

VALUES IN CONTEXTS		OUTCOMES BY SPECIFIC VALUE INSTITUTIONAL INTERACTIONS		AUTHORITATIVE AND CONTROLLING DECISION MAKING					
Wealth Participation Perspectives Situations Bases Strategies Outcomes	Claims	Participants		Participants at any level (regional community, national community, etc.)	Constitutive Process	Major outlines			
		Perspectives				Specific Authority Functions (intelligence, etc.)			
		Types of Claims	Relating to features of constitutive process			Agreements (organize by phase and value)	Participation	Wealth Association	constitution (phase analysis)
							Perspectives (power, respect, enlightenment, wealth, well-being, skill, rectitude, affection)		
							Situations		
							Bases		
							Strategies		
							Outcomes		
							same as above		
							Deprivations		
Private Allocations	Association by Non-Wealth Values	interaction with others (phase analysis)	same as above						
				Resources	Allocation				
					Planning and Development				
					Use or Enjoyment				
Labor Relations	(phase analysis)								
Family Law	(phase analysis)								
Respect same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						
Enlightenment same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						
Well-being same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						
Skill same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						
Rectitude same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						
Affection same contexts as above	same institutional interactions as above		same processes of authoritative and controlling decision making as above						

Table 5: Value and institutions map

Table 5: Value and institutions mapped onto the community process

We might sharpen our understanding of one of the important outcomes of a community's power process. We do this by following the six markers and asking the critical questions implicit in these markers about constituting power in society. For example, who participates and what is the level of participation in the particular constitutional order? Is the constitutional order directed at inclusion or exclusion? Does the constitution incorporate generally accepted standards of good governance such as responsibility, accountability, and transparency?

Our second marker touches on the questions of the perspectives of the critical actors and normative foundations of the constitutive process. This represents a kind of 'we (the people)' instead of 'we (the intellectual or economic or power elite).' The marker designating *arenas* touches on the level of institutionalization of constitutional expectations including individual civil, political and human rights.

The marker underlining bases of power touches on the critical issue of the nature of authority and ultimately its power to constrain brute force by the rule of law. The strategies of decision according to constitution and law are critical to the foundations of freedom and justice under law. The outcomes reflect the outcomes of the power process and, to some extent, mirror those results. Effective constitutional decision making attempts to enhance the virtues of the public order; whereas ineffective constitutional decision making stimulates the drift to tyranny, governmental lawlessness, and, ultimately, community anarchy.

#### **SPECIALIZED COMPONENTS OF LAW AND SOCIAL PROCESS USING VALUE INSTITUTIONAL ANALYSIS**

Using the same contextual markers that are part of contextual mapping, we may orient ourselves to particular aspects of the map for the purpose of doing narrow specialized research. For example, we may use phase analysis to outline critical and specialized aspects of context by organizing the map of community process according to values. In the table below, the markers relate to specific features of different value processes.

# MAPPING CONSTITUTIVE AUTHORITY AT ALL LEVELS

ADDRESS THE...	AND SPECIFY...			
<b>Participants</b> <i>(consider Inclusivity / Exclusivity and Responsibility / Freedom from Obligation)</i>	Individual(s)?			
	Group(s)...	Governmental...	National?	
		Non-governmental...	Transnational?	
			Political parties?	
			Pressure groups?	
			Global & national civil society?	
<b>Perspectives</b>	Demands...	Directed toward clarification of common interests?		
	Identifications...	In rejection of special interests?		
		With what community?		
	Expectations...	To what degree?		
		Contextual?		
	Realistic / Irrational			
<b>Arenas</b>	Interests? (complementary character plus supporting expectations)			
	Establishment...	Institutionalization...	Legislative?	
			Executive?	
			Judicial?	
		Geographic...	Administrative?	
			Central?	
		Temporal...	Peripheral?	
	Occasional?			
	Access...	Continuous?		
		Crisis?		
<b>Bases of Power</b>	Open?			
	Compulsory?			
<b>Strategies</b>	Authoritative?			
	Controlling?			
	Diplomatic?			
	Ideological?			
	Economic?			
<b>Outcomes</b>	Military?			
	...by Intelligence?			
	...by Promoting?			
	...by Prescribing?			
	...by Invoking?			
	...by Applying?			
	...by Terminating?			
	...by Appraising?			
<b>Effects</b>	Consequences for public order?			
	Changes in participants?			

Table 4: Suggested topics to consider when ...

Table 4: Suggested topos to consider when mapping constitutive authority.

instruments of internal governance and external recognition leads to the creation of sovereignty with independence and international legal personality.<sup>25</sup>

The term *sovereignty*, by itself, gives us no clues as to its creation, how it is maintained, its changing character, or, indeed, how it is terminated.<sup>26</sup> Contextual mapping may provide a useful bridge between the different disciplines and cultural contexts in which the term is used, often abused, and certainly misunderstood. My aim in this section has been to point the way to the application of contextual mapping to this subject.

<sup>25</sup> Scholars disagree about the extent to which recognition is required to establish legal personality, or if legal personality can indeed exist independently of recognition. If legal personality can exist without recognition, recognition is transformed into a legal duty possessed by the state. See PETER H. F. BEKKER & T. M. C. ASSER INSTITUUT., *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* 74 (M. Nijhoff 1994).

<sup>26</sup> The technique of contextual mapping provides indicators that locate sovereignty within the interpenetrating regional, national, and global constitutive processes. The mapping technique permits an inquiring scholar to locate sovereignty within an appropriately comprehensive social and power context and permits us to mark out areas of stability and change the sovereign influence on global public order and civil society as a scholastic agenda. The idea that sovereignty is a central element of whatever is meant by constitutional law is neither new nor remarkable. The mapping technique seems to confirm this in a more objective way. More importantly, however, the technique permits us to look behind the *Grundnorm* realistically and dynamically.

clearest example yet of a global compact representing the parties' common interest is the U.N. Charter.<sup>23</sup>

The world power process includes claims to become sovereign, to remain sovereign, and to change or realign sovereign competence. Mapping this process requires the identification of operative participants in the world social and power processes, their perspectives, demands, and expectations, their bases of power, the situations in which they operate, their general strategies for action, and the basic outcomes and effects of politically conditioned action. One of the major outcomes of the process of effective power has been the creation and maintenance of the institutions of authoritative decision making.<sup>24</sup>

Placing the concept of sovereignty within the map of the social, power, and constitutive processes, we find that sovereignty reflects the allocation of fundamental decision-making competencies about the basic institutions of governance itself. Within a nation-State, it is the authorization and recognition of persons or institutions competent to make basic decisions about governing power at all levels. On the international stage, the stabilization of expectations in bodies politic with effective control over populations, territorial bases, as well as over the

<sup>23</sup> For example, the UN Charter identifies authoritative decision-makers and procedures by which decisions might be made because it articulates a framework of practices created to facilitate decisions in the interest of "[maintaining] peace and security," which, as Professor W. Michael Reisman puts it, "[requires] more and more cooperation between large and small states." See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993). Professor Reisman goes on to assert that "[t]he United Nations Charter is only a part of [the] ongoing world constitutive process...." *Id.* at 100. The New Haven School, on the other hand, is not concerned with formal structures of government. It instead remains focused on policy so that it can explore the interplay between law and the world community through the lens of social processes. Specifically, the New Haven School explores the processes of decision-making with specific regard to the "legal process, by which...[McDougal and Lasswell meant] the making of authoritative and controlling decisions." See Myres S. McDougal and Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959). The School's lead scholars suggest that international law is a "world constitutive process of authoritative decision," and not simply a conventional set of regulations, perhaps referring to existing legal regimes such as the UN Charter. The goal of international law, the School's founders argue, is the establishment of world public order by instituting regimes of effective control and moving away from existing regimes of ineffective control. See generally Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1966-67).

<sup>24</sup> McDougal and Lasswell offer a configurative conception of jurisprudence that is the final product of an authoritative decision-making process. See Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law, in JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* 3, 24-25 (New Haven Press 1992). They argue that a scientifically grounded answer to any policy-oriented problem can be reached that might promote the common interest to achieve a world order based on fundamental principles of human dignity. *Id.* at 34-36. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context. *Id.* See also MYERS S. MCDUGAL, et al., *The World Constitutive Process of Authoritative Decision, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1265 (Myres S. McDougal & W. Michael Reisman eds., 1981).



collaboration to establish and maintain the basic political and juridical institutions of effective and authoritative decision making.<sup>21</sup>

One of the most important outcomes of the power process is the patterns of communication regarding conflict and possible collaboration. The understandings generated by power brokers in their contestations for power frequently involve communications and understandings about the limits, constitution, and uses of power for collaboration rather than conflict. From an observer's point of view, a central feature of what is called *constitutional law* is its way of institutionalizing expectations relating to the management of power in the basic institutions of authoritative and controlling decision making. The understandings that emerge from the power process reflect the development—however imperfect—of cultural forms that seek to constrain excessive, destructive conflicts and to structure conflicts productively.

Practical frameworks of communication and collaboration are generated, wherein basic human expectations may reveal, upon scrutiny, a 'living' constitutional arrangement—a design of decision-making expectations that is fundamentally interwoven with social organization and that is actually or behaviorally constitutionalized.<sup>22</sup> This might happen without a written constitution and still be an effective instrument of constitutive authority. Alternatively, the outcomes of social conflict, such as civil war, anti-colonial wars, or agitation for self-determination, might lead to the formulation of written expectations about the management of basic decision-making competences in the political culture. In short, conflict sometimes provokes the creation of a written constitution. On the international stage, wars and multi-State conflicts have historically stimulated the development of regional compacts and mutual understandings; indeed, perhaps the

<sup>21</sup> From the perspective of the New Haven School, international lawmaking, or prescription, is seen as a process of communication involving a communicator and a target audience. The substance of this communication functions as signs or symbols of policy content, symbols of authority, and symbols of controlling intention. These three signs or symbols are: 1) the 'policy content', which is the prescription, 2) the 'authority signal', which is the legitimate basis from which to prescribe, and 3) the 'control intention', which is the enforcement power. In other words, a core philosophy of the School is that in order to count as law, international law must have a prescriptive policy content, it must be accompanied by symbols or signs indicative of widespread community acceptance (because the community is the notional basis for authority in international law), and it must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real. See Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); see also W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC. INT'L L. PROC. 101, 108-10 (1981) (discussing three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.)

<sup>22</sup> See Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49, 56-58 (1971) (documenting an experiment in which several Berkeley students were locked in a penthouse for three months. The focus of this experiment was the evolutive character of law).

To illustrate, any community exhibits contestations for power. These contestations may take the form of violent rebellions or a revolution. Suppose one side in the conflict wins. The winners will seek to 'constitute' or institutionalize their authority. They may have won a battle, but winning the peace and stabilizing their power basis may require more concrete formulations of the 'authoritative' and 'controlling' aspects of power. Even if no clear winner emerges from the conflict, the contesting parties may see that stabilizing their claims and expectations about power is in their mutual self-interest.<sup>17</sup> This is because stabilizing expectations about how the basic institutions of decision are established and continuously sustained are vital to the constitution of power and its concurrent and subsequent 'recognition'.<sup>18</sup>

From an empirical rather than a formal point of view, constitutions—written or otherwise—are nothing but codified expectations of authority and stability in contradistinction to the prospect of continuous (even violent) conflict over how power and authority are to be constituted and exercised. Realistically, conflict and its polar opposite, collaboration, are present in all forms of social organization; indeed, they have ever been ubiquitous in States and societies. Even when authority is provided for in a formal constitution, there shall always be conflict regarding the precise allocations of power and competence. This means that even when the high intensity violent conflict is contained, the settlement will be fraught with contestations for power. Conflict cannot be banished from human relations, but its form can change. Often, post-conflict settlements might generate situations of constructive conflict. Thus, some forms of conflict may be socially beneficial. For example, economic competition (as any capitalist knows) is a form of conflict<sup>19</sup> that is regarded as indispensable to economic development in market systems.<sup>20</sup> Similarly, non-violent competition in democratic governance is indispensable, not only to facilitate openness, but also to further progress and change in society.

The constitutive process is continuous. But it does not render irrelevant the similarly continuing process of conflict in accordance with the constitution. There is an intuitive, ongoing relationship between contestations for power and the constituting and stabilizing of such contestations. Accordingly, the continuing constitutive process shapes communication regarding conflict management and

<sup>17</sup> Notwithstanding this process of vying for sovereign power over a community, it has been argued that at least to some extent the beliefs of individual members of that community are reflected in each act of their sovereign ruler. See generally Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

<sup>18</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 97, 110-11 (Clarendon Press 1961).

<sup>19</sup> JOHN STUART MILL & STEFAN COLLINI, *ON LIBERTY; WITH THE SUBJECTION OF WOMEN; AND CHAPTERS ON SOCIALISM* 251-54 (Cambridge University Press 1989).

<sup>20</sup> See SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 46 (Cambridge University Press 1996) (arguing that "the world economy ... has shifted the balance of power away from states and toward [competitive] world markets"); see also WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 11-26 (Simon & Schuster 1997) (discussing the emphasis on competitive global capitalism).

contestations and conflicts about power at all levels of social process from the local to the global.

The marker defined as *strategies* asks the critical question about the strategic assets an actor may use or deploy in managing the critical bases of power to achieve the value demands that the actor desires. These strategies could run the gamut from diplomatic modalities of communication, through effective propaganda and marketing, through economic incentives and threats of deficits, and by military strategic deployments or interventions.

One of the most important outcomes of a system of power relations is designated by the marker outcomes. In order to use power, the participant must have some capacity to make decisions about power. These decisions will encompass the dynamics of cooperation.

What is distinctive about this map is the identification of seven discrete though interrelated functions that make up decision making at any level. For example, the decision to get married, to go to war, or to embark on a career in higher education such as law or legal studies. The final marker in this unpacking of power as a process is the marker we designate *effects*. How power is produced and allocated is enhanced by the process of contextual mapping. This provides a clearer picture about the nature of the society and the public order upon which it is based.

This brief explanation of the power process is now further developed because *law itself is one of the outcomes of the power process*, in the sense that law is a process of decision making that has a power component to it. Law, however, is meant to be more than power. It is also meant to carry the mantle of authority, and legal decisions are meant to be both authoritative and controlling to count as law. To understand these relationships between society, power, decision, and legal decision making that is authoritative and controlling, requires us to focus on the essence of this chapter: the relevance of contextual mapping to understand relationship between society, decision, and decision according to law.

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### CONTEXTUAL MAPPING OF THE CONSTITUTIVE PROCESS

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To recap the framework for inquiry outlined above, the focus on contextual mapping essentially means that we seek to map three dynamic interrelated processes: the *social process*, the *power process*, and the *constitutive process*. The social process is simply the activity of human beings seeking through institutions (such as the family) to promote their values. The power process is a specialized aspect of the social process. It is the activity of human beings pursuing power through institutions. The constitutive process is an aspect of the power process. It is the process by which institutions for the management of power are effectively and authoritatively developed; or, more precisely, the constitutive process is the creation of reasonably predictable expectations about the allocation of fundamental decision-making authority within the nation-State or body politic.



For example, the first marker is the identification of critical players (participants). This will obviously pose one of the basic questions about who is included and who is excluded from power arenas in society. The perspectives of the participants poses the question of what their perspectives are about power in terms of identity, claiming, or demanding values and their rational or reasonable expectations. The question of the arenas of power poses the question of who has access to those arenas and who is denied.

The next marker focuses on bases of power available to the participants. The approach I present is distinctive in this regard in that it presents itself as the most radical and realistically descriptive component of the definition of power in any context and any level of social organization. All values may be sought for their own sake as claims or demands. All values may as well serve as bases of power to achieve other values. In short, power may be used to gain more power, wealth, respect, rectitude, health and well-being, education, skill, or indeed love and affection. Similarly, any other value may be used to acquire power or any other articulated value. For example, wealth may be used to leverage power or respect, or affection. Respect may be used to leverage power, rectitude, health and well-being, etc. Thus, we see that 'power,' as a radically contextualized outcome of social organization, requires the guidance of mapping and markers to facilitate inquiry into law and policy.

The marker describes as *situations* or *arenas* reflect the element of problems that implicate the spatial and temporal aspects of power in society. The critical power problems, which generate claims of importance about the power process, include the geographic aspect of power. Territory or control over territory is a major resource of the idea of territorial sovereigns, important participators in the global power and constitutional order. The jurisdictional reach of sovereign power is often delimited by the understandings of the territorial reach of its governing competence.

The *temporal* markers indicate the role of duration of power over spatial resources. A simple illustration of this principle is the role of duration of time as an indicator of "title" as reflected in the legal idea of prescription – possession over time. Such possession, which is over time uncontested, tends to vest title in the possessor. Additionally, occupation of some duration may also vest title in the occupier.

The marker of *institutionalization* is a vital marker that reflects the element of governance, which is organized as distinguished from one that is unorganized in the expression of sovereign power, in particular, claims and settlements.

The marker identified as *crisis* is only omnipresence in all interactions implicated by the contestations in the social process about power. Contestations about power invariably have the potential to gravitate to the condition of crisis, as for example in expressions of high intensity violence. Low intensity contestations invariably have the potentials of gravitating to high intensity levels of violence and crisis. The marker of *crisis* points to an omnipresence condition that accompanies

## CONTEXTUAL MAPPING OF THE EFFECTIVE POWER PROCESS

ADDRESS THE...	AND SPECIFY...		
Participants	Individual(s)?		
	Group(s)...	Governmental...	National?
		Non-governmental...	Transnational?
			Political parties?
			Pressure groups?
			Global & national civil society?
Perspectives	Demands for...	Participation in the shaping and sharing of power?	
		Maintenance of the processes of authoritative decision-making?	
	Identifications?		
	Expectations?		
Situations/Arenas	Geographic?		
	Temporal?		
	Institutional?		
	Crisis-Centered?		
Base of Power	(all values)		
Strategies	Diplomatic?		
	Ideological?		
	Economic?		
	Military?		
Outcomes	...by Intelligence?		
	...by Promoting?		
	...by Prescribing?		
	...by Invoking?		
	...by Applying?		
	...by Terminating?		
	...by Appraising?		
Effects	Consequences for public order?		
	Changes in participants?		

**Table 3: Suggested topics for consideration when producing a contextual map of the effective power process.**

One of the most important outcomes of social interaction at any level is the problem of conflicts about power, its appropriate management, and its possible uses for improving or possibly depreciating the value expectations of the community. Power is thus one of the most important outcomes of social organization, and the precise scope of these outcomes may most effectively be described (and more precisely defined) in terms of problems about power. The conceptual map outlined above may thus be understood as providing markers for understanding the problems posed by power outcomes in social process.

outline is that in general the emphasis on decision making is to identify and map decision making in the context of society and the problems, which it produces. As a technical matter, decision making is an outcome of power; and authority is an outcome of constituting power as a pattern of established and recognized authoritative practice. What we mean by decision making may be seen in unpacking seven interrelated and sequential functions of decision making and choice. At whatever degree of actual skill and efficacy decision making will involve an *intelligence* predicate, a focus on *promoting* its efficacy, its dynamic of *prescription*, *invocation*, *application*, and *termination* as well as the self-appraisal by the decision maker.

## CONTEXTUAL MAPPING OF THE COMMUNITY PROCESS

ADDRESS THE...	AND SPECIFY...		
Participants	Individual(s)?		
	Group(s)...	Governmental...	National?
		Non-Governmental...	Transnational?
			Political Parties?
			Pressure Groups?
			Private Associations?
Perspectives	Demands for...		Power?
		Respect?	
		Enlightenment?	
		Security?	
		Well-being?	
		Skill?	
		Rectitude?	
		Affection?	
	Identifications?		
	Expectations?		
Situations/Arenas	Geographic?		
	Temporal?		
	Institutional?		
	Crisis-Centered?		
Base Values	(when values perform a power/value function)		
Strategies	Diplomatic?		
	Ideological?		
	Economic?		
	Military?		
Outcome-Generated Problems	...of Production?		
	...of Conservation?		
	...of Distribution?		
	...of Consumption?		
Effects	(implicate all values, especially those critical to power, decision making, and organizing formalized authority, which will then affect the production and distribution of all values other than power)		

**Table 2: Suggested topics for consideration when producing a contextual map of the community process.**

From the point of view of legal policy, a general map such as is provided for the guidance of inquiry will inevitably lead us to the analysis of the dynamic interrelationship between the processes of effective power, the processes of effective decision making conditioned by power, the management of power through institutions of authority and authorized decision making. What we can now briefly