New Paradigm for Global Rule of Law

Winston P. Nagan, Member, Board of Trustees, World Academy of Art & Science;
Director, Institute for Human Rights, Peace & Development, University of Florida, USA
Garry Jacobs, Chairman of the Board, World Academy of Art & Science;
Vice-President, The Mother's Service Society, India

Abstract

Law is both a condition and a consequence of social development, an outcome of the broader social process, a form of social organization which channels social energies based on the relative strength of past practice and precedent, the present balance of power and emerging social values. Values are the bedrock of social process and the driving force for social activism. Historically, law evolves as a mechanism for conflict avoidance and resolution founded on the practical management of conflict and higher values, made possible by the implicit acceptance and internalization of the authority component of collective expectations. Established law acts as a conservative force of the status quo subject to continuous pressure to evolve from the changing public conscience and social values. Lasswell's comprehensive model of social process highlights the contribution of multiple participants to the evolution of law at the macro and micro level, including the role of individual value demands and the potential assertive power of the human community as a whole. The article explores the potential role of non-states in changing international law regarding the legality of nuclear weapons. An appreciation of the integral relationship between law, politics and society is essential to a fuller understanding of social, power and legal processes and the goal of universalizing peace and human dignity.

Law is a powerful instrument for social development. At the same time it is itself a product of social development. The objective of this paper is to formulate a paradigm of law and development that will foster realization of the values essential for addressing global issues and the positive evolution of the human community. Law is a response to the problems that emerge from the social process and from the process of social development. Human problems represent conflicts between values that change over time. Effective solution to human conflicts depends on our ability to arrive at clarity and consensus regarding those values which are most conducive to human progress.[1, 2, 3, 4] An appreciation of how law has developed historically in response to past conflicts may serve as a guide to understanding its present status and possible future directions. This historical focus must include not only the formulation of law, but also its actual practices and outcomes. This is apparent when we consider that the

> *"Law is both a condition and a consequence of social development."*

eradication of discrimination or corruption depends as much on the prescription and application of prevailing law as it does on the prescription of new law.

Law is both a condition and a consequence of social development. All aspects and dimensions of society impact on and are influenced by the rule of law. For example, in recent months, the European financial crisis has exerted strong pressure for modification of the laws governing financial management of EU member states as well as the powers and responsibilities of national and European institutions to address the challenges posed. Changes in law and public policy relating to the financial management of banks and central banking institutions constitute important components of the policy response. Similarly, rapid advances in technology and communications impact on laws relating to regulation of the Internet and intellectual property. Political activism, like the Arab Spring, Moscow Winter, Occupy Wall Street Movement, has thrown into question the constitutional legitimacy of governments and the fundamental rights of citizens. Soaring levels of unemployment have compelled changes in labor and social welfare policies and greater government responsibility for the economy. The Fukushima disaster has led to changes in law and public policy regarding nuclear energy in Germany and Switzerland and raised legal issues related to the rights of sovereign nations to environmental protection from the actions of their neighbors. These are just a few of the many aspects of social change which influences and is influenced by the prescription and application of law. An appraisal of the relevant trends and conditions which have influenced legal outcomes against the values that are claimed and preferred requires acute analysis not only of past precedent and the present balance of interests and forces; it must also take into account the likely direction of their future development.

Law does not evolve in a vacuum. It evolves with human agents as interest articulators and authoritative and controlling decision makers. It evolves as an important dimension of the wider quest of society for more effective institutional arrangements to fulfill the goals of the collective. The global challenge is to formulate creative strategies that will facilitate the most rapid and satisfactory progress for global society as a whole. A greater theoretical understanding of the relationship between law and social development and the processes governing their interaction and evolution should enable us to arrive at practical measures to resolve present conflicts and advance the collective human agenda.

"A greater theoretical understanding of the relationship between law and social development and the processes governing their interaction and evolution should enable us to arrive at practical measures to resolve present conflicts and advance the collective human agenda."

1. Law as Outcome of Social Process

As an aspect of social organization, law is a mechanism for channeling social energies and interests. At any point in time, law consists of a more or less precarious balance between the past, present and future. Application and development of law are social processes that are influenced by multiple forces: the force of past precedent, established custom, and accepted tradition; the force of present political, economic and social power; the force of emerging aspirations; and ideas about the shaping and the sharing of the basic values for which there is a demand for acceptance.

Values are the bedrock of the social system and a driving force for social development. They represent the quintessence of society's acquired knowledge and convictions regarding the essential principles for survival and sustained human accomplishment. Law reflects the arena of important values in society and the precise points at which there is contention between conflicts about those values. For example, when sophisticated, rapid-fire, automatic weapons are involved in tragic instances of mass homicide, public outrage in the US rises once again to challenge antiquated constitutional protection for citizens' rights to bear arms, a right originally instituted at a time when 'arms' referred to single shot, mussel-loaded flint lock pistols and muskets.* Thus, legal choices go to determine what to conserve, what to bury, what to affirm and what to enhance. Since values are changing rapidly in the modern era, social change leads to changes in understanding of the law as well as reconstruction of its prescriptions, application and enforcement over time. Growing support for government curbs speculative investments by banks and huge compensation packages for bank executives, which reflects changing social attitudes toward the social responsibilities of banks as institutions of public trust. Law is a continuing process of authoritative and controlling decision-making within which the community seeks to defend and secure the common interest. It is a continuing challenge for the present and the future.

The founding of the United Nations Organization (UN) illustrates this process of interaction and precarious balancing and its evolution over time.† Although conceived and cast in the highest idealistic terms of universal human values, the real basis on which the UN was founded was the overwhelmingly dominant physical, economic and political power of the allied nations which emerged victorious in World War II. The UN can be seen as an outcome of a global conflict. The UN Charter creating a semblance of democracy and universality in the composition of the General Assembly nevertheless concedes effective power concentrated almost exclusively in the Security Council, in which the five permanent members possess absolute power to act in concert on behalf of the world or in opposition to one another in pursuit of their own narrow self-interests. The basis for this undemocratic arrangement was the old concept of national sovereignty, a legacy of three centuries of nationalistic consolidation and competition, which already showed signs of irrelevance to cope with the emerging problems of an increasingly globalized world. Nationalism, power and idealism were combined in a formula that was sufficiently prescient to avoid world war for the last 65 years, yet increasingly powerless and inept to cope with the emerging problems of the 21st century.

2. Evolution from Coercion to Rule of Law

Historically, the threat and use of coercion have played a central role in determining the outcome of social processes. Conflict and coercion are outcomes of the social process. These outcomes we may identify and map as a process of effective power.‡,5 Conflicts

---

Amendment II of the United States Constitution – The Second Amendment was adopted on December 15, 1791, along with the rest of the United States Bill of Rights. It is the part of the Bill of Rights that protects the right of the people to keep and bear arms. The right to keep and bear arms, often referred as the right to bear arms or to have arms, is the assertion that people have a personal right to fire arms for individual use, or a collective right to bear arms in a militia, or both.

† The United Nations Organization was founded in 1945 after World War II to replace the League of Nations, to stop wars between countries, and to provide a platform for dialogue.

‡ More generally on the relation of law to social process see Lasswell and McDougal, "The Relation of Law to Social Process: Trends in Theory about Law," University of Pittsburg Law Review 465 (1976).

> *"Law evolves as a sublimated alternative to physical coercion..."*

about effective power are reflected in the issue of States' rights and abolition of slavery in America. These issues were resolved on the battlefields at Gettysburg, Shiloh and Vicksburg. The liberation of Libya in 2011 from four decades of dictatorship was similarly resolved by force of arms. If all social relations were exclusively a function of conflict, then the strongest would inevitably prevail on the basis that might is right. However, as societies evolve they generate understandings about managing power and develop strategies for conflict resolution. As conflict becomes increasingly expensive and destructive, protagonists frequently determine that the costs of conflict may exceed the potential gains. At this point the power brokers would look for ways to stabilize conflict and manage fundamental decision making by agreement and understanding. As democracy and human rights become more prevalent as sources of authority, they support tolerance and subordinate exclusive resort to naked power, both internally and internationally. Thus, the Arab Spring in Egypt, for example, achieved peacefully what their neighbors achieved by violence. Law evolves as a sublimated alternative to physical coercion, but legal authority retains the capacity for coercion as its ultimate foundation and reinforcement. Social authority comes to replace physical coercion as the primary means for resolving conflicts, but its power is accepted and respected because it retains an explicit or implicit capacity for physical enforcement, as well as the use of authority as a base of power.

Legal authority evolves as an alternative mechanism for conflict avoidance and resolution founded on higher values such as peace, collective security, human rights, justice and due process. Law evolves as an instrument to manage the politics of conflict based on authorized decisions and agreed upon rules of social order. Law is not the only social institution that plays this role. Money also became an important factor in the transition from violence to social order, providing economic incentives, rewards and punishments to protagonists to eschew resort to force. Historically, money has been used to resolve disputes, appease aggressors, compensate victims, propitiate antagonists, and incentivize competitors. But as governance and law evolved as recognized authorities, coercive force progressively gave way to social convention, legislation and jurisprudence as the principal means for dispute resolution. This evolution from physical violence to social power to authorized competence and higher values is an affirmation of the value basis of law. It replaces the principle that might is right and applies value-based principles to affirm the rights and enhance the power of the weaker segments of society.

This process is evident in the field of international relations where the habitual resort to war between nation-states that characterized European affairs for centuries has now been effectively replaced by an institutionalized political and legal framework. In the words of Dutch security expert Rob de Wijk, "War in Europe has become unthinkable." Similarly, though with less absoluteness, establishment of the UN system after the Second World War has replaced periodic conflicts between nation-states, widespread imperialistic ambitions and colonialism with treaty negotiations across the conference table, debate in General Assembly and Security Council, judicial inquiries, international commissions, arbitration, mediation,

binding and non-binding resolutions, and countless other mechanisms for channeling energies from coercive violence into political, legal and intellectual processes. This transition from violence to law continues today in both national and international contexts.

Law involves an implicit acceptance and internalization of social authority which is reflected in the constitutionalization, that is to say, the acceptance of the allocation of fundamental decision making authority for society which generates shared expectations about the shaping and sharing of human values. Law codifies the most enduring values which emerge as social norms and customary practices accepted by the community, often representing the "living law" of the society.[6] Indeed, public acceptance of basic expectations is a crucial aspect of law. Unless the community accepts the legitimate authority of its authorized decision makers and their prescription, application and enforcement of law, such authority may lose its authoritative foundation and be compelled to resort to coercive force to maintain the status quo. Unless those laws reflect accepted norms and expectations, such acceptance is unlikely. Thus, rule of law is based on the major expectations which the community holds about the exercise of authority and control in the common interest. Law as codified strives to be the embodiment of the basic values reflected in the public conscience of what the collective of human beings agree to accept, that is to say, the collective fundamental expectations about authority, control, and the respect for basic values.[7]

> *"Law codifies the most enduring values which emerge as social norms and customary practices accepted by the community, often representing the "living law" of the society."*

3. Role of Law in Social Progress

Once formulated, law represents a conservative force for maintenance of the status quo and resistance to change. On the other hand, public conscience, social attitudes and values continue to evolve over time, exercising a continuous pressure for changes in the formulation, interpretation and application of law. This has profound implications for the evolution of both national and international law and emerging expectations of justice and value.

The growth of positivism gave prominence to the idea that law is a critical agent of social change in the form of legislation. As Bentham expressed it, legislation can serve the common interest by measures to promote the greatest happiness for the greatest number.[8] However, Bentham perceived judges as an inherently conservative force, wrapping their conservatism in the symbols of natural law, which he called "nonsense on stilts".[9] He spurred an awareness of the importance of science in understanding and improving the performance of law in social process and development.

Modern discourses have generated a multitude of approaches resulting in important but partial insights about the role of law in social process. Two Fellows of the World Academy, Harold D. Lasswell and Myres McDougal, saw the problem in a very different light and developed a far reaching theory integrating social process and legal process based on universal human values. The culmination of their efforts was a two-volume work titled

Jurisprudence for a Free Society: Studies in Law, Science and Policy.[10] The intellectual and scholastic challenge presented in their work requires an integration of many of the traditional approaches to law and society in a manner that leads to a new paradigm for the study of law and society. Their approach is problem-oriented and contextual, multidisciplinary, goal and value-guided, and decision-focused. They viewed law as a process of authoritative and controlled decision-making in which, since time immemorial, the community has sought to clarify and implement the perceived common interest. They regarded law as decision in response to the problems that emerge from the social context. That response may conserve, modify, change or be changed by the values and the institutions of society, which suggests that law may be both a condition and a consequence of the social dynamics of society.

The genius of their approach was to provide a framework of social process that permits mapping at any level of detail or abstraction. The basic model can be described as *human beings pursuing values through institutions based on resources.*[11] Using in part anthropological experience, they identified eight salient values that are identifiable cross-culturally in any social process at any level of abstraction — power, wealth, respect, enlightenment, health and well-being, affection, skill and rectitude. These values broadly encompass the entire spectrum of human needs and aspirations: political, economic, social, educational, health-related, human security, family and personal relationships, capacities and ethics.

 The central purpose of the rule of law is to ensure that value allocations and the institutional forms specialized to the production and distribution of values should at least minimally secure the preservation of the prevailing values of the society. This is the conservatory function of law. However, social processes are dynamic and social values change over time. Frequently, the demands by social participants require that institutions evolve to reflect a change in values and to enhance the production and distribution of those values that are demanded. Here, the role of law in the form of decision is charged with the development and sustainability of institutions and situations for the purpose of enhancing positive social outcomes for an improved human prospect.

It is obvious that a multidisciplinary method is necessary for understanding the conservative and progressive aspects of the role of law. This requires understanding the role of law in the establishment and maintenance of constitutional order, the role of law in managing the production and distribution of values that are a condition and a consequence of constitutional order, and the role of law in the protection and enhancement of civic order and civil society. These challenges are waiting for a new generation of thinkers to formulate a comprehensive global framework, while at the same time moving with dexterity in understanding the local social consequences and policy implications of law.

> *...individuals are often the initiators, the movers and shakers of important social developments.*

4. Critical Participants in the Global Community[*,†]

Such an endeavor necessitates development of a theory of social process that is sufficiently comprehensive and global to encapsulate all the critical participants in the global community — the factors that determine their interactions; the processes that govern the development of these participants and those that govern the evolution of the global community as a whole. At the same time, the theory should be capable of reflecting the unique role of various agents in this wider process. In short, the theory is confronted with the challenge of being comprehensive, selective and specific.

4.1. The Individual

Traditionally, the formulation of international law has been regarded principally as the purview of nation-states. Lasswell argued for a wider perspective that takes into account the contribution to the social process of all participants, including the individual. The global social process is comprised of individuals and sometimes associations of individuals who act as claimants demanding access to the shaping and sharing of basic values. We observe in both the national and the global context that individuals are often the initiators, the movers and shakers of important social developments. Without these individual participants, social movement and development would flow at a modest pace. Try to imagine the Indian Independence Movement without Mahatma Gandhi, the American Civil Rights Movement without Martin Luther King Jr., the Anti-Apartheid Movement without Nelson Mandela, or the end of the Cold War and the "Fall of the Berlin Wall" without Mikhail Gorbachev. [12, 13,14,15] Similar roles have recently been played in different fields by Al Gore, Osama bin Laden, and the Four Horsemen (Kissinger, Nunn, Perry, Schultz). The central point here is that the individual is a participant in the global social process.[16] Under certain circumstances, the individual stakes a claim to his or her identity, rights or convictions and acts to preserve and protect them. Additionally, the individual is a claimant and, therefore, an articulator of value demands on behalf of groups or an entire community. Without the individual as a claimant, there would be no social change and no social progress. What is true of individuals is also true of groups of individuals, small organizations such as the Club of Rome (climate change), Al Qaeda (terrorism), International Physicians for Prevention of Nuclear War (IPPNW), and Pugwash (nuclear weapons).

The process of claiming is a process of actively staking demands about the basic values of society. These demands are articulated in the form of basic rights. Human rights are driven by the demands of individuals and associations of social participants in the global social process. Lasswell devoted much of his academic life to exploring the role of the individual in the global social process. His approach was regarded as threatening to conventional legal and political wisdom, because it radically expanded the field of participants and multiplied the complexity of analysis required. In addition, it challenges conventional wisdom by disproportionately magnifying the potential power of the individual. Yet, this challenge to convention resonates

with much of the historical narrative in which individuals – Napoleon, Lincoln, Edison, Ford, Einstein, Gandhi, Hitler, Roosevelt, Stalin, Churchill, Mao, King, Mandela, Gorbachev – have exercised overwhelming influence on global processes. Professor Richard Falk, one of the most distinguished international lawyers of the 20th Century, described these ideas as generating what he called "dangerous knowledge".[17] The intellectual challenge generated by a realistic demand for an accurate depiction of global social process and all the important social participators remains a matter of unfulfilled promise and represents a unique opportunity for an original contribution of global significance.

4.2. Nation-States

Law, in particular, and the social sciences, in general, prefer to work with large aggregates. Classes, nations, sovereigns, and inter-sovereign organizations dominate the conceptualization, the problems and the discourses about these issues. Influenced by highly formalistic positivism, the boundaries of international law are largely conceptualized around the sovereign nation state. Since there are a limited number of sovereign states in the world community, a science of international law has a limited range of participant actors who are the focus of study and action.[18] These assumptions constitute important barriers to a realistic understanding of the central components of global society and tend to deny the appropriate intellectual space for the role of the individual in the global social process.

Developments in both law and the social sciences have sought to reduce the rigidity of this form of collective conceptualization of participants in global society, giving rise to partial theories which selectively and somewhat anecdotally broaden the range of appropriate participants. One of the most important challenges for new theory is to determine whether a global orientation can generate effective theory and effective methods of exposition to account for all the important stakeholders in global society, especially the individual social participant.

4.3. Sovereignty and Human Rights

Sovereignty is one of the most widely invoked symbols of international governance. This concept asserts that the State is the sole legitimate participant in and determinate of the constitutive process. In contrast, the fundamental premise of human rights is to give a place for individual legal identity in both the national and the global social and legal process. Whereas national constitutive processes clearly affirm the rights of individuals and provide legal processes for their enforcement, international law still focuses primarily on the rights of sovereign states which may be in direct conflict to individual rights. Nuclear energy is a case point. As the Fukushima accident illustrates, increasing global dependence on nuclear energy has the potential to create significant conflicts between sovereign states and between states and citizens of other countries. If the impact of a nuclear power plant accident crosses national

"Last year, Germany, Switzerland and Italy announced plans to completely phase out nuclear energy within the next decade. Yet, that would afford their citizens no protection from the fallout of an accident in a neighboring country that continues to rely on nuclear energy."

boundaries, what rights do states have against actions by other states that may pose equal or greater dangers to their own citizens? For example, recent reports attribute thousands of fatalities in the USA in 2011 to rising levels of radiation resulting from the Fukushima accident.* Last year, Germany, Switzerland and Italy announced plans to completely phase out nuclear energy within the next decade.[19] Yet, that would afford their citizens no protection from the fallout of an accident in a neighboring country that continues to rely on nuclear energy.

Issues such as these make it extremely important that we understand the place of human rights in global society and the basis for the claim that they are universally binding on States and peoples. Lasswell's model may provide us with a way of unpacking sovereignty and human rights to better understand their place in the global constitutional scheme.[20]

The World Academy's own historical antecedents justify this pursuit and illustrate its relevance. The founders of WAAS largely consisted of scientists, philosophers and heads of international organizations who had witnessed, or participated in, the ravages of two world wars. Albert Einstein and Bertrand Russell authored the famed Einstein-Russell Manifesto highlighting the dangers posed by nuclear weapons, which led to the founding of the Pugwash Conferences in 1957 and the Academy in 1960.[†, ‡, 21] After heading the Manhattan Project, which developed the first atomic weapons, Robert Oppenheimer grew increasingly alarmed at the future implications of the nuclear genii he had helped unleash, opposed development of the hydrogen bomb, and became a vocal advocate of efforts to prevent a nuclear arms race.[22] Joseph Rotblat, a nuclear scientist who left the Manhattan Project in protest, later helped found both Pugwash and the Academy and went on to win the Nobel Peace Prize in 1995 for his dedicated efforts for the abolition of nuclear weapons.[§] These and many other individuals and organizations, including Pugwash and the International Physicians for the Prevention of Nuclear War, played a crucial role in bringing the International Court of Justice to the verge of declaring any use of nuclear weapons as a crime against humanity in their landmark advisory opinion the following year.

5. Micro-law[23]

Lasswell's recognition of the critical role of the individual in the formation and application of law led to development of a parallel insight by his student, Michael Reisman, another WAAS Fellow who highlighted the importance of micro-level events in the formation and application of law.[24,¶] It is not merely acts of the legislature, executive and judiciary at various levels of government that determine the law of the land. Individual actions of individuals and groups can under certain circumstances acquire a symbolic and practical significance that

---

*Radiological Assessment of effects from Fukushima Daiichi Nuclear Power Plant, United States Department of Energy (16 April 2011) – The radiation effects from the Fukushima Daiichi nuclear disaster are the result of release of radioactive isotopes from the crippled Fukushima Daiichi Nuclear Power Plant after the 2011 Tōhoku earthquake and tsunami.

†The Pugwash Conferences on Science and World Affairs – an international organization that brings together scholars and public figures to work toward reducing the danger of armed conflict and to seek solutions to global security threats. It was founded in 1957 by Joseph Rotblat and Bertrand Russell in Pugwash, Nova Scotia, Canada, following the release of the Russell-Einstein Manifesto in 1955.

‡The Russell-Einstein Manifesto, Issued in London, 9 July 1955

§ The Nobel Peace Prize 1995 was awarded jointly to Joseph Rotblat and Pugwash Conferences on Science and World Affairs "for their efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms"; See "The Nobel Peace Prize 1995", Nobelprize.org.

¶ See also Michael Reisman, Law in Brief Encounters, Yale University Press (1999); See also Winston P. Nagan, Reisman's "Law in Brief Encounters"(Book Review), South African Law Journal 120, no. 4 (2003): 907; Walter Weyrauch, "The "Basic Law" or "Constitution" of a Small Group," Journal of Social Issues 27 (1971): 49–63; See also Walter Weyrauch, "Law in isolation—the penthouse astronauts; An experimental group cut off from the world makes its own rules," Society 5, no. 7 (1968): 39-46.

either undermines existing principles of law or establishes new ones in their place.

Gandhi's 1930 Salt March was a brilliant strategy encapsulated in a single act designed to challenge the legitimacy of British rule in India and demonstrate at the same time to hundreds of millions of Indians, the power they possessed to overturn an illegitimate colonial government.[25] A tax on salt, an almost universally applied tax by European countries at home as a source of revenue, was extended to India by an act of Parliament in 1882.[26] Enforcement of the act in a country with such a vast population and extensive coastline was inconceivable without the docile cooperation of the local population. For years, that compliance was forthcoming. In a single act of statesmanship, Gandhi launched a massive civil disobedience movement that spread throughout the country and led to the arrest of more than 80,000 Indians.[27] From then on, it became evident that the days of British rule were numbered. The Salt March later served as a source of inspiration for Martin Luther King Jr.'s Civil Rights Movement. Like the Boston Tea Party, a single local act had profound legal consequences nationally and internationally.

> *"The individual act of value demand is the micro unit of the social process by which law is made and by which it evolves over time."*

On December 1, 1955 Rosa Parks refused to obey a bus driver who ordered that she give up her seat to make room for a white passenger in Montgomery, Alabama.[28] Her arrest and summary trial sparked a 381-day bus boycott by the black community of Montgomery, until the law requiring segregation on public buses was lifted. Parks' civil disobedience became a symbol of the modern Civil Rights Movement. Parks herself became an international icon of resistance to racial segregation. The individual act of value demand is the micro unit of the social process by which law is made and by which it evolves over time.

In December 2010, 26-year-old Mohamed Bouazizi was getting ready to sell fruits and vegetables in the rural town of Sidi Bouzid, Tunisia. Bouazizi was the breadwinner for his widowed mother and six siblings, but he didn't have a permit to sell the goods. When the police asked him to hand over his wooden cart, he refused and a policewoman allegedly slapped him. Angered after being publicly humiliated, Bouazizi marched in front of a government building and set himself on fire.[29] His act of desperation resonated immediately with others in the town. Protests began that day in Sidi Bouzid, captured by cell phone cameras and shared on the Internet. Within days, protests started popping up across the country, calling upon President Zine El Abidine Ben Ali and his regime to step down. About a month later, the President fled the country.[30] The momentum in Tunisia set off uprisings across the Middle East that became known as the Arab Spring.

6. Lasswell's Social Process Model

Lasswell's summation of social process is valid for any level of conceptualization; human beings pursue values through institutions based on resources.[31] Simple as this model is, it can be generalized to the global level and yet also serve to explain the social process dynamics of small groups, such as the family (micro-social interaction). The central elements of this model begin with the individual human being who is active in demanding access to the

shaping and sharing of values. Cross-culturally, value demands target the social institutions specialized for the production and distribution of particular values. The individual therefore targets the institution. In targeting the institution, the individual must make some assessment of what bases of power he may access to facilitate and make more effective his claim on the system. This model generates complexity because it requires methods to assess those bases of power, to describe society as it is, to describe the problems in society as they are, and to consider as well the institutions of problem-solving at any level that can be deployed in response to the problem of value claims and resistance to these claims.

Borrowing insights drawn from the natural sciences, Lasswell and McDougal developed a form of conceptual and analytic mapping to guide inquiry into the social process.[*] They developed a map that can be summarized in terms of the following markers: (1) identification of the participators, as discussed above; (2) subjectivity of the participators, including their claims for identity, claims for values and claims relating to expectations; (3) description of the values available to participants.[32] They based this approach on a radical description of social power postulating that power may be sought for its own sake or for access to any other important value. At the same time, they perceived that every other non-power value may serve as a base of power to achieve access to power in any other value.

Table 1: Major Components of Lasswell's Global Social Process Model

Values	Institutions	Situation	Outcomes
Power	Governance – Political Parties	Arena	Decision
Enlightenment	Universities – WAAS	Forum	Knowledge
Wealth	Corporations	Market	Transaction
Well-Being	Hospitals, Clinics	Habitat	Vitality
Skill	Labor Unions, Professional Organizations	Shop	Performance
Affection	Micro-social Units (Family) Macro-social Units (Loyalty)	Circle	Cordiality, Positive Sentiment, Patriotism
Respect	Social Class	Stage	Prestige
Rectitude	Churches, Temples	Court	Rightness

Situations define the context in which the claims on values occur. They are especially important in the global context, because of the unequal distribution of power and the multitude of conceptual models which shape the way we think about global issues (bipolar,

---

*Id.; See also Michael Reisman, The New Haven School: A Brief Introduction (2007)

tripolar, multipolar). Traditional models based on a state-centered paradigm may not adequately account for multinational firms, large hedge fund investors, popular uprisings, liberation movements, terrorist operations or organized crime activity. Each of these actors considers the possible strategies they may use given the demands, bases of power accessible to them, and the importance of critical strategies to generate desirable outcomes. Strategies implicate ideological symbols, diplomatic protocol, economic strategies and coercive military initiatives.

The critical marker of global social process is its outcomes and effects for the participants. A fully valid theory and method for the elucidation of the global social process should give us the ability to systematically and accurately predict the outcomes that emerge from this global process, such as the ultimate impact of the current European financial crisis on the structure of the European Union, survival of the Eurozone and regulation of international banking.

Table 1 summarizes the major components of Lasswell's Global Social Process Model.[*] It includes eight value categories identified from anthropological sources and expanded under the influence of the Universal Declaration of Human Rights. The authors used values descriptively to understand the state of social process, including its deficits as they actually are. The challenge is to determine how we might develop strategies to influence social process so that it enhances the positive scheme of value distribution and consumption.

7. Good Governance

Good governance is a valued outcome of the constitutive process.[33] Good governance is a function of the participants who are included and excluded from the governance process, the fundamental claims of the participants regarding the allocation of power and competence, and the basic expectations they hold about the structures that establish and maintain the constitutive process.[34] The stakeholders in the governance process participate by way of making claims and counterclaims, including claims by the State to conservation and to change.[35]

Participation also requires access to a basis of power through some form of communication and representation based on prevailing social values that affirm the legitimacy, right or essential necessity of that participation. The toppling of Mubarak's government in Egypt in 2011 was possible because the society-at-large recognized and asserted its right to demand political change and successfully effected change without violence, whereas in Libya and Syria public protestors were denied access and forced to resort to alternative strategies. Rising public outrage over rampant political corruption in India has recently enabled a popular movement to gain national support for legislation to curb and punish malpractices. Internationally, specific individuals and organizations such as Pugwash and IPPNW have been able to gain access to power structures, but global public opinion lacks the legitimacy to exert influence even on issues such as nuclear abolition or climate change where the vast majority of human beings share common values and interests.

Participation takes place in arenas, such as legislative, executive, judicial, administrative and electorate, which represent spatial, temporal factors central to participation. They could

---

* See Part III for a more detailed discussion of Lasswell's model.

also include arenas of local and global salience – Tiananmen Square in Beijing, Tahrir Square in Cairo, and Wall Street. These arenas may be geographical, institutional, etc.

Any justifiable constitutive process will provide the participants with access to strategic resources to support their claims to effective participation. These resources could be described as coercive or persuasive. Persuasive resources include strategies of conciliation, mediation, negotiation, arbitration or non-violent civil disobedience. Coercive strategies could involve the use of the power of the State to compel complaints with desired modes of behavior.

The outcomes of a constitutive process could result in the grudging distribution or a maximal distribution of power to enhance participation. This is a model that could be developed for application to any global problem of governance, such as the challenges represented in the Arab Spring.

8. Application of the Model to Law regarding Nuclear Weapons[36]

The efficacy of this model as a conceptual tool and a source of strategy may be illustrated with reference to nuclear weapons. The Nuclear Non-Proliferation Treaty (NPT) is the primary international legal instrument governing the development, proliferation, and possession of nuclear weapons.[*] Originally framed in 1968, its immediate aim was to prevent further proliferation of nuclear weapons technology to other states. The treaty also set forth the conditions under which non-nuclear weapon states (NNWS) would be granted access to technology for the peaceful use of nuclear energy in exchange for foregoing the right to develop or possess nuclear weapons. In exchange, Article VI of the treaty stipulated that the five original nuclear weapon states (NNS) shall enter into good faith negotiations leading to complete nuclear disarmament. The treaty essentially sought to freeze the status quo by denying access to nuclear energy technology to states that refused to sign. In spite of continued calls by the NNWS, the NNS have resisted steps to implement Article VI, resorting to military, political, economic and social pressure to maintain their monopoly. The fact that the world has been unable to compel the NNS to fulfill their pledge or to prevent at least four other states from acquiring nuclear weapons points to serious lacunae in the framing and implementation of international law relating to this issue.

A full comprehension of the situation requires that we broaden the framework, as Lasswell and McDougal assert, to encompass a much wider range of participants, a broader set of values and other social processes that fall outside the traditional boundaries of law. We have already referred to the key role played by a few distinguished individuals and organizations. The actual field of institutional participants numbers in the thousands, including organizations drawn from all eight categories listed in table 1, such as Global Zero, Greenpeace, WFUNA, ICAN, IPPNW, Middle Powers Initiative, Abolition 2000, Mayors for Peace, Nobel Peace Laureates, and countless groups of parliamentarians, scientists, physicians, women, lawyers, religious, military, civic and labor leaders. Although the NPT never anticipated a role for the UN General Assembly, WHO, UNESCO, the International Court of Justice, the Human Rights Commission, self-declared regional nuclear free zones and many others have exercised influence and made value demands related to this issue.

---

[*] *The Treaty on the Non-Proliferation of Nuclear Weapons*, Opened for signature in 1968, entered into force in 1970 and extended indefinitely on 11 May 1995.

Furthermore, over the years the value base for these claims has also shifted markedly. No longer is it confined to the security of nations. Today, individuals and civic groups are major claimants demanding protection for their individual and community rights: present and former military leaders protesting against wasteful expenditure on unusable weapons systems; environmentalists demanding recognition of the ecological threat represented by these weapons; physicians warning of the health hazards of radiation, etc. Other groups assert that the very existence of these weapons constitutes a threat to the fundamental human rights. Primarily, as the result of efforts by Pugwash, IPPNW and WHO, the case was brought before the ICJ in 1995. Thus far, the widening field of participants has resorted primarily to raising public awareness through the media or seeking to influence political decisions at the national or international level. This does not preclude the possibility of unified action by larger associations of participants.

Lasswell's model not only takes into account the myriad efforts of these other participants to influence international rule of law. It also points to the possibility of other strategies. The Prosecutor of the International Criminal Court suggested the possibility of approaching the ICC with a case against NWS on the grounds that even the threat of use of these weapons constitutes a crime against humanity. Recent experience within the World Academy suggests that there may be other more direct forms of action that can be taken to bring about a change in international law.

Underlying all these initiatives are some fundamental questions of international law: Do individuals and groups of the world have an inherent and inalienable right to freedom from the threat of nuclear weapons and from the medical and environmental damages that could affect large civilian populations as a result of nuclear weapons usages? Do the world's citizens have a sovereign right to representation and exercise of their political will independent of the structures and policies of the nation states within which they reside? Do the nations of the world, the vast majority of which protest and reject the right of the NWS to retain nuclear weapons and which also represent the vast majority of human beings, have a right to declare use and possession of these weapons illegal? What is the legal validity of international institutions based on an undemocratic, unrepresentative constitutive process? Are there salient principles of international law and universal human rights that override the authority of unrepresentative and undemocratic institutions of global governance? Is there an inherent right, and if so, is there a feasible means by which the majority of humankind can express, exercise and demand recognition of the values it affirms?

"The process of social power is itself a subset or component of a still wider social process by which human beings collectively affirm values and seek to realize them in their individual and collective lives."

There are of course a multitude of value/institutional concerns that implicate the global rule of law. Among the most important of these questions is the issue of the global environmental crisis.[37] These issues do not exhaust the range of rule of law problems that might fall within the scope of legitimate inquiry by the Academy.

9. Integrated Theory

Lasswell perceived that the constitutive process by which law is created and modified forms a component or subset of a more fundamental and comprehensive process of social power by which authority is exercised in society, and that the process of social power is itself a subset or component of a still wider social process by which human beings collectively affirm values and seek to realize them in their individual and collective lives.

Similarly, Lasswell and McDougal widened our understanding of the agents who participate in the formulation and evolution of law, power and other values in society. While traditional legal theory focuses almost solely on the role of legislative, judicial and executive branches of government, Lasswell perceived that all those who can claim access to power in society have the potential capacity to influence the constitutive legal practice. Furthermore, he understood that the eight major categories of values are inter-convertible. Therefore, any agent who possesses one value has the potential capacity to influence or acquire the others. This is most evident in the case of the possessors of wealth, who enjoy considerable influence over political and legal processes in all countries of the world. It is less evident but also true of the possessors of other values, which explains instances in which popular movie stars, respected religious leaders, outstanding technocrats and skilled orators exert considerable influence on politics and law. Lasswell and McDougal extended the principle of integration still further by tracing the constitutive, power and social processes down to the micro-level where they are subject to influence by small groups and single individuals. They identified underlying social, cultural and psychological factors which influence the conceptions, motivations and actions of these micro-level actors and events.

Some legal theorists argue that this model adds such mind-boggling complexity to legal analysis that it renders the theory impractical. But the historical record so clearly affirms the truth of Lasswell's fundamental premises, that it is impossible to reject their obvious truth. When we examine great revolutionary or evolutionary transitions in law and politics, invariably we find outstanding individuals – a Rosa Parks, King or Gandhi – as well as small acts of civil disobedience or other significant events associated with them. So too, when we examine the most modest incremental changes in law that more commonly occur, we discover at their roots the acts of individual legislators, presiding judges, jurors, expert witnesses and special interest groups expressing their personal attitudes, convictions and beliefs in acts of judgment and power that influence the formation, interpretation and application of law.

The integral relationship between legal, political and social process and the linkage between the micro-level acts of individuals, groups, institutions and governments and macro-level changes in law may deter theorists from pronouncing generalized truths of legal process. But, for those interested in and committed to accelerating the evolution of law and legal processes to more fully embrace and reflect higher human values, Lasswell's model provides a detailed map of the potential participants, resources, institutions and strategies that can be harnessed to alter social outcomes. It makes more conscious the processes by which society, power and law evolve. It empowers those committed to social change. It offers hope and inspiration that more rapid and radical progress is possible nationally and globally.

Author Contact Information:
Winston Nagan - *Email: nagan@law.ufl.edu*
Garry Jacobs - *Email: garryj29@gmail.com*

Notes

1. Myres McDougal, William Reisman & Andrew Willard, "The World Community: A Planetary Social Process," Faculty Scholarship Series Paper 753 (1988) http://digitalcommons.law.yale.edu/fss_papers/753 The most recent expression of the idea of a global social process and how to map it is found in the article.

2. Myres McDougal, "International Law and the Future," *Faculty Scholarship Series* Paper 2662 (1979) http://digitalcommons.law.yale.edu/fss_papers/2662

3. Harold Lasswell, "The Inter-relations of World Organization & Society," *Yale Law Journal* 55 (1946): 889-909 http://digitalcommons.law.yale.edu/fss_papers/3120/

4. Harold Lasswell, "Future Systems of Identity in the World Community," in *The Future of the International Legal Order* eds. Cyril Black & Richard Falk (Princeton: Princeton University Press, 1972).

5. Harold Lasswell & Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* Vol. II, Appendix IV (Leiden: Martinus Nijhoff Publishers, 1992), 1439-1488. Lasswell and McDougal provide a detailed outline and map of "The Community Power Process: An Outline for Policy-Oriented Inquiry".

6. Louis D. Brandeis, "The Living Law," *Illinois Law Review* 10, no.7 (1916): 461.

7. Myers McDougal, Harold Lasswell & William Reisman, "The World Constitutive Process of Authoritative Decision," in McDougal & Reisman, *International Law Essays* (New York: Foundation Press, 1981). The establishment of control conjoined by authority reflects the emergence of basic constitutional understandings and processes. A comprehensive description is given.

8. James Burns, "Happiness and Utility: Jeremy Bentham's Equation," *Utilitas* 17, no. 1 (2005): 46-61.

9. Jeremy Bentham, et al., eds., Rights, Representation, and Reform: *Nonsense upon Stilts and Other Writings on the French Revolution* (Oxford: Oxford UP, 2002), 291.

10. Harold Lasswell and Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* Vol. I & II (New York: Springer, 1992).

11. A summary of this view of social process and the relevant markers is found in a section of *Jurisprudence for a Free Society*, Vol. I, pp. 141-201, *Trends in Theories about Law: The Relation of Law to its Larger Community Context* (1992) – this section maps the global community process, the global process of effective power, the global constitutive process and the global system of public order as an integrated framework. For a detailed map of the social process context, which is developed with a map of each specific value of institutional reference, see also pp. 335-587; See also Daniel Ryan Koslosky, "Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context," *North Dakota Law Review* 84 (2008): 175 citing Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, "The World Community: A Planetary Social Process," *U.C. Davis Law Review* 21 (1988): 807, 809-10. It is notable that the "perception of interdependence" within the social process "leads participants to appreciate the relevance of pursuing common interests and motivate them to clarify it." See Harold D. Lasswell, *Psychopathology and Politics* 240-67 (1930) (describing the "state as a manifold of events"). The policy sciences look to signs and symbols to demarcate the meaning of interaction between persons. See Myres S. McDougal, Harold D. Lasswell & James C. Miller, *The Interpretation of Agreements and World Public Order xii* (1967) (theorizing that "signs are materials or energies that are specialized to the task of mediating between the subjective events of two or more persons"). For an orientation of the social process see generally Harold D. Lasswell, *World Politics and Personal Insecurity* 149-50 (1935).

12. Dennis Dalton, *Mahatma Gandhi: nonviolent power in action* (England: Columbia University Press, 2001).

13. Thomas F. Jackson*, From civil rights to human rights: Martin Luther King, Jr., and the struggle for economic justice* (Philadelphia: University of Pennsylvania Press, 2007).

14. Hakan Thörn, *Anti-apartheid and the Emergence of a Global Civil Society* (England: Palgrave MacMillan, 2006).

15. Peter Schweizer, *The fall of the Berlin Wall: reassessing the causes and consequences of the end of the Cold War* (Stanford: Hoover Institution Press, 2000).

16. Winston P. Nagan & Craig Hammer, "The Changing Character of Sovereignty in International Law and International Relations, Human Rights," *Columbia Journal of Transnational Law* 12, no. 1992 (2003): 1-60.

17. Richard Falk, "A New Paradigm for International Legal Studies: Prospects and Proposals," *The Yale Law Journal* 84, no.5 (1974-1975): 969-1021.

18. *Member States of the United Nations* (http://www.un.org/en/members/index.shtml) – there are 13 states whose sovereignty is disputed and 193 member states.

19. Seth Masia, "Nuclear power retreats in Germany, Switzerland, Italy" *American Solar Energy Society,* 1st June, 2011).

20. Myres McDougal, Harold Lasswell & Lung-chu Chen, *Human Rights and World Public Order* (London: Yale University Press, 1980)

21. "The World Academy of Art and Science: History and Manifesto," *Cadmus* 1, no. 1 (2010): 119-120. http://cadmusjournal.org/content/world-academy-art-and-science-history-and-manifesto

22. Joseph Rotblat, "Leaving the Bomb Project," in *Visionary for Peace* eds. Reisner Braun et al., (Weinheim: Wiley-VCH Verlag GmbH & Co. KGaA, 2007).

23. Winston Nagan & Craig Hammer, "Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights," *Virginia Journal of International Law* 47, no. 3 (2007): 725-805.

24. Myres McDougal, Harold Lasswell and William Reisman, "The World Constitutive Process of Authoritative Decision," *Journal of Legal Education* 19, no.3 (1966-1967): 253-300.

25. Allen H. Merriam, "Symbolic action in India: Gandhi›s nonverbal persuasion," *Quarterly Journal of Speech* 61, no. 3 (1975): 290-306.

26. Romesh Dutt, *The Economic History Of India* (London: Routledge And Kegan Paul Ltd, 1906).

27. Merriam, *Symbolic Action in India*, 24.

28. Rosa Parks & Gregory J. Reed, *Quiet Strength: The Faith, the Hope, and the Heart of a Woman Who Changed a Nation* (Miami: Zondervan , 2000).

29. "How a fruit seller caused revolution in Tunisia," *CNN*, January 16, 2011.

30. "Tunisia: President Zine al-Abidine Ben Ali forced out," *BBC Africa News*, 14 January 2011.

31. Daniel Ryan Koslosky, *Supra* at note 11.

32. *Id.*

33. Winston Nagan & Craig Hammer, "Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process," *Maine Law Review* 60, (2008): 429.

34. *Id.;* See also Lynn M. Sanders, *The Psychological Benefits of Political Participation Department of Government and Foreign Affairs*, Prepared for presentation at the Annual Meeting of the American Political Science Association, San Francisco (August 30 - September 2, 2001).

35. Harold D. Lasswell, "International Lawyers and Scientists as Agents and Counter-Agents of World Public Order," *The American Journal of International Law* 65, no. 4 (1975): 366-376.

36. Winston P. Nagan & Erin K. Slemmens, "Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration," *Tulane Journal of International & Comparative Law* 19 (2010): 41.

37. Myres S. McDougal & Jan Schneider, "The Protection of the Environment and World Public Order: Some Recent Developments," Faculty Scholarship Series, Paper 2653 (1974); Myres McDougal & Jan Schneider, "Priorities for Public Order of the Environment," *Annals of the New York Academy of Sciences* 261(1975): 255–260; See also Myres McDougal "International Law and the Future," *Mississippi Law Journal* 50, (1979).