The Identification and Appraisal of Diverse Systems of Public Order

Myres S. McDougal

Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation

https://digitalcommons.law.yale.edu/fss_papers/2615

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
THE IDENTIFICATION AND APPRAISAL OF DIVERSE SYSTEMS OF PUBLIC ORDER

By Myres S. McDougal

Of the Board of Editors

AND

Harold D. Lasswell

Yale Law School

It is a commonplace observation that the world arena today exhibits a number of systems of public order, each demanding and embodying the values of human dignity in very different degree. Yet the problems connected with the identification of public order systems, and their appraisal in terms of impact upon the values of human dignity, have received so little systematic attention that scholars of many nations, in no sense exclusive of the United States, continue inadvertently to contribute to the confusions of everyday life manifest in the whole world community and all its component regions.¹

¹ Criteria have not been elaborated for even preliminary identification of existing international systems, which vary in territorial spread from two-Power arrangements upward toward demanded or asserted universality. Suggestions are variously made in the literature of possibly useful classifications of systems in such terms as Western European (and North Atlantic), American (North, South), Soviet (European, Asian), British Commonwealth, Islamic, Hindu, Burmese, Southeastern Asian, and so on.


The program for the April-May, 1959 meeting of the American Society of International Law is built about the theme of "Diverse Systems of World Public Order Today."
The consequences of continued confusion are to impede the continuing efforts that are indispensable to the building of the new institutions of which there is such desperate need. Among traditional legal scholars it has long been customary to give unquestioning verbal deference to the proposition that if there is any international law at all, it is a universal law, embracing the organized governments of the world community as a whole, or at least all those bodies politic admitted to the ever-enlarging European "family of nations." 2 The existence of regional diversities in the interpretation of allegedly universal prescriptions, and in the fundamental policies about the allocation of power and other values sought by such interpretation, has been cloaked in the shadows of "decent mystery" by hopeful insistence that such divergent interpretations are but occasional aberrations which will disappear when the real universality of the relevant concepts is appropriately understood.

This make-believe universalism has had the effect of undercutting the authority of every doctrine put forward in the name of the whole body of nations. Even prescriptions rationally designed to serve community interest, when properly invoked and generally applied, have suffered the onus of bearing a classificatory label identical with the symbol which is also employed to identify propositions whose authority is dubious in the extreme, or wholly non-existent. Professional lawyers and men of affairs the world over exhibit the most extreme oscillation between over-affirmation of the authoritativeness of what they term "international law" and over-denial of the validity of any significant claims put forward in the name of such a system.

Among Anglo-American jurists it is thus habitual to wage a silent war of attrition against the conception of a comprehensive international law on behalf of terms like "conflict of laws" or "comity," which they treat as an *arcanum*, to be opened only by the exercise of transcendant subleties legitimized under the recognized legerdemain of principles of jurisdiction.

2 The common assumption is thus stated in Sauer, "Universal Principles in International Law," 42 Grotius Society Transactions 181 (1957): "It goes without saying that the notion of present-day international law implies universality because this law means a law for all nations of the world." Dr. Sauer notes a certain shrinkage, however, and observes "that the present condition of universal international law is a sad one." *Ibid.* 184.

The "universalism" asserted or demanded, too often in attempted self-fulfilling description, by different writers and spokesmen exhibits of course many varying nuances in reference. Sometimes reference is made to the range of participants alleged to be subject to authoritative prescription and it is insisted that a single international law governs Western and non-Western, Christian and non-Christian, or Communist and non-Communist, states alike. On other occasions the emphasis in reference is upon alleged uniformity in application of prescriptions—that is, that the same results are achieved in the same or comparable contexts when the only difference lies in the identity of the parties to the controversy. Still again "universalism" may merely express a demand that all states accept and implement the same set of policies relating to their external interactions. On rare occasions, the reference is explicitly and candidly to mere words, accompanied by demands that future interpretations of the words be made to conform to the requirements of a projected world order. Cf. Dickinson, Law and Peace 122 (1951).
derived from territorial sovereignty, nationality, and other technical concepts.\(^3\)

Not the least obstructive result of this confusion is the failure to keep at the focus of responsible world attention both the future oriented nature of the challenge contained in the idea of universal legal order and the crucial fact that a legal order of inclusive scope can only come into existence in a process of interaction in which every particular legal advance both strengthens a world public order and is in turn itself supported and strengthened by that order. The processes of law have as their proper office the synthesizing and stabilizing of creative efforts toward a new order by the procedures and structures of authority, thereby consolidating gains and providing guidance for the next steps along the path toward a universal system. By pretending in one mood that international law is a contemporary and presumably well-constructed edifice while insinuating in another that it is a pretentious and dubious fantasy, the true dimensions of the task are concealed. Effective, comprehensive universality, despite the faint shadows of worldwide organization, does not now exist. It is for the future; and can be expected only as a reward of clarification and of relevant effort.

A pervasive present illusion is that lip service to the claim of universality for contemporary international law serves the cause of universality. On the contrary, the invocation of spurious universalism on all questions diverts creative concern from the vital issues on which the diverse systems of public order that now dominate the world scene are not united, and which, if they are to be resolved by peaceable persuasion rather than bellicose coercion, must be brought into the open and kept there as unremitting challenges to take appropriate action. Obscurity helps to perpetuate the divisions of the world; and in the deepest sense serves the interest of no one, for all mortals are in deadly peril of inadvertent as well as planned destruction in the wake of nuclear conflict.

Having full regard to the common interest in removing the cloud that overcasts the future, it must not, however, be supposed that all interests are identical, or that the existing decision-makers of all nation states are without what they regard as important stakes in continuing, rather than terminating, the present state of danger.

In view of the universal testimony in public and private about the suicidal peril of continuing the arms race, one may well exclaim: “How can such things be?” Are the top officials of the world so depraved in mind and character, so insistent upon egocentric power, that they would rather risk the end of man than agree to a genuinely universal system of public order?\(^4\)

With the demoniac case of Adolf Hitler fresh in mind, we cannot deny the possibility that totalitarian systems of public order are capable of

bringing into power and keeping in power a personality whose self-image is so inflated by unconscious processes that he is ready to ruin the world if he cannot rule it. The bitter and shocking revelations by Khrushchev of the last mad years of Stalin provide us with another example of the pathologic horrors of systems that feed on dreams of world dominion imposed by blends of fascination and terror.

Despite these ominous precedents we do not assert that the primary danger from the present anarchic state of the world, so far as issues of elementary safety are concerned, is the spawning of another paranoidal Caesar in Moscow. The continuing threat is more humdrum than that. We do not even need to make the assumption of malevolence, of individual depravity that prefers office to the sacrifices necessary to abate the nuclear danger. A much simpler explanation may very well account for the failure of leaders, notably of totalitarian leaders, to make whatever short-range sacrifices may appear necessary in order to install the operations essential to a truly universal system of international law.

We refer to the conditions that surround the political leader of totalitarian systems. Such a leader has come to the top by surviving the chronic uncertainties and risks of a police state. His every move is reacted to instantly, not by peaceably disposed competitors in free debate and election, who are campaigning for votes, but by ambitious assistants and nominal colleagues, whose only route to greater power is ruthless conspiracy and coercion, and who thus are necessarily out to ruin his career, if not to end his life. It cannot be assumed that under these menacing conditions the apparent leader of a totalitarian junta can lightly allow himself to appear to acquiesce, for example, in measures that authorize the bringing of foreign personnel into the arsenals of the totalitarian garrison. The overwhelming probability would appear to be that the first leaders who move in this direction will forfeit their political influence, and possibly their lives. These top figures, despite all their braggadocio and bombast, have been effectively paralyzed as leaders of co-operative achievement by a polity of mutual and deadly intimidation; they gyrate in endless convolution while the arms race gains breadth and malignance.

Yet the spokesmen of totalitarian Powers are the ones who, professing to be more orthodox keepers of the faith than their bourgeois opponents, pay most punctilious deference to the supposed universality of international law. And why? Strange as it may seem at first glance, the most convincing interpretation is that the existing imperfections of the system can be used by them to help prevent further advances toward a world order with genuine measures of security. For it is in the name of such allegedly universal doctrines of international law as sovereignty, domestic jurisdiction, non-intervention, independence and equality—all of which appear to fortify claims to freedom from external obligation—that the case is made to resist the institutional reconstructions which are indispensable to security.

In this grave posture of world affairs it can only make sense to put aside the veil that is provided by false conceptions of the universality of international law. An indispensable step toward a truly comprehensive system of world order is to disabuse all minds of the false myth that
universal words imply universal deeds. The effective authority of any legal system depends in the long run upon the underlying common interests of the participants in the system and their recognition of such common interests, reflected in continuing predispositions to support the prescriptions and the procedures that comprise the system. The discrediting of claims to universality which are in fact false is thus a first necessary step toward clarifying the common goals, interpretations, and procedures essential to achieve an effective international order capable of drawing upon the continuous support essential to global security by consent. By piercing the veil of pseudo-universality we may, further, diminish the degree of unwitting support that totalitarian Powers obtain from the persisting failure of many scholars and leaders of the non-Soviet world to disclose the true state of affairs. Too many people, professional and lay, have failed to see that insistence upon universality as now "existing" serves as a tactical screen to disguise the strategic goal of advancing toward an imposed universalization of the totalitarian form of public order. Soviet leaders hope to benefit the totalitarian objective by keeping the bodies politic of the non-Soviet world sufficiently divided to forestall joint exposure of the Soviet position and to prevent continuing conjoint pressure for progress by co-operation toward a world order of human dignity.

For the visible future at least the lead must of course be taken by scholars and public figures physically located in the non-Soviet world. It is obvious that scholars who reside in the non-Soviet world have much more freedom in the expression of unconventional ideas than their opposite numbers. In part this comes from the diverse social environments where they live and from which they draw support. In part the critical factor is ideological, reflecting freedom from, rather than subjection to, a deterministic materialistic metaphysics. The non-Soviet world has several well-established modern and industrial societies which make no demands to go beyond their national frontiers for the purpose of subordinating other peoples to a centrally administered socio-economic and political structure.

Scholars and public figures in the non-totalitarian world can use this relatively favorable environment to make critical appraisals—of the national self as well as the self of other nations. It is therefore feasible for them to dissolve the curtains of confusion created by the common practice of glorifying specific institutional practices instead of glorifying the goal values of human dignity and engaging in a continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the over-arching goal.

Fortunately, advantage may be taken of the fact that the major systems of public order are in many fundamental respects rhetorically unified. All systems proclaim the dignity of the human individual and the ideal of a worldwide public order in which this ideal is authoritatively pursued and effectively approximated. They differ in many details of the institutionalized patterns of practice by which they seek to achieve such goals in specific areas and in the world as a whole.
The important point is that varying detailed practices by which overriding goals are sought need not necessarily be fatal to the future of mankind but can be made creative in promoting and expanding freedom, security and abundance. The modern world is a cauldron of aspiration for a better life on the part of millions of human beings hitherto devoid of any expectation of receiving serious consideration. Unless the institutional details of all systems of public order are open to reconsideration in the light of the contribution that they make to the realization of human dignity in theory and fact, the plight of the world community will remain as precarious as we know it to be today.

Not the least of the institutionalized devices that call for reappraisal are the doctrines and operations having the name of international law. We suggest that major contributions to world order would be the divorce of many of these putative principles from the contexts that give them spurious significance and the vindication of authoritative prescriptions that have genuine relevance to the goal values of human dignity.

The task is a prime responsibility of the scholarly world, and especially of jurisprudence and the social sciences generally. Some of the work has been done by traditional scholars, though too often in scattered and incomplete form. We shall outline a map of the undertaking that we have in mind and in whose execution we invite all like-minded scholars to participate. It will be made evident that we are calling, not for a single research project to be done once and for all, but for a continuing process designed to become part of the intelligence and appraisal functions of the world community. In common with all institutional details this inquiry will be open to perpetual reappraisal.

The map we recommend begins with (a) orienting ourselves in world social process, (b) identifying within this, a process distinctively specialized to power, (c) characterizing as the legal process those decisions that are at once authoritative and controlling, and (d) defining as the public order those features of the whole social process which receive protection by the legal process. From this map we proceed to (e) outline our commitment to the realization of a universal system of public order consistent and compatible with human dignity, (f) analyze the intellectual tasks that confront the scholar who accepts this overriding goal, (g) indicate some of the specific questions that arise in the consideration of any system of public order, and (h) refer to the scholarly procedures by which the task of inquiry can be executed on a satisfactory scale of depth and coverage.

*For background and development of social process analysis with special reference to law and politics see, among other studies, Lasswell and McIougal, “Legal Education and Public Policy: Professional Training in the Public Interest,” 52 Yale L. J. 203 (1943); Lasswell and Kaplan, Power and Society (1950).
"process" because there is interaction; of "social" because living beings are the active participants; of "world" because the expanding circles of interaction among men ultimately reach the remotest inhabitants of the globe. Interaction is a matter of going and coming, of buying and selling, of looking and listening; and more. The most far-reaching dimension is the taking of one another into account in the making of choices, whether these choices have to do with comprehensive affairs of state or private concerns of family safety. Such subjective events of mutual assessment tie people into the same process even when they retire behind the ramparts of castles and garrisons to prepare against an eventual day of reckoning.

The participants in the world social process are acting individually in their own behalf and in concert with others with whom they share symbols of common identity and ways of life of varying degrees of elaboration. Whether acting through one channel or the other the fundamental goal stays ever the same, the maximization of values within the limits of capability. A value is a preferred event; and if we were to begin to list all the specific items of food and drink, of dress, of housing and of other enjoyments, we should quickly recognize the unwieldiness of the task. Hence for the purpose of comparing individuals and peoples with one another we find it expedient to employ a brief list of categories where there is place for health, safety and comfort (well-being), for affection, respect, skill, enlightenment, rectitude, wealth and power. Human beings the world over devote their lives to the incessant shaping and sharing of values, activities which they accomplish by making use of patterns of varying degrees of distinctiveness.

Each identifiable "practice" is a pattern of subjectivities (perspectives) and of operations. The practices which are relatively specialized to the shaping and sharing of value we identify as an "institution." Hence we recognize institutions of government, specialized to the shaping and sharing of power; economic institutions, which focus upon the production, distribution and consumption of wealth; religious and ethical institutions, specialized to the grounding and specification of responsible conduct; mass media and other institutions of enlightenment; schools of arts, trades and professions, and associated institutions of skill; pervasive patterns of social class, which are basic institutions of respect; the institutions of family and friendship (affection); and of health, comfort and safety (well-being). These institutions, organized and unorganized, utilize the resources of nature in greater or less degree in the shaping and sharing of preferred outcomes of the social process.

When we consider the globe as a whole we perceive that it is composed of communities of diverse size and degrees of institutional distinctiveness (culture). A short time ago Western Europe and North America were the sole possessors of modern science and technology, and of related patterns of culture. Today the culture of science is spreading toward universality as ancient civilizations are revived, and the relatively isolated folk societies of Asia, Africa, South America and the Pacific come within the orbit of modernization and industrialization.
World Power Process

Within the vast social process of man pursuing values through institutions utilizing resources, we are especially concerned with the characteristic features of the power process. A social situation relatively specialized to the shaping and sharing of power outcomes is an "arena"; and it is evident that the world at any given cross section in time is a series of arenas ranging in comprehensiveness from the globe as a whole, through great continental, hemispheric and oceanic clusters, to nation states, provinces and cities, on down to the humblest village and township. The identifying characteristic of an arena is a structure of expectations shared among the members of a community. The assumption is that a decision process occurs in the community; that is, choices affecting the community are made which, if opposed, will in all probability be enforced against opposition. Enforcement implies severe sanction.

When we scrutinize an arena in more detail, going beyond the minimum necessary for bare definitional purposes, it is possible to identify several categories of participants. Some are official organizations, or governments—national and international. Others are specialized to bringing influence to bear upon those who make the important decisions (political parties, political orders, pressure groups, gangs). Some are associations which, though active in the social process, do not concentrate upon power but primarily seek other values. The ultimate actor is always the individual human being who may act alone or through any organization.

Whatever the type of participants—group or individual—the actual conduct of participants in the power process depends in part upon their perspectives, which are value demands, group identifications and expectations. They may demand, for example, a rising standard of living; and the rising standard may be sought on behalf of the family with which one is identified, or on the basis of identification with depressed classes in a community. Demands may be accompanied by structures of expectation that place great reliance upon strategies of persuasion (or coercion) as the most likely means of influencing results.

Each participant has at his disposal values that he employs as bases for the influencing of outcomes. An inventory discloses that all values—power, wealth, respect, and so on—may be used to affect a decision outcome. Base values are made effective by the strategies used to affect outcomes. Strategies are often classified according to the degree to which they rely upon symbols or material resources. Diplomacy depends primarily upon symbols in the form of offers, counter-offers and agreements among elite figures. Ideological strategy also uses symbols as the principal means of action, the distinctive mode being communications which are directed to large audiences. Economic instruments are goods and services; military strategy employs weapons. Every strategy uses indulgences (such as economic aid to allies) or deprivations (such as boycott of unfriendly Powers), and proceeds in isolation or coalition. The coalitions within an arena at a given time reflect the number and strength of the participants interacting in the arena. During the nineteenth century the world arena
was dominated by a few great Powers; in recent times the structure has to an increasing degree been bipolar.

The strategies of participants succeed or fail in the degree to which they culminate in military victory or defeat, or in the winning or losing of votes in intergovernmental organizations or direct negotiation among nation states.

The outcomes affect the value position of every participant in the world context in terms of every value and institutional practice. In addition, post-outcome effects may change the basic composition and modes of operation of the entire world community.

**The Legal Process**

Within the decision-making process our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions. Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not. The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law.

In order to identify and compare the rôle of law in the processes of power it is serviceable to distinguish seven functional phases of decision-making and execution. *Prescription* is the articulation of general requirements of conduct. Among the organs specialized to this function are constitutional conventions and legislatures. International law is articulated principally in the daily activities of foreign offices as they justify or attack, accept or reject, the claims put forward by themselves or others. Prior in time to prescription in a given sequence is *recommendation*, or the promoting of prescriptions. This function is actively performed by such official and semi-official bodies as international governmental organizations, national and trans-national political parties, and pressure groups. Also the *intelligence* function is typically prior in time to prescription or recommendation; it includes the gathering and processing of information about past events, and the making of estimates of the future, especially of the costs and gains of alternative policies. Official organs of intelligence are partly specialized to secret intelligence; but a very large part is open, and in free countries is very largely supplied by the press and by research and scholarly agencies. Since its founding the United Nations has performed a vast intelligence operation for all.

*Invocation* consists in making a preliminary appeal to a prescription in the hope of influencing results. Hence invoking activities are conspicuous in negotiation; they also include the justifying of claims defended or attacked by counsel before tribunals of the world community. Invocation is the function of public officers or the community agents who are confronted by the responsibility for labeling specific patterns of conduct in reference to legal norms. *Application* is the final characterization of a situation in reference to relevant prescriptions. When a court speaks at the end of
litigation, or an administrative organ decides a concrete case, each operation is an applying activity. The appraisal function formulates the relationship between official aims and subsequent levels of performance. Among special agencies of appraisal are auditors, inspectors and censors. Although the appraising function might be included with intelligence, its prominence in political controversy justifies independent recognition. The function of termination is the putting to an end of authoritative prescriptions and of arrangements arising within them.

A Public Order System

Within the distinctions thus developed, we are able to clarify what is meant by a system of public order. The reference is to the basic features of the social process in a community—including both the identity and preferred distribution pattern of basic goal values, and implementing institutions—that are accorded protection by the legal process. Since the legal process is among the basic patterns of a community, the public order includes the protection of the legal order itself, with authority being used as a base of power to protect authority.

In this perspective it is evident that our world is composed of a series of community contexts beginning with the globe as a whole and diminishing in territorial range and scope. To the extent that it can be demonstrated that the globe as a whole is a public order system, and only to that extent, do we speak of universal international law. To the degree that territories larger than national states comprise a public order system, we refer to regional international law. Great Britain, for example, has figured simultaneously in more than one large region, and if we add the bilateral contexts which in some cases can be regarded as public order systems, Great Britain plays a rôle in many such configurations. Obviously today it is more accurate to speak of international laws or multi-national law than of international law.

Clearly, systems of public order differ not only in territorial comprehensiveness but also in the completeness of arrangements in terms of the different value processes regulated, and in the internal balance of competence for decision inclusive of the entire area in question and that for decision relating exclusively to component areas within it. To the extent that there is universal international law some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units. Regional international law has a corresponding separation between region-wide prescriptions and sub-regional units. Similarly, nation states like the United States distinguish between the inclusiveness of Federal authority and the proper domain of the internal States.

Among major distinctions between public order systems are the degree to which specialized organs have been developed to conduct the decision process in the inclusive territory, and the degree to which the organs employed by each component unit also carry on the decision process for the whole. It requires no demonstration that international law is largely the creation of organs of the latter type, since the bulk of the world legal
system has grown up in the "custom" of communicating foreign offices, supplemented by special conferences, and more recently by intergovernmental bodies whose tasks, speaking formally, are not "legislative" (that is, are not regarded as performing "prescriptive" functions).

It is not possible at present to describe the public order structure of the world community, since for the most part existing knowledge is fragmentary and noncomparable. Nor can we proceed with confidence to set detailed limits upon the relative completeness of legal systems and hence of systems and near-systems of public order. It is sufficient to say that, whatever lines are drawn between a system that the scientific observer calls "complete" and systems that are "incomplete," the present absence of authoritative and controlling arrangements for minimal security will preclude the acceptance of the entire world community, as at present constituted, from being classified among complete legal systems, and hence among complete public orders.

TOWARD A UNIVERSAL ORDER OF HUMAN DIGNITY

Our overriding aim is to clarify and aid in the implementation of a universal order of human dignity. We postulate this goal, deliberately leaving everyone free to justify it in terms of his preferred theological or philosophical tradition.

The essential meaning of human dignity as we understand it can be succinctly stated: it refers to a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power.

Given this overarching goal and the present posture of world affairs, what can scholars do individually and through the organization available to them to further the objective?

Manifestly, five intellectual tasks are pertinent to the solution of this as of any legal problem.

First, clarification of goal. Clarification can proceed in two directions, in justification of the commitment to the goal, or in detailed specification of what is meant in terms of social and power processes, and legal and public order systems. If we were to specify in detail the meaning of "widely shared participation" in social values, we would consider each of the value-institution processes of society in turn.

Second, description of trend. Having clarified the goal of human dignity, the next intellectual task is the discovery of the degree to which historical and contemporary events conform to or deviate from the goal.

Third, analysis of conditioning factors. Simple historical sequences are not enough to provide understanding of the factors which affect decision. We need to ascertain the factors that condition the degree to which goals have been achieved or failed of achievement.

Fourth, projection of future developments. Assuming that our individual or group efforts will not significantly influence the future, what are the probable limits within which goal values will be achieved?

Fifth, invention and consideration of policy alternatives. Assuming
that our efforts may have some impact upon the future, what policy alternatives will maximize our goals (at minimum cost in terms of all values)?

Each of these five intellectual tasks may be illustrated in further detail. We begin with the clarification of goals and indicate with a series of questions about each value what we mean by the sharing of values.

**Power.** To what extent is power widely or narrowly held? *E.g.*, how many members of the community are involved in amending the constitution, or enacting other prescriptions; or in the function of intelligence, recommendation, invocation, application, appraisal, termination? (The involvement may be direct, as in referenda, or indirect, as in representation.) To what extent are the processes of adjustment coercive or persuasive? *E.g.*, how intense is the expectation of violence? Of peaceful agreement?

**Wealth.** To what extent is the economy focused upon savings and investments? Upon rising levels of consumption? Upon shorter hours of work? *E.g.*, what tax and other fiscal measures make for forced saving or discourage saving and investment? Is there compulsory labor? Are there minimum income guarantees?

**Respect.** What is the commitment to caste or to mobile class forms of society? *E.g.*, does status depend upon position of family at birth? Or upon any other characteristic besides individual merit? To what extent is minimum respect accorded to everyone on the basis of mere membership in the human race? *E.g.*, prohibition of humiliating penalties; protection of privacy; protection of freedom of agreement against official and private limitation. To what extent are individual differences protected when they depend upon government? *E.g.*, protection of reputation.

**Well-Being.** To what extent is continued increase of numbers encouraged even at the expense of immediate improvement of the values available to individuals? *E.g.*, are birth restrictions promoted or opposed? What are the policies regarding care of the old? In what degree is the living population sought to be protected from mental and physical deprivation, *e.g.*, accident, disease and defect prevention; prevention of private and public violence? In what degree is the health, comfort or safety of the population restored after deprivations have occurred? *E.g.*, arrangements for care and cure.

**Skill.** To what degree is the body politic committed to optimum opportunity for the discovery and cultivation of socially acceptable skills on the part of everyone? *E.g.*, is there universal and equal access to educational facilities? Does the access continue to whatever level the individual is capable (and motivated) to make use of? In what measure does the body politic provide optimum opportunity for the exercise of accepted skills? *E.g.*, are there employment guarantees or suitable levels? Are new skills recognized and assisted readily? *E.g.*, prohibitions upon skill monopolies.

**Enlightenment.** To what extent does the community protect the gathering, transmission and dissemination of information, *e.g.*, guarantee freedom of press, of research, of research reporting? In what degree does the
community provide positive aid, e.g., encourage the use of competent sources (though not permitting monopoly)?

Rectitude. To what degree does the body politic protect freedom of worship and of religious propaganda? To what extent is positive assistance given to foster freedom of worship and religious propaganda, e.g., aid to doctrinal schools?

Affection. What is the protection given the family and other institutions of congeniality? E.g., what are the barriers against disruption? What affirmative aid is given, e.g., freedom in the choice of partner; in group formation; financial and other modes of help?

Next we turn to the description of trends. Our concern is for trends throughout the world community with special reference to all the bodies politic, however incomplete their level of political organization. The term “trend” is used to designate the present distribution of goals sought, the degree of their contemporary realization, and the extent to which this realization has become greater or less through time.

It is perhaps obvious that we are not to be satisfied with taking note of the fact that the ideal of human dignity is verbally accepted. We therefore propose to go beyond the dominant beliefs, assumptions and loyalties (the myth) of any given society and look into its operational technique. It is therefore ultimately necessary to conduct the studies that reveal the true state of affairs throughout the entire social process. Then we can sum up the state of public order according to the degree of effective sharing and the basic institutions that receive protection.

Each value-institution pattern has a specialized system of myth and of operational technique. The myth falls into three parts: doctrine, formula, folklore. Political doctrines, for instance, include the prevailing philosophies of politics and law. Economic doctrines include theoretical justifications of capitalism or socialism. Respect doctrines either justify social class discrimination or the opposite. And every other value has its doctrinal myth.

The political formula takes in all the constitutional, statutory and other authoritative prescriptions of the legal order that relate to the decision process. It is possible to find corresponding rules for the other values, such as wealth. Some of these rules receive legal backing; others are not supported by the community as a whole, but depend solely upon the support of a component group.

The political myth also includes popular lore about the heroes and villains of yesterday and today, and the notable events of history (and the future); similarly, for wealth, enlightenment, and the other values.

The operational technique exhibits the extent to which the perspectives constituting a myth are adhered to, or deviated from.

The foregoing categories provide a broad reference frame within which more detailed consideration can be given to the patterns of authority and control, and particularly the patterns of international law, characteristic of each legal system. We shall devote a separate section to the outlining of such questions.
Turning to the third intellectual task, the analysis of conditioning factors, it is necessary to make an inventory of the categories of factors to be investigated by the scholarly community. Scholarship which would be creative, must look behind technical formulas and authoritative procedures to the conditions that importantly determine which formulas and procedures are in fact employed. Relevant comparisons must take into account entire contexts rather than rely upon a few isolated variables divorced from the setting in which they occur. We shall go no farther than to indicate the five sets of conditioning (interacting) factors that must eventually receive attention. First, we mention culture, which is the term that characterizes the most distinctive patterns of value distribution and institutional practice to be found in the world community. Second, class. This word covers the position of individuals or groups in terms of the control of values. One may be upper, middle or lower (elite, mid-elite, or rank and file) in control over each value. Third, interest. The word is used to refer to groups less inclusive than a class or unbound by class. Specific occupational skills, for example, may cut across lines of class. Fourth, personality. The term designates the basic value orientations, practices and mechanisms characteristic of an individual. Fifth, crisis level. This expression, referring to conflict situations of extreme intensity, applies to each of the foregoing categories, but can be separated for convenience. In addition to those factors which pertain directly to values and institutions, place must be found for the impact of the entire resource environment, and of basic genetic capabilities, upon mankind.

The fourth task, that of projection of future developments that are likely to affect international law, requires a disciplined consideration of past trends conjointly with the available stock of scientific knowledge. One alternative—that of the total extinction of man—we can rule out of consideration for obvious reasons. But there are drastic new developments that we can wisely anticipate, notably in the field of science and technology. We are already in the early phases of penetrating outer space; and it is not too early to consider a range of contingencies which will arise as we come close to planetary exploration. The explosive growth of machine simulators of the brain, of experimental embryology, and of simple devices of contraception have given some intimation of how our fundamental ideas are likely to undergo drastic revision. If one projects present prospects in the physics of particles and energies, one perceives all sorts of major developments affecting man and his resource environment. We shall keep the present discussion within manageable limits by postponing further consideration of these potentialities.

The ever-present question in everyone's mind is whether we can invent or recognize policy alternatives that are likely to move us most rapidly, and at least social cost, toward a more perfect realization of a universal international law of human dignity. We shall have space to refer to one fundamental alternative to which the present analysis is intended to contribute. If we are to move knowingly and skillfully toward the goal, it will be necessary for the scholarly community to perfect the intelligence
and appraisal functions of those who are striving toward the realization of human dignity.

We turn to a more specific consideration of the existing state of affairs.

COMPARING INTERNATIONAL SYSTEMS OF PUBLIC ORDER

The questions with which we are concerned are those pertinent to the ultimate appraisal of the success or failure of any system of public order as instruments of the overarching goal of human dignity. We are chiefly interested in international systems, and particularly in the external impact of each system. Specific interpretations of many universalistic terms and propositions differ greatly on particular problems. Hence it is especially important to examine the diverse systems of public order whose several commitments affect the flow of events in the world arena.

The following questions about any particular system of public order, to be asked here of any grouping of states, are directed to the identification of its fundamental categories and techniques and to the appraisal of both its inner operations and external interactions in terms of impact upon the values of human dignity. With respect to each specific inquiry, we ask a double question: What is the proclaimed, explicit myth or implied assumption about myth? How in fact is the proclaimed or assumed myth interpreted and applied in particular instances of social interaction? We are concerned both for what values are expressed in the basic conceptual structure of the system about important problems and for how these concepts are applied in practice to affect the sharing of values and the degree of achievement of the basic goal values.

Relevant questions might be directed toward every aspect of social interaction, including any or all of the traditional problems of international law. For convenience we group questions about the conceptions and applications of any particular system of public order under the following three main headings: (1) Conceptions of Law (including perspectives of authority and techniques of effective control, as well as myth and practice about the interrelations of authority and control); (2) Features of Power Processes Protected by Law; and (3) Features of Basic Value Processes Protected by Law. It may be emphasized again that the questions we ask are intended to be suggestive only and not exhaustive.

(1) Conceptions of Law

The important questions here relate to both perspectives of authority and techniques in effective control. Most generally the questions are: What processes, structures and functions, of authority are established or recommended? What processes, structures and functions, of effective control are established or recommended? And what interrelations between authority and effective control are established, assumed, or demanded? 

* We recognize of course that authority and control may overlap and it is indeed precisely this overlap that we recommend as the most useful reference of the word “law.” The asking of separate questions about authority and control may, we hope, promote realism in inquiry about their interrelations.
Concerning authority, more specifically, important questions relate to perspectives about both decision-makers and criteria for decision-making.

First, in regard to decision-makers: Who are regarded as authoritative decision-makers and by what processes are they established and identified as authoritative? What is the degree of community participation in such processes of establishment and identification? Are decision-makers in the various authority functions distinguished from parties to the interactions regulated? Do they include both national and international officials? Do they include representatives of non-governmental groups or parties? Who, with what qualifications, are selected by whom and how? What constitutive, legislative, executive, judicial, and administrative structures of authority are established or recommended? How, in sum, must such structures be appraised in terms of such fundamental continua as democracy—despotism, centralization—decentralization, concentration—deconcentration, pluralization—monopolization, and regimentation—individuation?

Second, in reference to criteria for decision: By what distinctive criteria—in terms both of the scope, range, and domain of values affected and of procedures by which decision outcomes are to be brought about—does the system of public order under inquiry recommend that decisions be taken? How are perspectives of authority grounded in terms of fundamental justifications of decision? Are ultimate references to trans-empirical or empirical events? If trans-empirical, are the references religious or metaphysical? If metaphysical, idealistic or materialist? If ultimate reference is empirical, is it to events within or without the social process? If transcendent of the social process, how characterized? If within the social process, is it by unclarified demand for "precedent," "logic," "validity" or other alleged rectitude norms or by systematic reference to expectations about social process values? If reference is to social process values, is demand made for caste or human dignity values? If the system declares an overriding goal of human dignity, what particular values and institutional practices are included in the conception of such goal? What degrees in the sharing of particular values are specified as required by human dignity? With what degree of universalism or inclusiveness are criteria of authority, whatever their ultimate reference, asserted and demanded? For what "community" is "common interest" proclaimed?

Important questions about criteria for procedures relate both to the structures of authority established or recommended for each policy function indicated above—prescription, intelligence, recommending, invoking, applying, appraising, terminating—and to the impact of the modalities by which each function is performed upon human dignity values. For each function the two most general questions are: What structures of authority (constitutive, legislative, executive, judicial, administrative) are specialized to the performance of this function? How does the performance, which is in fact established or recommended, impact upon all demanded values? Impressionistic indication of the type of more specific, relevant question with respect to each function may be indicated seriatim:
**Prescription.** What is the relative reliance, in the performance of this function, upon specialized organizations or tribunals, upon explicit agreement by participants in an arena, and upon unilateral decision by contending participants in the name of "customary law"? What principles and procedures are afforded for expediting the achievement of consensus and the making of agreements? To what "sources" of policy (prior uniformities in behavior and subjectivities of "rightness," general principles of mature systems, considerations of equity and fairness, opinions of the learned, and so on) are unilateral decision-makers authorized to turn in shaping and justifying decision? Does the system purport to accept the notion of "customary law" but reject the inherited general principles of mature societies? To what degree is there community participation in, and acceptance of, all procedures?

**Intelligence.** How effective and economic are specialized structures in bringing to the attention of decision-makers the information required for rational decision? How widely is available information shared in the community?

**Recommending.** How many different types of participants are permitted to engage in this function? How open is participation in advocacy of policies or decisions? Are opposition groups permitted or encouraged? Are the mass media of communication accessible to all?

**Invoking.** What is the degree in equality of access by all types of participants to the invoking machinery of the community? What participants are admitted to what arenas for invoking what prescriptions?

**Applying.** Is arrangement made or recommended for the impartial, third-party application of community prescriptions? Are appropriate procedures, and dispositions of effective power, afforded for prompt enforcement? Are procedures for enforcement compatible with human dignity?

**Appraising.** How effective are the structures afforded for appraising the economy and legality of decision? How open is the sharing of results of appraisals? May private groups make appraisals of the legality of government?

**Terminating.** How efficient is provision for the termination of obsolete prescription? Do the procedures afforded give effective expression to the demands of the people affected? What is the relative reliance upon termination by consensus of the parties affected and upon unilateral decision by one party? Is an appropriate balance sought and achieved between stability in expectations and necessary change, with minimum costs in terms of all values?

Concerning effective control, more specifically, the important general questions are two: What processes, structures and functions, of effective control are brought to bear in support of, and in turn receive reciprocal protection from authority? And, in contrast, what processes of effective power escape the control of authority? The first of these questions will be developed in some detail below. The second requires only brief illustration. The thrust of the inquiry is whether all participants in power
processes and all instruments of policy are effectively made subject to processes of authority. In what degree do political parties, pressure groups, and other private associations achieve a privileged position above the law or are subordinated to the legal process? In what degree are the varying instruments of policy—diplomatic, ideological, economic, military—subjected to, or freed from the regime of law? More comprehensive illustration might of course outline detailed inquiry about democracy of access to, and dispersal of information about, effective power processes. The most complete inquiry would parallel that with respect to the process of authority.

(2) *Features of Power Processes Protected by Law*

The first questions here relate to the allocation of competence, protected by processes of authority, between particular states and larger groupings, or the general community of states. What inclusive competence is protected in the general community or larger groupings of states? What exclusive competence is protected in particular states? How economic is the balance achieved for the production and sharing of the values of human dignity for all mankind? Is it the balance which is best calculated to maintain minimal security, in the sense of freedom from intense coercion or threats of such coercion and freedom to promote the greatest production and widest sharing of other values? In what degree does the inclusive competence protected both secure democratic access by peoples to participation in decision-making which affects them and achieve an assumption of responsibility adequate to maintain application of inclusive policies in arenas both internal and external to particular states? In what degree does the exclusive competence protected secure states from arbitrary external intervention and promote freedom for initiative, experiment, and diversity in effective adaptation of policies to all the peculiarities of the most local contexts? Are technical concepts proffered by the particular system under inquiry—such as "international concern," and equivalents, for protecting inclusive competence, and "sovereignty" and equivalents (including "domestic jurisdiction," "independence," "equality," and "non-intervention") for the protection of exclusive competence—designed and interpreted in fact to promote a rational, productive balance between competences?

*Of.* Lipson, "The New Face of Socialist Legality," 7 Problems of Communism (No. 4, July-Aug. 1958) 22, 29:

"What the reformers have not touched and will not touch is the political basis that necessarily prevents 'socialist legality,' Soviet-style, from meeting the standards of legality upheld by other countries. There will be no sure legal guarantees that the troikas and purges will not recur, that the cult of (some other) personality will not again become the religion of the state, and that terror will not lay waste another generation of Soviet citizens; indeed, there can be none as long as the party, and the elements of Soviet society striving for supremacy through or against the party, remain unwilling to grant effective autonomy to the legal system, keeping it above the political struggle as a safeguard of general order and liberty."

"It is convenient to use the traditional words, "general community of states," without imputation of universality, to refer to the largest grouping seeking common values."
DIVERSE SYSTEMS OF PUBLIC ORDER

“sovereignty,” for example, subordinated to, or regarded as a part of, international law or is it conceived as a “discretionary power which overrides the law”? Is “international concern” interpreted in practice to protect inclusive decision which is genuinely inclusive or used as a cloak to conceal arbitrary exclusive decision?

For the more detailed posing of these and other relevant questions, brief reference may be made seriatim to each of the important elements or phases in a power process: participants, arenas, bases of power, strategies, outcomes, and effects.

Participants

Which of the effective participants in the world power process are accepted as full participants in processes of authority—that is, given access to authority structures and functions for the protection of their interests and subordinated to authority for insuring their responsibility to community policies? Which effective participants are admitted, or subjected, in lesser degree to what authority structures and functions? By what criteria are different types of participants accepted or rejected in varying degree? What territorially organized communities are accepted as authorized participants in what degree? What provision is made for regional groupings of territorial communities? Is the ultimate goal a monolithic “single state” or a pluralism of balanced regions? What rôle is accorded international governmental organizations? Are they conceded an independent rôle or regarded as mere diplomatic appendages of states? What rôle is accorded non-governmental groups? Are differences made between political parties and other private associations? Are individual human beings a recognized category of participants in processes of authority or are they regarded as mere objects of authority?

 Arenas

Are the various particular arenas provided for the performance of authority functions adequate to promote the resolution of controversies by persuasive, rather than coercive, means and to reduce to a minimum the number of decisions not taken in accordance with authority?

Are special criteria, other than those stipulated for the identification of generally authorized participants, imposed to regulate admission to particular arenas? When a new territorially organized community emerges, by changes in effective control and authoritative arrangements, from an older community, do authoritative prescriptions make a distinction between emergence by consent and by violence? Between indigenous internal change and change stimulated by external intervention by peoples from other communities? Between change in the name of a totalitarian world order and in genuine demand for indigenous freedom? Do relevant prescriptions achieve an economic balance between maintaining security in

---

8 Jenks, note 1 above at 120.
the larger community and promoting genuine self-direction in the lesser communities?

Are principles and procedures about membership, representation, and credentials stipulated for international government organizations compatible with easy access by all interested participants or do they create controversy and continuous world tension?

Is provision made for the reciprocal recognition and protection by governmental participants of the private associations they variously charter and foster for the greater production of specific values, such as wealth and enlightenment? How open is the access of individual human beings to governmental arenas, political parties, pressure groups, and private associations?

Are decisions about recognition, membership, representation, and credentials established as inclusive or exclusive?

Bases of Power

A. Resources

By what criteria may exclusive claims to resources such as land masses, internal waters, and airspace be established? Is peaceful use and succession protected against violent seizure?

By what criteria is a balance achieved between exclusive and inclusive claims to sharable and strategic resources, such as the oceans, international rivers, international waterways, Polar regions and outer space? Does the balance achieved promote the most productive and conserving use for the benefit of all?

B. People

By what criteria are varying degrees of control over people as bases of power honored and protected? What discriminations are permitted between "nationals" and "aliens"? By what criteria may a territorial community impose its nationality upon or withdraw its nationality from an individual for varying purposes? What are the limits upon naturalization and denaturalization? What selective admissions, exclusions, and corrective measures, with respect to both physical access to territory and all value processes, is a territorial community permitted to impose for power purposes upon its nationals and upon aliens? Do relevant prescriptions protect the utmost individual voluntarism in affiliation and activity that is compatible with a reasonable community security?

C. Institutions

How adequately are participants protected in their freedom of decision, as to both internal and external arrangements, from external dictation?

Are principles of non-intervention fashioned to catch the more subtle modalities of coercion or only the cruder, physical forms? Are protected freedoms appropriately balanced by imposition of responsibility for the maintenance of internal institutions adequate to the performance of community responsibility? Is “self-determination” invoked to secure and protect a genuine self-direction of people or merely as a slogan to promote destruction of existing communities?

Is the equality between states which is protected a real equality in sharing of power and responsibility or is it a pseudo-equality which defers by verbal legerdemain to the security considerations of the greater powers? Is it tacitly expected that discriminations will be made which are not explicitly provided?

Strategies

With respect to each instrument of policy—diplomatic, ideological, economic, and military—what are the prescriptions about who can employ the instrument, with respect to whom, for what objectives, under what conditions, by what methods, and with what intensities in effects?

How adequate are prescriptions for promoting the persuasive, non-coercive use of instruments of policy? Are adequate immunities and facilities afforded to diplomats and others to facilitate negotiation? Does the “peaceful settlement” demanded by a system express a real willingness to compromise and to seek an integrated solution in community of interest or is it a mere tactic in the poising of an opponent for ultimate destruction? Are provisions about the formation, application, interpretation, and termination of agreements rationally designed to protect the reasonable, mutual expectations of parties? When the “validity” of agreements is found, not in the mutual expectations of parties, but in alleged objective conditions, by what criteria is it decided which conditions create validity and which do not?

Do prescriptions contain a clear prohibition of the use of instruments of policy in modalities so coercive that they threaten a target participant’s continuing bases of power and independence in decision? Does the prohibition upon too intense coercion extend to all instruments of policy, singly or in combination, or only to the military instruments? Is the use of force limited to the conservation, rather than to the expansion of values? Do prescriptions in the law of war about permissible combatants, areas of operations, objectives of attack, instruments and means of attack, and de-

10 The distinction between persuasion and coercion may be clarified in terms of the number and cost of alternatives open to a participant. By persuasion we refer to interactions which leave open a number of alternatives with expectations of high gain and low cost. By coercion we refer to interactions which leave open few alternatives, with expectations of little or no gain and high costs.

We assume that the participants consciously pursue a range of realizable alternatives in representative situations in the social process. This assumption is necessary to indicate that people who have been trained to demand and expect few alternatives are not free.
degrees of destruction, achieve a reasonable balance between humanitarianism and military necessity? Do the prohibitions of coercion and violence impose a community-wide responsibility or are "neutrals" tolerated? 11

Outcome and Effects

By what criteria—territoriality, nationality, passive personality, protective, universality, etcetera—are states accorded exclusive competence to prescribe and apply law for particular events or value changes? By what criteria—"acts of state," "immunities," etcetera—is it expected that a state which has acquired effective control over persons or resources will defer in decision to the law prescribed by another state? What varying degrees of competence are accorded states with respect to events within their own territory, in the territory of other states and in areas open to many or all? Do relevant prescriptions both permit states substantially affected in their community value processes by particular events to assert competence over such events and, when two or more states are so affected, promote compromise by requiring claimants to take into account the degree of involvement of the values of others in the same or comparable events? Do the prescriptions as a whole establish an appropriate stability in the expectations of participants that controversies will be handled in agreed ways without the disruptions of arbitrary assertion of power? Do they achieve an appropriate balance between subordinating non-governmental participants—individuals and private associations—to inclusive community authority and freeing such participants from parochial and arbitrary restraint for creative initiative in ordered exploitation of the world's resources, sharable and non-sharable?

Do prescriptions about aggregate changes—state and governmental succession—achieve a necessary balance between continuity in the application of general community policy and freedom for local communities to direct internal changes as they deem their unique conditions to require?

(3) Features of Basic Value Processes Protected by Law

Ideally our inquiry here should extend to detailed examination of all the remaining community value processes—such as with respect to wealth, enlightenment, respect, well-being, skill, rectitude, and affection or congenial personal relations—in a manner comparable to that employed above with respect to power processes. Such inquiry would survey the degree to which authority has been brought to the protection of claims made with respect to general participation in interactions in which a particular value is shaped and shared, to access to certain particular situations of shaping and sharing, to continuing control of certain values as base values to affect the shaping and sharing of the value demanded, to the employment of strategies

of varying degrees of persuasion and coercion in interactions, and to certain outcomes in enjoyment or consumption of the value demanded. An omnipresent question would, of course, be with respect to each detail of every process whether participation is kept open and free to access by all interested parties or reserved as monopoly for a few.

For brief indication of the general method of inquiry we make reference only to a few important questions with respect to certain important values. We begin with “security,” in its maximum sense of the sum of position, potential and expectancy with respect to all values, and then proceed to other values.

Security

By “security” we here refer to demands for the maintenance of a public order which affords full opportunity to preserve and increase all values by peaceful procedures, free from more than a minimum level of coercion or threats of such coercion. In terms of the general analysis of power the questions grouped under the rubric of security emphasize, not so much the sharing as the mode by which the social process is carried on. Obviously the fundamental goal of human dignity commits us to the minimum use of coercion compatible with the most advantageous net position for all value outcomes.

For inquiry into any particular system, some of the more general questions may be indicated as follows: What policies are recommended as appropriate for the international community in regard to coercion? What objectives are asserted as permissible, and what impermissible, for employment of coercion? What operational meaning is given to proclaimed policies in terms of policies sought in fact? How are proclaimed and actual policies translated into specific conceptions of permissible and impermissible coercion? What, on the one hand, are the recommended conceptions of “aggression,” “breaches of the peace,” “threats to the peace,” and “intervention,” and, on the other, of “self-defense,” “collective self-defense” and “police action”? Are these concepts given an operational meaning which in fact authorizes, and promotes, the defense of independence and territorial integrity? Are all instruments of coercion, including the techniques of externally instigated coup d’etat, brought within their compass? What factors in the context of the world arena are recommended to decision-makers for consideration in the making of specific interpretations in concrete instance? What structures of community authority are approved and recommended for application and enforcement of community policies? What recommendations are made about the procedures by which decisions are to be taken? What specific sanctions are approved and recommended for securing conformity to community policies? Is there willingness to place adequate effective power at the disposal of community organization or agency? Is there willingness to take the measures in reference to other values, such as in regard to standards of living, freedom of communication and inquiry, respect for human dignity, which are necessary to predispose peoples to the maintenance of a secure public order?
Wealth—Economic Growth and Trade

The demand of the lower income groups and nations around the globe to live a better life in the material sense has confronted the world community with most acute problems. Important questions about any projected system of world public order are: Does this order protect an economy which seeks an appropriate division of labor and the development and exploitation of resources on a world (or universal) scale or some lesser scale? By what policies, persuasive and coercive, are resources allocated? Do these policies embrace the most productive sharing of sharable resources? Are appropriate institutions provided for planning and development functions? What balance is achieved between the public and the private control of resources, or between central and decentralized control? Does this balance promote or retard the democratic functioning of other value process? Are wealth considerations subordinated to power considerations? How adequate is the protection and regulation of private claims to resources, and of the wealth activities of private associations across state lines? Are appropriate institutions provided for the most productive international exchange? What accommodation is afforded between free markets and state trading?

Respect—The Articulation and Implementation of Human Rights

The criterion of human dignity is most obviously applicable in relations including the degree of effective freedom of choice given to individuals in society. To respect anyone is to protect his choosing function so long as its exercise does not seriously imperil the corresponding freedom of others. For inquiry into how diverse systems of public order have distinctive approaches to all that affects human rights, we suggest questions as: Does this system begin with a presumption in favor of private choice? In favor of privacy? Does it provide equality of access to value processes upon grounds of merit or foster discriminations based upon caste, race, alienage, color, sex and so on? Does it prohibit or permit value deprivations incompatible with common humanity? Does it provide positive assistance to individuals on the basis of common humanity in overcoming handicaps? For what territorial community does the system demand human right? What specific content does it recommend, and reject, for international prescription, covenant or customary? Does this content embrace all or only a few values? How closely does it approximate, exceed or fall short of, such demands as are asserted in the Universal Declaration of Human Rights? What particular modalities, by inclusive decision, for the implementation of particular human rights does it accept or reject? Is there acceptance of disinterested, third-party decision?

Enlightenment and Top Skills

It is generally recognized by observers of the world scene that barriers to the gathering, transmission and dissemination of current information of
events around the globe help to sustain the local monopolies of intelligence that stand in the path of peace and order. Further, the enormous significance of scientific and technological know-how has emphasized the importance of prompt enlightenment as to fundamental discoveries about nature or society.

The relevant questions for spotlighting divergence in approach are as above: What positive facilities, governmental and private are afforded for promoting inquiry, communication, education and training? How open is access to all processes? Are discriminations made on grounds other than merit? Is freedom of expression, assembly, and association encouraged? Does the system promote the sharing of information, scientific knowledge, and cultural exchange, across state lines? What content and modes of implementation are proposed for international prescription? What limits are imposed upon the use of the ideological instrument for purposes of coercion?

Well-Being

The importance of maintaining optimum standards of safety, health, and comfort is as axiomatic as the interdependence of all peoples with respect to such standards. Relevant questions relate both to the facilities provided—including all degrees of governmental involvement—for medical care, prevention of disease, healthful housing, appropriate food and clothing, sanitation, working conditions, leisure and recreation, et cetera, and for the area of community concern and effective prescription and application of policy.

Rectitude

The reference here is to the consensus in conceptions of right and wrong sufficient to support all other institutional patterns of the world community toward which we aim. A society of human dignity implies a high degree of unity as to goal values and to the non-coercive practices by which goals are clarified and put into effect. More specifically, what is involved is a high degree of effective application in public and private of the formal standards of responsibility which are essential to attain and maintain the desired society.

Immediate questions relate to varying conceptions of individual and collective responsibility in national and international systems of criminal law and to accommodations between diverse systems, by extradition, protection of political offenders, rights of asylum, and so on. More long term questions relate to potentialities for adjusting national criminal laws and procedures to more comprehensive unities, for adapting local systems of ethics (with or without religious and metaphysical derivation) to more comprehensive unities, and for adapting prevailing moral sentiments for larger unities. Recurrent inquiry seeks the degree of freedom of choice in beliefs about right and wrong and the adequacy of facilities for the enjoyment of rectitude beliefs.
Affection (Including Loyalties)

Goals here include the development of a sense of belonging to the whole community of mankind and concern for the common good (positive identification), the spread of congenial personal relationships in all groups regardless of cultural or class characteristics, and the development of non-destructive human personalities capable of entering into friendly contact with others. Relevant questions relate to authoritative formulae and procedures affecting the comprehensiveness of loyalties and memberships and the congeniality of personal relations. Of especial concern are any potentials for adapting local doctrinal systems and sentiments to larger loyalties and for adjusting national and international prescriptions for facilitating more comprehensive memberships. The humanitarianism in family law and the degree to which this humanitarianism is projected across state lines are of obvious pertinence.

What the Scholar Does in Gathering and Processing Data

There remain for brief consideration some of the technical problems that relate to the operations by which scholars gather and process the data required to identify and appraise systems of public order. We shall briefly characterize the strategy by which the facts of any given community context can be obtained. Broadly conceived, the most promising strategy of inquiry moves from the well known to the less known, in this case implying that a beginning is made by employing the operations familiar to all legal scholars, then proceeding to the phases of the situation for which the social and behavioral sciences provide the sharpest instruments. Legal scholars in international law must take direct responsibility for the plan as a whole, and for the execution of those parts that require the traditional training of lawyers. It is also essential that the legal scholar work in close association with specialists from related fields whose contributions are called for. Briefly:

Operation 1. Establish the provisional identity of a public order system within a community context by means of an inventory of explicit legal formulae.

The inventory can be made by examining constitutional charters, statutes and doctrines purportedly applied by decision makers in specific controversies. What value patterns and basic institutional practices are given explicit protection or aid in fulfillment? What value-institution patterns receive implicit support (that is, what does the scholar infer from the formal material, even though the language is somewhat ambiguous)?

By extending research through past time, changes of trend in the public order system, as tentatively understood, can be described.

Operation 2. Add accuracy and detail to the inventory obtained by means of Operation 1 by describing the frequency with which each prescription found in the legal formulae is invoked or purportedly applied in controversies.
In the formal decision process authoritative prescriptions are mentioned with varying degrees of frequency by the parties who seek to justify their claims, and by decision makers who are performing functions of invocation or application. It is also true that authoritative prescriptions may be ignored in circumstances to which they refer (as viewed by the scholar-observer). It is pertinent also to note that authoritative language is often referred to outside the formal decision process (for instance, between private negotiators). Moreover, prescriptions might have been used in factual situations outside the legal process, though actually no one invoked them in controversies difficult if not impossible to distinguish from those which were eventually brought to the formal attention of decision-makers.

The data gathered by Operation 2 makes it possible to relate the language of authority more directly to the facts of control. As a matter of definition it will often be clarifying for the scholar to specify the minimum level of frequency of invocation and purported application that he requires before accepting a particular pattern of authority and control as “law.” The information assembled by Operation 2 makes it feasible to classify specific authoritative statements, not only as law but as obsolete or obsolescent or emergent law. By extending research historically the trends in the role of each statement can be revealed.

Operation 3. Analyze all other sources for the purpose of making a fuller identification of the systems of public order provisionally revealed by the proceeding operations. Describe the legal process in the context of the decision process as a whole, and of the social process within the entire community context.

Most of the scholarly effort at this phase is devoted to obtaining data by methods that are not conventional to traditionally trained legal scholars. Hence reliance is put upon the finding of specialists upon the value-institution processes of wealth, respect, well-being, and so on. Likewise specialists upon the inherited nature of man and the physical resources by which he is surrounded, and with which he interacts, are to be made use of. The data obtained in Operations 1 and 2, which deal with aspects of the legal process, must be put in the context of all categories of significant factors (culture, class, interest, personality, crisis).12

To some extent the procedures of data gathering in Operation 3 will be the interview or participant observation. Insofar as materials must be gathered which are residues of the historical process the basic methods are those familiar to historians. The growing application of experimental method has resulted in the use of “pre-tests” whose purpose is to reveal the direction and intensity of the predispositions current in a given group. These devices open up the future possibility of proceeding in more informed fashion to devise facilitating strategies for the realization of public order objectives.

All the facts assembled in each operation above will of course be contributory to the five intellectual tasks to be performed by scholars in the fields of international law. The data will interact with the clarification of values, the characterization of trend, the analysis of conditioning factors, the projection of future developments, and the invention and appraisal of alternative policies for the optimum realization of the clarified values of human dignity.

_The Contemporary Challenge to Scholars_

For some decades scholars of international law have been preoccupied with the task of establishing that the subject of their professional concern was in fact law and could not be dismissed as a miscellany of maxims principally useful for the admonishing of decision-makers to act ethically. The implicit assumption appears to have been that unless the universality of international law is established, there is no international law whatsoever; and further, that the most effective means of moving the world toward a universal body of law is to assert its contemporary reality in fact.

It is high time that the community of scholars abandon a conception of their rôle in history whose principal effect is to condemn them to inaccuracy and futility. The inaccuracy consists in the assertion of universality in fact, and relative futility is demonstrated by the contemporary division of the globe into diverse systems of public order whose leaders use the appeal to universality as a pawn and a screen in the tactics of world power.

The challenge to scholars is to resume their proper function which is to assist all who will listen to distinguish clearly between the current facts of the global context and estimates of future developments—and between estimates of policy alternatives that will merely move the world closer to some universal system of law and public order, however unfree, and alternatives that will in fact foster the common objective so frequently proclaimed by the authorized spokesmen of existing nation states, namely, the goal of realizing human dignity in theory and fact.

More specifically the challenge to scholars of international law is twofold: (1) to develop a jurisprudence, a comprehensive theory and appropriate methods of inquiry, which will assist the peoples of the world to distinguish public orders based on human dignity and public orders based either on a law which denies human dignity or a denial of law itself for the simple supremacy of naked force; and (2) to invent and recommend the authority structures and functions (principles and procedures) necessary to a world public order that harmonizes with the growing aspirations of the overwhelming numbers of the peoples of the globe and is in accord with the proclaimed values of human dignity enunciated by the moral leaders of mankind.

In this perilous epoch of threatened catastrophe legal scholars have an opportunity of unparalleled urgency to assist in performing at least two indispensable functions: the function of providing intelligence and of making recommendations to all who have the will and capability of decision.

As old orders crumble and dissolve under the ever-accelerating impact of scientific, technological and other changes, the future becomes increasingly plastic in our hands, holding out the possibility of moulding a world
order nearer to the aspirations of human dignity, or of losing out to the most ruthless and comprehensive tyranny that man has ever known.

The impact of scholarly research and analysis can be to disclose to as many as possible of the effective leaders, and constituencies of leaders, throughout the globe the compatibility between their aspirations and the policies that expedite peaceful co-operation on behalf of a public order of human dignity. In a sense the present incompatibility is already obvious to every individual who possesses even a modicum of authentic information about the chronic threat of accidental as well as deliberate disaster. Besides the aspiration to remain alive, and to keep family and nation alive, there are legitimate aspirations to remain in a potent power position for all values. Research and analysis can indicate to the leader even of non-democratic regimes which policies, if adopted, are likely to maintain them in an advantageous position, as they guide their peoples through peaceful transitions toward a more perfect realization of public orders of freedom and responsibility on a local and global scale.

Scholars are in a position to make, to apply, and to disseminate awareness of, the basic distinction between preferred goals and specific institutions. The goal of widespread participation in all values throughout the social process is the fundamental criterion of policy. This must receive specific form, for example, in institutional practices of popular government, of graduated income distribution, and of an open class system. It is of the utmost importance that particular institutional devices shall be open to continuous and competent investigation to assess the actual contribution that they are making to the overriding goal. Productive controversy can rage over the definition of human dignity in specific institutional terms, and also over the technical measurements applied by scholars to the appraisal of their operations. Instead of institutional symbols such as "capitalism" versus "socialism," "territorial" versus "functional" representation, "centralized" versus "decentralized" planning, considered abstractly and affirmed dogmatically, the focus of attention and debate can usefully shift to the appraisal of contemporary structures according to their positive or negative impact upon present and prospective value-shaping and sharing.

The task of appraisal, as we have continually emphasized, is more than the examination of statutes, treaties, regulations, and proclaimed judicial doctrines. The relevant context that requires investigation is the constellation of factors affecting the creation and interpretation of authoritative language throughout the entire decision process. Under ascertainable circumstances appropriately authoritative language can foster the realization of effective systems of public order at every level of inclusiveness up to and including the community of mankind, systems consistent and compatible with the overriding goal of human dignity. As a contemporary step in the direction of such universality it is imperative that spokesmen for the field of international law cease proclaiming the present universality of international law, and drop the assumption that it is a matter of indifference what system of public order achieves universality. This is the challenging opportunity that "our time of trouble and "age of anxiety" offers to all scholars everywhere.