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关于悖论的研究：从社会系统论角度来探讨国际  
法对跨界水问题的调整作用

Embracing the Study of Paradoxes: A Social Systems Perspective  
of International Law's Regulation of Transboundary Waters

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A Social Systems Perspective of International Law's Regulation of Transboundary Waters

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Chapter 3 is an adaption of an article entitled ‘Making Paradoxes Invisible: International Law as an Autopoietic system’, *International Journal of Law in Context* (Cambridge University Press), Revise and Resubmit.

Chapter 4 is an adaption of an article entitled ‘Making use of Paradoxes: Law, Transboundary Hydropower dams and beyond the technical’, *Law and Critique* (Springer), Accepted for Publication.

Chapter 5 is an adaption of an article entitled ‘How to study the future of Integrated Water Resource Management?’ Under Review.

## 内容摘要

本文是关于“悖论”的研究。与传统观点不同，本文旨在迎合新时代的精神，重新认识悖论的存在和发挥作用的方式。以下是一个悖论的例子：当一位律师想知道“合法性和非法性”这一区别本身是否合法时，尽管他手头上缺乏完整充分信息，他却仍然在这种情况下被迫作出自己的判断。在调整跨界水的国际法规范中最突出的悖论就是由分化的主权观念中所产生的矛盾性期望。这也是为什么我们不难理解，为何国际法学者在学术上经常处于不安的状况中。尤其是考虑到公平合理利用原则，作为国际法学界面对跨界水领域问题所能提供的最为实体性的回应，却未能给解决问题提供任何答案——因为该原则尝试将所有情况涵括在内，结果却是什么情况都无法涵括在内。甚至在某种程度上似乎是这一原则让国际法这一学科产生出“碎片，隔离” (humpty-dumpties)。因为我们日渐发现，法律论证策略逐渐发生以下转变：从确定性向不确定性、从过去到未来，以及从发现认定规则事实到计算各种概率和可能性。尽管法律的形式主义已经发生了以上转变，但是实践中国际法学者很少采用更为合理的方法论来应对上述的不确定性。相反，我们经常看到的是一系列形形色色的自相矛盾和同义反复的法律论证套路，这种套路无法为我们提供任何有意义的“法律”结果。换言之，国际法学似乎对以上转变无所适从，且时至今日仍然在理论上处于无助的状态。

本文提倡透过应用卢曼(Niklas Luhmann)的社会系统论 (social systems theory) 来得出有效的解决之道。这是因为相比起提高专业知识、增加信息交换和合作交流，这个理论更有能力透过系统化的方法来解释人类理性的有限性，进而启发社会。在这个意义上该理论通过提供一套强大的方法论工具 (methodological tools) 来描述跨边界水域的法律条文所面对的沟通性难题，从而解放了国际法学者的分析能力。为了阐述这个理论的潜力，本文提出了一个受卢曼思想启发的理论性框架，该框架三个部分分别聚焦于系统封闭性(Closure)、系统开放性(Openness)以及系统运作封闭性(Operative Closure)。

第一个部分探讨了系统封闭性，即这是能使得国际法律体系 (ILS) 将其自身从其他制度区分开来的方法。它主要专注于制定这个制度里的典型内部特征，以及利用这些特性来将悖论 (paradoxes) 制度化，使其变成更无害、受限和被允许的矛盾 (contradictions)。

第二部分则是探讨系统开放性，通过这个方法可以驱使法律制度去寻找及比较一些替代方案来解决争议。该部分主要专注于研究法律有效利用悖论的可能方式，从中找出重复出现的、有规律的利用模式。

第三部分探讨系统运作封闭性，所有的社会体系都是以这种开放的形式来实现自身的封闭性。它主要专注于如何研究水资源综合管理的未来。这一部分主要专注于研究综合水资源治理的未来发展。

此论文的主要目的并非企图改进现有的调整跨界水问题的国际法规则，而是为了使具有更明确的视角来看待关于跨界水治理的“问题—解决方法”两者之间的关系。

关键词：国际公法、卢曼 Niklas Luhmann 、跨界水、悖论

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## ABSTRACT

This text aspires to fully embrace the spirit of the new era. This being the paradox of when for example a lawyer wonders whether the distinction between legality and illegality is in itself legal, but nevertheless is forced to select A over B, despite having lack of full information. In the field of international law's regulation of transboundary waters, the context of this text, the most prominent paradox is the differentiated sovereignty conceptions producing conflicting expectations. Unsurprisingly, legal scholars have found themselves in an academically unsettling situation especially considering that the most substantive legal response, the principle of equitable utilisation seems to say nothing by saying too much. It is almost as if the principle has made the 'humpty-dumpties' out of the discipline because what we find increasingly, is that legal argumentative strategies have moved from the certain to the uncertain, the past to the future, and from what can be ascertained to what is merely probable. Despite this changing formalism, rarely is a sound methodological approach employed that is adequate enough to deal with this uncertainty. Instead, too often we are left with a vast array of contradictory and repetitive argumentative routines that seem incapable of producing any meaningful 'legal' results. In other words, it seems the discipline finds itself unprepared and to this day in a state of theoretical helplessness.

This thesis as a remedy proposes that Niklas Luhmann's social systems theory offers a fruitful antidote. It is so because rather than slumbering over the rationales for more expertise, more information exchange and more cooperation, the theory has the capacity to enlighten society by instead explaining in a systemic way the core limitations of rationality. In this sense, it strives to emancipate analysis by offering a powerful set of methodological tools for describing the communicative challenges facing law's regulation of transboundary waters. To illuminate the theories potential, this thesis proposes a Luhmannian-inspired theoretical framework composed of three parts focusing on closure, openness, and operative closure.

The first part explores closure, that is the way in which the international legal system (ILS) strives to differentiate itself from other systems. It is concerned primarily with working out the typical internal characteristics of the system, and the manner in which these attributes proceed to institutionalise paradoxes into a more harmless, bounded, permitted contradiction.

The second part explores openness, that is the way in which the legal system strives to look for and compare alternative ways of solving conflicts. It is concerned primarily with working out the reoccurring patterns under which law might productively make use of paradoxes.

The third part explores operative closure, that is the way in which all social systems are closed in an open sort of way. It is concerned primarily with working out how to study the future of Integrated Water Resource Management?

The overriding intention of this thesis is not to try and improve law's regulation of transboundary waters but rather, it is to make more distinct the lens through which we view transboundary water governance problem-solution relationships.

Keywords: International Public Law, Niklas Luhmann, Transboundary waters, Paradoxes

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## **LIST OF ABBREVIATIONS**

**ERU** Equitable and reasonable utilisation

**ILS** International Legal System

**NSH** No Significant Harm

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