already addressed it before. Wilfred Jenks, for example, predicted the separation of international law into functional groups, beyond the fact that treaty's revisions do not necessarily encompass all original members of a treaty, what could lead to different legal relations. Thus, it would be difficult to formulate common legal standards[19].

At first, the new stream has pointed the issue relating to an institutional background: considering that many adjudicative bodies has been created in such period, theorists conjectured the probability of jurisdictional overlapping and the possible occurrence of forum shopping, whereby states could choose most favorable forum according to their interests[20].

Some scholars have pointed that the issue should no longer be attributed to the proliferation of adjudicative bodies solely, but to the proper contents of international

[18] See JAYME, Erik. *Identité Culturelle Et Intégration: Le Droit International Privé Postmodern*. (251) RCADI, 1995. pp. 246 – 262.

[19] See JENKS, Wilfred. *The Conflict of Law-Making Treaties*. The British Year Book of International Law, 1953.

[20] See ROMANO, Cesare. *The Proliferation of International Judicial Bodies: The Pieces Of The Puzzle*. Vol. 31, Issue 4, pp. 709 – 751, **New York University Journal of International Law and Politics**, 1998/1999. See also LAVRANOS, Nikolaos. *The Solange-Method As a Tool For Regulating Competing Jurisdictions Among International Courts and Tribunals*. Vol. 30, n. 3, pp. 275 – 334, **Law Journal Library Loyola of Los Angeles International and Comparative Law Revi**, 2008.

law, which are organized and operationalized into thematic circumscribed fields with no satisfactory interaction among them.

Although many cases could illustrate the difficult arising from the lack of rigorous interaction among norms and among adjudicating bodies, *swordfish unloading prohibition* case will be taken as a paradigm. In 2000, European Communities requested consultations over Chile's prohibition to transportation and importation of swordfish aiming its conservation, at World Trade Organization Dispute Settlement Body (DSB), because of its potential violation to GATT[21]. As a response, Chile has petitioned to the International Tribunal on The Law of the Sea (ITLOS), arguing that EC has failed to support maritime natural resources protection[22]. GATT prohibits quantitative restrictions on importation; United Nations Convention for the Law of the Sea obliges the state to endeavor the conservation of natural resources. Eventually, natural resources conservation requires market restriction. The case has been finalized by a deal between the parties but, as Marcelo Varella stands, it represents parties' enjoyment of inconsistencies rooted in international law[23].

Attaining to the issue, UN International Law Commission elaborated a report, prepared by a heterogeneous study group, advocating that international law detains all means to avoid normative conflict. The systematization of international law would be possible by applying traditional solving normative methods, as the primacy to be conferred to *lex specialis*, *lex posterior* and *lex superior* and further through applying systemic integration mechanism, which means resorting to article 31(3)(c) of Vienna Convention on the Law of the Treaties so as to interpret a treaty. The report acknowledges the reality of the so-called fragmentation of international law, having it, however, as difficulties arising from diversification and expansion of international law[24].

A central point to the debate has been the conceptualization of self-contained regimes. The ILC's report does not limit its definition to what was held as self-contained regimes by International Court of Justice in *United States Diplomatic and Consular Staff*

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[21] See WTO/DST. "Chile – Measures Affecting the Transit and Importation of Swordfish" (WT/DS193/1).
[22] See ITLOS. "Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean" – (Chile/ European Union - case nº 7).
[23] See VARELLA, Marcelo Dias. *A Crescente Complexidade do Sistema Jurídico Internacional – Alguns Problemas de Coerência Sistêmica*. Vol. 42, n. 167, pp. 135 – 170, **Revista de Informação Legislativa**, 2005. p. 158.
[24] See International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006.

in Tehran case: norms on state responsibility (secondary norms) under which a state cannot resort to other measures beyond those prescribed by the regime. It goes further to assimilate three senses whereby the expression is employed: 1) a conjunct of secondary norms; 2) a conjunct of primary and secondary norms inter-related; 3) and a social view of it, according to which whole branches of technical operation are said to be a regime[25]. In the third sense, a regime is a field of international law, like trade law or human rights law and so on. It is a social meaning for the expression, incorporating the assumption of technical sectorialization as the social phenomenon behind the dispersion of international law.

Although ILC's report acknowledges difficult relating to *lex specialis* by the fact that the horizontal character of international law enables two norms to be simultaneously had as *lex specialis*, it endeavors to clarify its limits and relation to general law. ILC's report holds self-contained regimes as a strong form of *lex specialis* and, having this attribute, finds the same limits: cannot derogate neither *jus cogens*, *erga omnes* obligations, or other superior norms; nor norms over which there is a non-derogation expectative. The report also argues that regimes are connected to general international law, because general law offers supplementary means for interpretation of regimes, it controls their application or, at least, fix consequences for de choice of one regime or other[26]. The organization of international law into regimes is also considered a source of difficulty for the application of *lex posterior* rule as a consequence of their thematic nomenclatures and the problem of complying with the "same subject" criterion[27]. *Lex superior*, in the other hand, is considered difficult by the report because it is few and unclear to be helpful relating to fragmentation[28]. The report, at the end,

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[25] International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006. pp. 68 and 69.
[26] International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006.p. 100.
[27] International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006.pp. 129 and 130.
[28] International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006. p. 205.

embraces systemic integration as a principle under which international tribunals are obliged to consider all normative ambience and weight legal values[29].

Notwithstanding ILC's position, there are expressive skepticism on solving normative conflicts methods: Ahmad Ali Ghouri critized ILC's report, arguing that the organization of international law into regimes condemns *lex specialis* criterion's efficiency. Relating to *lex posterior*, Ghouri stands that, inasmuch as VCLT has not addressed successive norms in terms of validity, the decision on whether treaty to comply with is led by states' political decision[30]. Relating to *lex posterior*, Ralf Michaels and Joost Pauwelyn give an example quite persuasive on its impossibility to offer definite solution between regimes: original GATT is dated back to 1947 whereas Treaty of Rome and Montreal Protocol are later and would prevail to the first; by the conclusion of GATT/1994, how normative relations could be managed? Thus, Michaels and Pauwelyn argues that such norms pertain to different systems and, then, conflicts behind fragmentation are not conflicts of norms, but conflicts of laws[31]. Derogation methods are, according to such perspective, required to be applied among dynamic cluster of norms, which operationalization hires a social rationality not conjured to be performed altogether to others. Over *lex superior* criterion the own ILC's launches several doubts on its efficiency for avoiding fragmentation: there is no, for example, authorized list of *jus cogens*. In addition, expressions like "elementary principles of mankind" or "intransgressible principles" has been more decisive in international litigation[32]. Finally, ILC report's approach on systemic integration has been criticized for having intended to absorb a legal principle of legal ambience consideration while it is an interpretative rule[33].

Interestingly, Martii Koskenniemi and Päivi Leino recognized on fragmentation debate equivalent features of what is figured to be postmodernity. The loss of overall control is assimilated by the writers as the absence of a common sense to

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[29] International Law Comission. *Fragmentation of International Law: Difficults Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Comission Finalized by Martii Koskenniemi (A/CN.4/L.644), 2006.. pp. 206 and following.

[30] See GHOURI, Ahmad Ali. *Is Characterization of Treaties a Solution to Treaty Conflicts?*. Vol 11, Issue 2, pp. 247 – 280, Chinese Journal of International Law, jun/2012.

[31] See MICHAELS, Ralf; PAUWELYN, Joost. *Conflict of Norms or Conflict of Laws? Different Techiniques in the Fragmentation of Public International Law*. Volume 22, Issue 3, pp. 349 – 376, **Duke Journal of Comparative & International Law**, 2011-2012.

[32] See International Law Commission; Op. Cit.; pp. 205 e 206.

[33] See TZEVELEKOS, Vassilis P. *The Use of Article 31 (3) (c) Of the VCLT In the Case Law Of the ECtHR: An Effective Anti-Fragmentation Tool Or A Selective Loophole For The Reinforcement Of Human Rights Teleology?*. Vol. 31, Issue 3, pp. 621 – 690, **Michigan Journal Of International Law**, 2010.

correspond to people's ideals and to be an axiological guide to international law as a whole. According to them, this is a result of globalization through which it was revealed a deep heterogeneous world. Fragmentation of international law is held by them as a postmodern anxiety[34]. Another interesting position has been given by Andreas Fisher-Lescano and Gunther Teubner reviving Luhmann's prediction on the fragmentation international law would face because of its division into sectorial lines. Fisher-Lescano and Teubner argue that fragmentation of international law cannot be averted by itself, because it is only an expression of fragmentation of global society. Thus, unity of international law is impossible to be met. The separated legal systems would permit solely some inter-legality operations[35]. According to such viewpoint, global society is featured by functional differentiation, whereby social groups are free to intensify their own rationalities, with no precise interaction.

In fact, much of the concerns on fragmentation of international law coincides to what has been said about postmodernity. The ILC's study group has been constituted by Gerhard Hafner's proposal. It makes reference to the end of Cold War and the increasing interdependence in globalized world, with, however, no central institution to subordinate, but institutional possibility only to coordinate, beside the existence of opposing structures in international law, such as the structure that govern states' relations, the structure that govern international organizations and individuals. It is also argued that specialization has fostered its organization into sectorial lines not interactive, beyond the fact that different spheres of law rule the same subject, eventually on a contradictory manner, configuring a normative parallelism; and the existence of competitive regulation among sectorial normative sets of norms. Such a context, according to him, threatens international law's credibility and legal assurance[36].

Since then, international law can be described under different perspectives. One can emphasize its increasing complexity, holding a conception whereby international law is in process of constitutionalization. Features like the acknowledgement of

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[34] See KOSKENNIEMI, Martti; LEINO, Päivi. *Fragmentation of International Law? Postmodern Anxieties*. Vol. 15, Issue 3, pp. 553 – 579, **Leiden Journal of International Law**, 2002.

[35] See FISHER-LESCANO, Andreas e TEUBNER, Gunther. *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*. Vol. 25, n. 4, pp. 999 – 1046, **Michigan Journal of International Law**, 2004.

[36] HAFNER, Gerhard. *Risks Ensuing From Fragmentation of International Law*. Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of Work Of the Comission (A/55/10), 2000.

imperative norms and the regulation of the process through which norms are created in international law are pointed so as to confirm its maturation into a constitutional order[37]. Alternatively, international law can be viewed with emphasis in normative conflict and the difficult international courts have to promote its integrality: if differenciation is emphasized, the perception hovers between fragmentation's criticism or a description of a healthy pluralism, which choice is dependent of ideological preferences of the observer, as Anne-Charlotte Martineau has stood[38].

However, as it will be demonstrated, postmodernity affects and fragments not only public international law, but the global law as whole. Global law is treated here as to comprise all dimensions of legal operation, such as national orders, regional and international systems of law.

4. FRAGMENTATION AS A CONCERN TO GLOBAL LAW: THE BRAZILIAN MIRACLE AS AN EXAMPLE

Brazilian constitution fixes standards to public expenses destined to public health and education. Its article 198, §2º, sets the minimum percentage of public revenue to be applied on health services to all federative entities, as well as its article 212 do the same relating to public education.

Inasmuch as the world has been sunk into austerity discourses as the unique alternative to lead with economic crisis, Brazil, which was already likely to adopt austerity measures, finally has been led to a radical alteration of its economic and politic foundations. At such scenery, Brazil has approved the New Fiscal Regime, which took a constitutional amendment form and it is projected to be in force for twenty years. The constitutional amendment conjures a lock to public expenses, whereby public expenses encounter a limit based on the expenses of previous financial exercise, which means what has been spent in the previous year. Referring to the minimum health and education provision, the amendment sets that the percentage will be applied taking such limits into consideration. So, it alters the base on which the minimum percentage would be applied, from public revenue to the former expense.

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[37] See FASSBENDER, Bardo. *The Meaning of International Constitutional Law***.** In *Transnational Constitutionalism – International and European Perspectives*. Cambridge University Press, 2007.

[38] See MARTINEAU, Anne-Charlotte. *The Rhetoric of Fragmentation: Fear and Faith in International Law*. Vol. 22, Issue 1, pp. 1 – 28, **Leiden Journal of International Law**, 2009.

The amendment was not made in constitutional text itself. It was consecrated in a document, which is also considered constitutional, named Constitutional Transitory Provisions Act. Such document has been firstly drawn to address issues on the transition between the former constitutional order and the emergent constitution of 1988. In spite of such transitional role, it has been target of several amendments since constitution has come into force.

Therefore, Brazilian Constitution and Constitutional Transitory Provisions Act both maintain their norms addressing the same issue in force: public expenses destined to health and education. Such coexistence is not pacific, because they fix different parameters of the minimum resources to be applied to education and health. Their differences, similarly to what occurs in public international law, cannot be solved by traditional methods on normative conflicts: the amendment cannot be held as special law, because its addressing is as general as the constitution itself is; it cannot be considered superior law because they both have constitutional status. The most favorable position would be to hold the amendment as *lex posterior*, but their relation cannot be understood by means of derogation, because article 110's interpretation (amendment), which leads to health and educational expenses, is dependent of ordinary constitutional articles 198 and 212, from the fact that it mentions such articles and cannot be comprehended without reading them. The amendment can only be understood if it is read altogether with ordinary constitutional provisions. The amendment is, then, at the same a contradiction and a regulation of the ordinary constitutional provisions.

Thus, the relation between ordinary constitutional text and the new transitory text cannot be assimilated in terms of traditional methods of normative conflicts solutions. The amendment is better understood as a temporal crack leading to a normative parallel universe. In the normative parallel universe, we have found the transition from a social democratic conception to a liberalistic reality. It is, perhaps, a postmodern characteristic, whereby social demands and flows of interests are so rapid, short-term and urgent that law has no time to be refined by people and confirmed by tradition.

Since independence, Brazil has had seven constitutions. It seems that transience has already been a Brazilian feature relating to its social processes and normative development. Events like the amendment's approval is a source to doubt whether Brazilian constitution is based on a "fundamental political decision" - if we can say such a thing has ever existed in any country - such as Carl Schmitt argued to be the

general material base, democratic or not, of a constitution[39]. Amendment 95/2016 is a fundamental decision because it reshapes the own conception of state and its scope. Here, there are many fundamental and transitory decisions, not necessarily debated to be democratic. The history of Brazilian constitutionalism is closer to what Carl Schimitt has taken as the typical decisionism on the state of exception, which is, for the author, a sovereign's power. The decision for the exception occurs, at Schimitt's viewpoint, as a state's self-preservation measure and can be compared to a miracle, meaning a providence within a not normal condition that could not be previewed by normality. The decision of exceptionalism is at the same out and within the rule of law: it evokes sovereign's authority to, with no legal rule on such attribution, transform law instantaneously[40].

Cynara Monteiro Mariano sees the amendment as an evidence of the permanent state of exception that Gilberto Bercovic argues be the characteristic of constitucionalism in Latin America. It is to say that, in global capitalism, stability and normality are verified in central capitalism while peripheral capitalism, the poor countries, is hit by emergency decisionism to save markets[41]. Bercovici has deeply analyzed the Weimar Republic transition to Nazism and the theoretical background that inspired both systems. However, in peripheral capitalism he argues to exist an economical state of exception permanent: state is a market's subordinate and Brazilian experience is featured by emergency decisionism. The author has, moreover, led to some propositions according to which economic crisis are so relevant in peripheral countries that we should count to a constitutional provision on economical state of siege, as well as we do relating to armed conflicts[42]. Clearly, rapid reforms, which characterizes the Brazilian permanence of exception, are prone to the lack of normative coherence; we are inclined to the miracles of exceptionalism of normative parallel universes.

So, why do we fear the fragmentation of public international law when fragmentation is right under our nose? And if decisionism has been hitting Brazil before, what's the effects of postmodernity here? Such scenery tends to accentuate transience and

[39] See SCHMITT, Carl. *Teoría de la Constitución*. Madrid: Alianza Editorial, 1992.
[40] See SCHMITT, Carl. *Teologia Política*. Elisete Antoniuk (trans.), Luiz Moreira (coord.). Belo Horizonte: Del Rey, 2006.
[41] See MARIANO, Cynara Monteiro. *Emenda Constitucional 95/2016 e o Teto dos Gastos Públicos: Brasil de Volta ao Estado de Exceção Econômico e ao Capitalismo do Desastre*. Vol. 4, n. 1, pp. 258 – 281, **Revista de Investigações Constitucionais**, jan/abr - 2017 (Available in: http://revistas.ufpr.br/rinc/article/view/50289).
[42] BERCOVICI, Gilberto. *Constituição e Estado de Exceção Permanente: Atualidade de Weimar*. Rio de Janeiro: Azougue Editorial, 2004. pp. 171 – 173.

the velocity of abrupt changes? Such considerations also leads to other questions: Brazil has had a relevant participation on the multipolarity of global politics, having its participation in BRICS as an example, but are we aware of our cultural legal tradition to go on the transcivilizational world that Onuma sustains to be the trend of our times? Do we have such a culture, or we are just a reproduction of western cultural, with, otherwise, no stability on this sort of social commonsense?

Fragmentation, if related to postmodernity, is a concern to global law. It challenges public international law, regional law, national orders, and so on. Additionally, fragmentation is not a legal issue solely; it requires transdiciplinarity, because it affects all aspects of globalized social life, such as economic, politic, sociological. There is no reason to study the possible fragmentation of public international law in a fragmented matter. Is it a consequence of globalization? How can be globalization associated to what has been named as postmodernity? What are the interests behind the usage of one international special regime in spite of other, as well as what is the interests behind the abrupt transformation of national legal orders? Are they connected?

If scholars truly desire to be helpful on such matter, they must refrain from producing pieces of perception on a compartmentalized matter and seek for encouraging debates able to build overall senses on the reality of globalized and postmodern world. This is the only way to permit Brazil to understand what its real position in the world is.

5. CONCLUSION

What is to fear on the so-called fragmentation of public international law? Nothing by itself. Public international law has not been historically uniform to be fragmented. Current specialization can be expression of a maturation and be extremely welcome. It can be understood as a stage of public international law in the path to become more effective. In fact, conflicts among specialized ranges of international law would favor the dialogue and the gradual construction of global understandings. It follows the relevant opinion of George Rodrigo Bandeira Galindo, who stands that "more important than to know if futurely public international law will be more or less fragmented or unitary is to know if it is life"[43].

[43] See GALINDO, George Rodrigo Bandeira. *Dialética negativa?*. In *Fragmentação do Direito Internacional – Pontos e Contrapontos*. Belo Horizonte: Arraes Editores, 2015. p. 2.

However, fragmentation of public international law becomes a problem if it is inscribed in a wider context: globalization and postmodernity, knowledge compartmentalization, abrupt changes on politics, decisionism and exceptionalisms. Much has been said that the problem underlying the fragmentation of public international law is the lack of legal security. But if fragmentation of public international law becomes a contributive to the rapid deformalization of consecrated policies, which is not so clear in the debates about the unity of international law, the issue is also its antidemocratic character. Variation of social rationalities hires an empowerment of certain flows of interests. In this sense, Anne-Charlotte Martineau has perceived the political interests behind fragmentation, questioning "whom does it seek to empower and whom does it seek to leave behind"[44].

Influential austerity discourses, which inspired Brazilian changes relating to its social politics, are as global as the own public international law is. They are multifactorial, dialectical and transdiciplinary, insofar as it is a result of both international tendencies and national dynamics. There is no reason to do not thing globalization globally: science shall seek for the association and interactions among multiple aspects of social understandings, to produce general senses on the miracles we are eventually subjected. If scholars aim to be helpful over postmodern context, which is likely to promote the acceleration of social life and tend to emergency and not debated decisionism, whereby the lack of coherence is a probable result, complexity paradigm have to be rigorous adopted. Specifically in legal debates, researchers shall seek the articulation and connection of all the aspects behind the debate of fragmentation of global law as a whole.

Such scientific activity also shall reshape the role of research and university: science shall not just seek to discover the truth solely, but also encourage social debates favoring social construction of general perceptions on globalized life. University must have an approximation to people. Then, Scientists are required to follow the contrary of Lyotard's path: it must seek for the construction of general perceptions, maintaining, however, its scientific character.

So on, Brazilian people should be conscious of its "miracles", the globalized and domestic character of such a blessing, how have people fallen in miraculous

[44] MARTINEAU, Anne-Charlotte. *The Rhetoric of Fragmentation: Fear and Faith in International Law*. Vol. 22, Issue 1, pp. 1 – 28, Leiden Journal of International Law, 2009. p. 28.

normative parallel universes and how international law contains and influences miracles. Even if incomplete, such as Edgar Morin has stood, such activity have to be encouraged by universities: university have to be a social arena to public debate, accessible to all social segments.

Metanarratives still exists. Usually they are reproduced by religions and morality. What is being suggested here is that science, and the university as a consequence, should constitute a space of questioning the main features of social life generally. Science will be a tool, in this sense, concurrent to others, for the construction of general and basic perceptions of people. For that, it is necessary to improve the dialogue among knowledge ranges, but also promote knowledge accessibility. Science must be approximated to people.

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