A Social Theory of International Law

International Relations as a Complex System

by

KAZUKO HIROSE KAWAGUCHI
Professor, Faculty of Foreign Studies
Sophia University, Tokyo, Japan

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There has long been an advocacy for the sociology of international law, and yet it has never been constructed so systematically and exhaustively as in this study. Based on vital terms such as actor and system, this book has completed an investigation into the subjects of the fundamental international sociological conditions over which international law is built, and accordingly, into how international law can control global relations.

The significance of this work lies in its aim of showing by the application of a consistent logic, how complex observed phenomena can be explained and understood on the basis of certain shared fundamental perceptions drawn from common experience.

By asking how a state acts in a complex system that consists of at least two subsystems having different goals and different logics, two specific issues are discussed:

(1) The relationship between domestic and international law, namely, that between Article 9 of the Constitution of Japan and the UN Charter (especially the provisions for a collective security system as mentioned in chapter VII).

(2) The relationship between international law and international politics, namely, the relationship between the prohibition of the use of nuclear weapons and the logic of nuclear deterrence.

In the 21st century, when the world is becoming more and more complex and there are ample chances of many incredible accidents occurring, a general theory on the sociology of law based on the idea of a complex system is timely.

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INTERNATIONAL LAW IN JAPANESE PERSPECTIVE

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Professor, Faculty of Foreign Studies
Sophia University, Tokyo, Japan

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Preface

The ability to shape one's own destiny—to make decisions on the basis of one's own ideals and goals—is a uniquely human characteristic. It is shared by the groups that human beings form—peoples, nations, and other communities—each bound by a common destiny. The very existence of different individuals and groups that have this characteristic virtually guarantees that there will be conflicts among them. And yet it is also human to want to find common ground with others.

When individuals or groups emphasize their differences, the result is conflict; when they find common ground, cooperation becomes possible. However, even when it appears that cooperative efforts have resolved the sources of conflict, not all conflict will disappear. Conflict is a natural part of all human interaction. Both conflict and cooperation exist simultaneously. All social phenomena can ultimately be reduced to the question of how these two human characteristics are reconciled and allowed to coexist on the same plane.

The type of relationship that I examine in this book could be called the relationship between a whole and its individual parts, or the relationship between law and politics, or the relationship between law and society. In examining each of these, one encounters propositions that have the same logical structure, such as 'The parts constitute the whole, and the whole constitutes the parts,' 'Politics creates law, and law controls politics,' 'Society generates law, and law controls society.' In this book, I have attempted to express that logical structure, which is characteristic of social phenomena, by means of systems theory.

In the concluding section of this book, I argue that the prohibition of the use or threat of use of nuclear weapons is in a mutually complementary

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relationship with nuclear deterrence—a statement that appears self-evident to some people and absurd to others. This forms the culmination of a discussion that I begin by inquiring into the individual's position in society. It might well be objected that there is no need to start at such a fundamental level in order to support the above position. To my mind, however, a theory should account for observed phenomena by applying the same logic at every point.

That was my approach in *Funso to ho: Shisutemu bunseki ni yoru kokusaiho shakaigaku no kokoromi* (Conflicts and law: A treatise on the sociology of international law according to systems analysis; 1970), which was based on my doctoral thesis, and I am still committed to the approach of that earlier book. Almost every year during the thirty years since that book was published, I have given lectures, conducted research, and led seminars on the sociology of international law as a member of the faculty of Sophia University. In the course of that work, I have consistently found—and have taught my students—that international law is manifested in the real world in the dynamics of international relations. I am presenting those findings anew here, reorganized into an abstract, axiomatic framework (Part I) and a discussion of controversial issues within that theoretical framework (Part II), in the hope that they will prove to be both valid and useful. In doing so, I am motivated by several considerations.

First, structural-functional analysis is said to have outlived its usefulness; 'self-organization' and 'complex systems' are now the key words, and theories of structuration and globalization have emerged. But no matter what the prevailing approach to the analysis of social phenomena might be, the actual issues that people in a society face remain the same. Those issues can be described in terms of the conflicts and coexistence, interactions, and dialectic development that occur between two opposed concepts, whether they be self/other, part/whole, individual/society, or micro/macro. My previous book was written during the heyday of structural-functional analysis, when Japanese sociologists were strongly influenced by Talcott Parsons. In a sense, this influence was a continuation of the tradition that dated back to Emile Durkheim and Max Weber. More recently, although influential figures such as Jürgen Habermas and Niklas Luhmann have been critical of Parsons, their criticisms have in fact been constructive, leading toward reconstitution and further development of his theories. In the process, structural-functional analysis has not lost its value to the social sciences, a fact that I wanted to confirm in writing this book.

Second, the significance of my work does not depend on presenting a new approach based on new concepts, but on developing an axiomatic theory, which is made possible by the presentation of certain fundamental concepts. The significance of this work lies in its aim of showing, by the

application of a consistent logic, how complex observed phenomena can be explained and understood on the basis of certain shared fundamental perceptions drawn from common experience. Some might insist that such an approach is not appropriate for the study of complex social phenomena, and that any theory that claims to do this must be unsound. But success depends on the choice of fundamental concepts. If they are selected and defined correctly, one's argument can be logically developed from the concepts themselves; in other words, a mathematical phenomenalism becomes possible. With the exception of neoclassical economic theories, the social sciences contain few instances of an approach of this kind. As far as I am aware, there do not appear to have been any previous attempts to construct an axiomatic theory that interprets social phenomena as a complex system. The present book offers one example of such an intellectual experiment—an attempt to understand complex phenomena by a consistent application of mathematical phenomenalism.

Third, at a point in time when the entire human race faces Hamlet's question 'To be or not to be,' I wanted to explore the options on which our thinking and our decisions are based. Humanity, with all its diverse ideals and goals, is looking back at the previous century and exploring the prospects of the new one. People are looking back at a century that included two total wars and asking themselves how they can carry hope, not despair, into the twenty-first century. The options that might enable them to do so arise from dialogue between past and present, and from dialogue between individuals and the larger wholes of which they are members. Those options include conservative and progressive courses of action, together with possible syntheses between the two. They also include self-interested and altruistic behavior, together with possible courses of action that might serve both one's own and others' interests.

Fourth, social phenomena have an aspect that can best be understood as the 'self-organization' of complex systems. The mechanism of this self-organization is the dialogue that takes place between reality and symbols. I wanted to write a book that would serve not only as a scholarly inquiry but also as an interdisciplinary textbook that would convey the workings of this mechanism to the students I teach, who are situated in a compartmentalized system of academic departments. When I define abstract concepts and develop deductive theoretical explanations of social phenomena, my students always ask for concrete examples. Thus, in this book I have presented the same reasoning, using a series of real-world examples, both with regard to the relationship between a whole and its parts, and with regard to relationships among the past, present, and future. Through this accretive use of examples, I have tried to present one form of the dynamic approach that is made possible by systems theory.

Although the need for debate based on an awareness of the kinds of problems addressed in this book has often been cited, scholars have been reluctant to shed their customary caution and to take up the challenge, because the accepted behavior in the sciences is to play by conventional rules. But the world will not change if everyone adheres to accepted behavior. At the same time, it is possible to be too adventurous for one's own good. This book, admittedly, belongs in the 'adventure' category. A theoretical work that might appear unconventional to the academic community probably would not have been accepted for publication if it were entirely lacking in significance. I would like to think that the significance of the present book lies in its having the following characteristics:

[1] It addresses the position of sociology among the social sciences, showing what role sociology plays therein and how it contributes to the other social sciences.

[2] It shows that jurisprudence, unlike the other social sciences, studies symbols that represent the realities of society; it then conceptualizes the sociology of law as an interdisciplinary science that deals with how society functions through interactions between those realities (such as political, economic, and other social realities) and symbols (such as elements of culture, ideals, and laws). What is unusual about this approach is that I have conceptualized social systems and legal systems as two types of systems that are independent of each other, and then have identified ways in which they interact. In other words, I view the sociology of law not as a field centered on jurisprudence, nor as a branch of sociology, but as a field that is equidistant from both jurisprudence and sociology.

[3] By similarly situating international law vis-à-vis the study of international relations, this book constructs a sociology of international law. As the societies that are members of the system known as the international community become increasingly interdependent, forming a multilayered community system amid ongoing globalization, in the background the symbol system of international law is also developing and growing on multiple levels. In an international community that has lacked a truly supranational agency, it has largely been left to the states—either individually, or jointly through international politics—to create, apply, and implement the law of that community, i.e., international law. For that reason, Western scholars have long recommended that the sociological or political background of international law should be taken into account. But even in the West, there have until now been almost no attempts to systematically incorporate sociological theory directly into the construction of a sociology of international law. The late Professor Takeyoshi Kawashima, who contributed greatly to the establishment of legal sociology in Japan, often called for a sociology of international law; in his view, international law is

the area most suitable for study by legal sociologists. Whenever I reread Professor Kawashima's letters touching on this subject, I am fondly reminded of his passion for scholarship.

[4] This book examines a specific case of the relationship between domestic and international law, namely, that between Article 9 of the Constitution of Japan and the UN Charter (especially the provisions for a collective security system in chapter VII thereof), and it discusses how Japan, as a member of two systems, should behave. In so doing, it addresses the significant differences of opinion that have arisen, due to differences in the two disciplines, between scholars of constitutional law and scholars of international law. I have approached the difficulty caused by these differences by asking how a state acts in a complex system that consists of at least two subsystems having different goals and different logics.

[5] This book also examines a specific example of a relationship between international law and international politics, namely, the relationship between the prohibition of the use of nuclear weapons and the logic of nuclear deterrence. This is another issue that cannot be resolved by analyzing either the international legal system or the international political system as if it were independent and inviolable. The international legal system, on its own, has no means of implementing any ban that it imposes on nuclear weapons; similarly, the international political system, on its own, cannot confer moral legitimacy or legality on nuclear deterrence. The role that each system performs in the international or global community becomes clear only when, by regarding that community as a supersystem containing two subsystems that share its goal(s), one can analyze the relationship between the two systems. A paper in which I discussed this subject was published in Japanese in 1998. To my regret, although the paper was written before India and Pakistan carried out underground nuclear tests in May 1998, causing worldwide dismay, it was not published until later in the year. But I believe that, even after the fact, the ideas discussed in that paper provide a framework within which to clearly recognize and assess the implications that those tests have for other members of the international community that have chosen to support the nuclear nonproliferation regime.

Destiny is unpredictable; the patient work of many years can vanish in an instant. Accordingly, I am deeply grateful to have the opportunity to publish ideas that I have been developing for more than thirty years. During that time I have often lost confidence, but mentors and colleagues too numerous to mention have given me a gentle (or sometimes not-so-gentle) push to set me moving in the right direction again. At the risk of offending many who helped or encouraged me by leaving out their names, I wish to thank the following people and organizations:

Prof. Takeyoshi Kawashima, Prof. Jun'ichi Aomi, Prof. Ken'ichi Tominaga, Dr. Naoki Komuro, Prof. Ryuichi Nagao, Prof. Takao Tanase, and my other mentors and friends who, in the late 1960s, took part in the Empirical Jurisprudence Study Group of the Faculty of Law, University of Tokyo; the senior scholars and friends who gathered in the 1970s to publish *Hoshakaigaku koza* (A course in legal sociology) under the editorship of Prof. Kawashima; Prof. Hidetoshi Takahashi, for whom I worked as a research assistant from April 1969 through October 1971, when he headed the University of Tokyo Computer Center, and the researchers with whom I became acquainted there; Prof. Tamito Yoshida, who asked thought-provoking questions when I first delivered a paper to the Japan Sociological Society and who since then has frequently given me very helpful advice; Profs. Haruo Murata, Ken'ichi Nishiyama, and Hiroshi Deguchi, together with the many researchers in new fields who have given me their unfailing support at the General Systems Theory Study Group that was set up by Profs. Yasuhiko Takahara and Shunpei Kumon.

Of course, I wish also to thank my colleagues at the Sophia University Institute of International Relations, with which I have been affiliated for more than thirty years. The daily conversations among this group of ten or more people have turned into an interdisciplinary salon. It was one of those colleagues, Prof. Tadashi Kawata, who originally inspired my interest in interdisciplinary studies in the form of international relations when I entered the Division of International Relations, College of Arts and Sciences, University of Tokyo.

My 'primary reference group' as a scholar has been the Japanese Association of International Law. Even though legal-sociological methods are not the primary concern in that organization, I have received continuing support from my doctoral supervisor Prof. Yuichi Takano, from Prof. Yasuo Ishimoto, who chaired the oral presentation of my doctoral dissertation, and from many other members of the Association who continue to take an interest in methodology.

During my stay in the United States of America as a visiting scholar at the Center for International Studies, Massachusetts Institute of Technology (1982-1984), and at the Reischauer Institute of Japanese Studies, Harvard University (1989-1999), I was privileged to make the acquaintance of several professors and researchers who kindly supported and assisted me in a variety of ways. I would especially like to extend my gratitude to Professor David Kennedy whom I met first in 1982, and again after a long absence in 1998. He kindly invited me to give a lecture at the 1999 annual meeting of the American Society of International Law, held in Washington.

I was also fortunate to have received from the Japan Society for the Promotion of Sciences the Grant-in-Aid for the Publication of Scientific

Research for the academic year 2000 and 2002, which was used for this book. It was by means of this grant that I was able to bring out the English translation of my work through the courtesy of Simul International Incorporated. Accordingly, I would like to express my deepest gratitude to all who lent a hand in bringing out this translation, in particular Geraldine Harcourt (translator) and Phil Quellet (editor). Professor Cyril Veliath SJ of Sophia University, also did me a favor in often checking my English at my request. The publication of this book by the Kluwer Law International was realized through the kind assistance of Judge Shigeru Oda, of the International Court of Justice. Throughout this publication, and in particular during the final stages of proofreading and type-setting, I was greatly assisted by Shinzansha Publishers.

I felt convinced that the only way in which I could truly repay my debt to the generosity of these many individuals, was to bring out a book worthy of being read for years to come.

Kazuko Hirose Kawaguchi
November 30, 2002
Tokyo

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Introduction

TOWARD AN INTEGRATED UNDERSTANDING OF SOCIETY

I-1. The Need for Interrelation and Systematization of the Sciences

The social sciences are one of society's means of self-knowledge and self-expression. However, society, whether on the national level or international level, is complex; moreover, it is in constant flux, a never-ending process of becoming. Social scientists have therefore divided the work of understanding society into a number of disciplines, such as economics, sociology, political science, and jurisprudence, each of which has created its own system of knowledge by analyzing the mechanisms of social phenomena from a particular perspective and within a particular time frame, based on its own premises and its own reasoning.

Underlying this multidisciplinary approach is the tacit assumption that, through such a division of labor, the social sciences *as a whole* can elucidate all aspects of social phenomena at all points in time. This assumption, however, has not necessarily proved to be valid. Although it is true that scholars in any one discipline, working with the same premises and the same reasoning, can share their findings among themselves without misunderstanding or distortion, there is no guarantee that these findings can be imparted with the same accuracy to scholars in another branch of the social sciences, where different premises and reasoning apply. Thus, legal scholars and economists, even when speaking the same language, will not necessarily understand each other's terminology in the same way; the same applies to legal scholars and political scientists. Division of labor is possible, but it does not automatically lead to cooperation among the sciences.

The purpose of this book is to pursue the possibility of such cooperation based on work done in the individual social sciences. Each science, starting from certain premises, has analyzed certain aspects of the complex, ever-changing social phenomena that are its subject. Only when these premises and aspects are identified, interrelated, and systematized does cooperation among the social sciences become possible, thereby enabling us to gain a holistic, dynamic view of society and to provide a unified frame of reference. Because the social sciences have come into existence as one of society's means of self-knowledge, if given a unified frame of reference they are in turn capable of conceptualizing a better society. The social sciences can be said to take shape through a kind of dialogue between social theories and social realities, in that social scientists selectively abstract certain aspects of social realities as they develop social theories. Through this dialogue, social sciences can help to move society in a more desirable direction.

In the following pages, I will attempt to develop the above concept of the social sciences by means of systems theory, which is founded on the concepts of *systems* and *actions* or *behavior*. I have adopted this approach because the mathematical logic of systems theory (see I-4) can yield a holistic representation of both the complexity that arises from conflicts or incompatibilities between the whole of society and its individual parts, and the changes that arise from the complex interactions among the whole and its parts.[1] This methodological and epistemological standpoint in which I use mathematical logic to represent interactions in complex real situations, I would refer to as mathematical phenomenalism. In this standpoint, I do not subscribe to substantialism, but seek only to understand the relationships among and between phenomena.

Part I of this book presents a model for the application of systems theory to social phenomena. This model enables one to grasp, in a unified way, the complexity and constant changes seen in contemporary societies at both the national and international levels.

Part II consists of case studies based on the model introduced in Part I. Under the overall theme of 'Japan in the international community,' a number of topics related to the problem of the whole and its parts are considered theoretically, and Japan's behavior as part of a complex system is examined. These topics include the relationship between the United Nations Charter

[1] Basic concepts such as 'system,' 'action,' and 'action system' will be presented in chapters 1 and 2. Their relationship with earlier work in sociology, especially Parsons' theory, is reviewed in my previous book, Conflicts and Law (in Japanese), which I reprinted for the readers' convenience, in this English edition in chapter 4. In this book, I have reorganized the treatment of these concepts to take into account later developments in the field, namely, the debate among Habermas, Luhmann, Giddens, and others, and the debate concerning general systems theory.

and the Constitution of Japan; the function of the U.S.-Japan Security Treaties in creating international order; and the relationship between law and politics (specifically, the relationship between the legality of the use of nuclear weapons and the logic of nuclear deterrence). Although the discussion as a whole is theoretical, and the emphasis throughout lies on presenting a theoretical framework, it can be said that Part I consists of basic principles and Part II deals with their application.

The structure of the book and the significance of this approach are outlined in greater detail below.

I-2. The Basic Framework: An Integrated Concept of Society Based on the Theory of Systems and Actions

Systems theory enables one to gain an integrated picture of modern society, in all its complexity and constant change, from at least three viewpoints: [1] the relationship between the whole of society and a part thereof; [2] the complexity of modern society; and [3] interactions, including relationships of cause and effect, within modern society.

I-2.1 The Relationship between the Whole and Its Parts

In the terms of systems theory, society is a whole that can be viewed as a system. In society, an individual does not exist in isolation, but behaves in relation to others and to society as a whole. A system consists of a set of actions; when these actions are specified, their relationships determine the structure of a specific system. This structure, in its turn, determines the actions of the actors. Systems theory shows that a whole and its individual parts exist in such an inseparable relationship.[2]

[2] Although this theoretical framework uses different terminology, its analytical concepts are of the same type as those used in Anthony Giddens' theory of *structuration* and Roland Robertson's concept of *globalization*. In *The Constitution of Society* (especially pp. 25-28), Giddens conceptualizes the structuration of social systems using the notion of the duality of structure, in which "the structural properties of social systems are both medium and outcome of the practices they recursively organize." Robertson, in *Globalization* (pp. 8-31, 97-105), suggests that "we may best consider contemporary globalization in its most general sense as a form of institutionalization of the two-fold process involving the universalization of particularism and the particularization of universalism" (p. 102), and notes: "Questions of the degree to which globalization encourages or involves homogenization, as opposed to heterogenization, and universalization, as opposed to particularization, are crucial, as well as complex" (p. 12). Giddens' theory of structuration and Robertson's concept of globalization can be reinterpreted by applying systems theory's concept of action systems (which is more abstract than the concepts employed by

I-2.2 The Complexity of Society

To say that societies are complex means that they do not consist of just one system—an economic system, for instance. A society consists of multiple systems, such as economic, political, legal, and cultural, to name but a few. Moreover, as individual systems these do not have the kind of independent existence that lends itself readily to analysis. A society made up of discrete systems would not be viable. Although it is possible to conceive of one system in isolation from the others as a partial system or subsystem, in reality the various systems influence one another, giving rise to complex social phenomena (*Fig. 1*).

Figure 1. The complexity of society

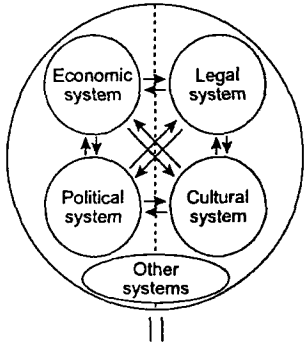


Figure 3. Sign systems representing social phenomena (bodies of knowledge)

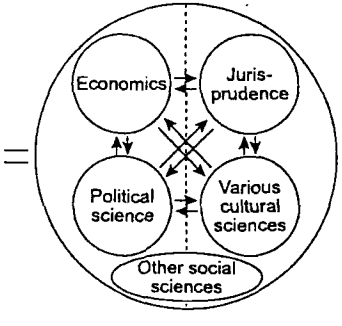
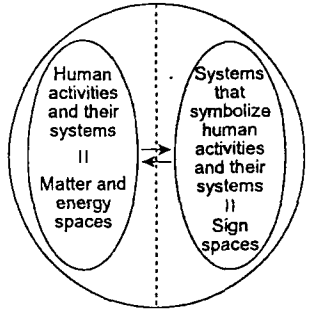


Figure 2. Society as the interactions of matter/energy spaces and sign spaces



Giddens and Robertson) to social phenomena as internal models of both the whole and its parts.

The subsystems are inseparable because they are parts of a whole, i.e., society. How do they influence one another? In society, certain subsystems mediate among and connect other subsystems, each of which operates according to its own separate logic. These mediating subsystems represent the meanings of each subsystem as information or knowledge. Human activities in, for instance, the economic or political sphere, create actual social phenomena; at the same time, the meanings of these activities and phenomena are expressed in a variety of symbols, especially linguistic ones, and they are then transmitted and accumulated as information or knowledge (*Fig. 2*).

For example, economic phenomena have given rise to the system of knowledge known as economics; political phenomena have yielded another knowledge system, political science. In general, the symbols and ideas that are products of human activities generate the independent systems that we know as the sciences, culture, and the arts (*Fig. 3*). Human beings are symbol-making animals who perceive and conceptualize reality by means of the symbols that they make.

Legal phenomena constitute a system of rules (what *should be*) that are built on a foundation of actual economic, social, and political phenomena; they form a symbol system that both represents and creates a social structure. Legal science or jurisprudence, in turn, is a body of knowledge about this symbol system. It is situated somewhat differently from those fields that are classed as social sciences, such as economics and political science, because while the latter study the actual occurrence of social phenomena (what *is*), jurisprudence studies the body of rules for assigning meanings to social phenomena (what *should be*). But although these different social sciences deal with the different realms of what *is* and what *should be*, they are identical as scholarly disciplines in that each is a body of knowledge and each forms a single symbol system.

The statement that societies are complex means that they are wholes made up of interrelated subsystems, each operating according to a different logic. Japanese society can superficially be seen as a collection of people of Japanese ethnicity, a view that can give the impression that this society is not complex. However, the concept of an ethnically homogeneous nation is a kind of ideological construct that, in seeking to explain Japanese society in terms of the logic of a society characterized by uniformity, ignores the existence of other ethnicities such as the Ainu and people of Korean ancestry. But even if Japan were in fact monoethnic, a wide array of differences would be revealed if one were to analyze the personal characteristics of its individual members. Thus, although Japanese society might seem to be characterized by uniformity when viewed from a particular perspective, when viewed from other perspectives it clearly is seen to lack such

uniformity. Similarly, one can view the international community as a superficially uniform collection of states that are alike in being sovereign and independent. But if one focuses on any particular nation's individuality, which typically takes the form of asserting its own national interests and emphasizing the maintenance of its own culture, one realizes how complex a system the international community actually is.

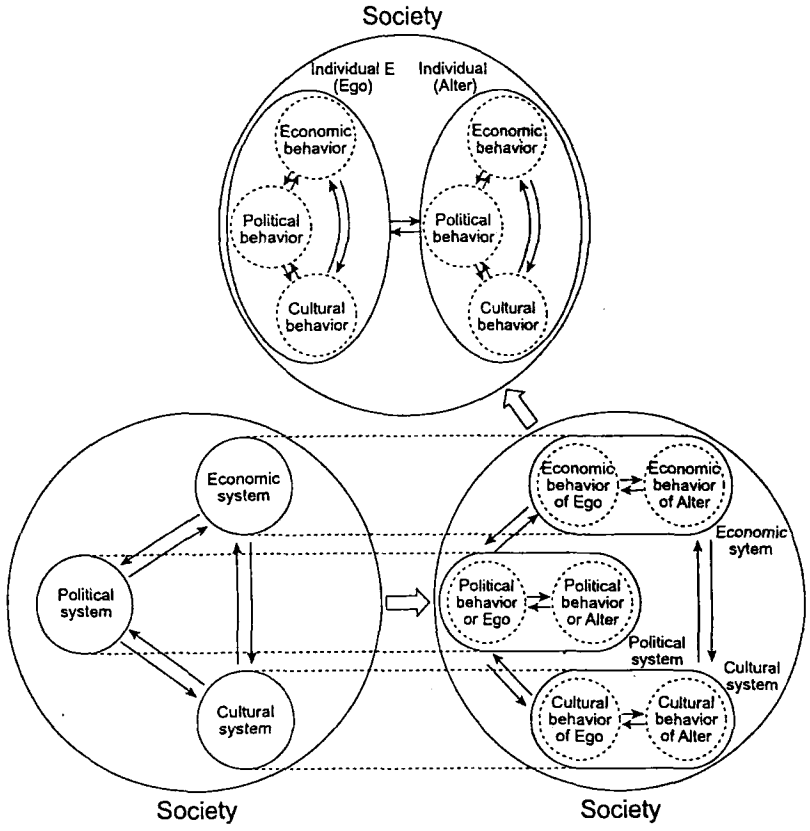


Figure 4. The correspondence between social and individual complexity

A person born into a complex society is not a pure being like the *Homo economicus* posited in microeconomics or the *Homo sociologicus*[3] of sociology. He or she is a complex being, at the same time both *H.*

[3] As defined in the theory of action systems, this analytical concept refers to a person who fulfills role expectations (see 2.3). See also Dahrendorf, *Homo Sociologicus*.

economicus and *H. sociologicus*, and also perhaps a political being, a law-abiding being, and so on. However, despite playing such multiple societal roles, a person does not split into multiple personalities but remains one complete, integral individual. This is possible because human beings not only perceive reality through the symbols that they create, but by manipulating those symbols at will (for example, by interpreting them) people are also able to perceive, interrelate, and systematize the economic, political, social, and cultural systems in which they participate. They perform these operations through the medium of the information, knowledge, or discipline that represents a particular system's meanings (*Fig. 4*). Thus, as a result of such activities by human beings, an interdisciplinary system of learning is generated as a new body of knowledge.

I-2.3 Interactions, Including Relationships of Cause and Effect

In a complex society, change does not occur in the form of simple cause and effect. Change in one system, whether economic, political, or legal, can be both a cause and/or effect of changes in one or more other systems. In addition, change of the whole can give rise to changes in one or more of its parts, and change in one or more parts can result in further changes of the whole. In chapter 2, I will present the action system as the simplest model that can represent the complexity of society, and I will discuss social complexity and the mechanisms of social change within the frame of reference that the action system provides. This kind of activity can, in itself, help to integrate the social sciences as a means toward developing the integrated concept of society that is our goal.

I-3. Developing an Integrated Concept of Society through the Sociology of International Law

In this book, the sociology of law is viewed as one of the social sciences, which together can generate an integrated concept of society. Moreover, this field of study is a very fundamental and essential social science, in that it elucidates the interactions between the actual occurrence of social phenomena, on the one hand, and the legal phenomena that are part of the signs system by which those phenomena are represented. In Part II, the basic framework developed in Part I will be applied to questions of international relations and international law. The discussion in Part II has two underlying concerns: that of the relationship between the whole and its parts, and that of interactions over time.

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