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The Prescribing Function in World Constitutive Process: How International Law is Made*

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No problem has proved more refractory to lawyers and scholars than understanding and explaining how international law is made. Domestic analogues, whose explanatory power may be inadequate even in their own contexts, have so little relevance to the complexities of international politics that those who invoke them finish either by throwing up their hands and conceding that the model is inappropriate for the task[1] or by painting themselves into the palpably absurd position that there is no international law.[2] But, of course, there are many effective international norms. To gainsay such norms because of a theory is a grotesque caricature of understanding and scholarship. As the world becomes more pervasively transnational and interdependent, an understanding of how international law is

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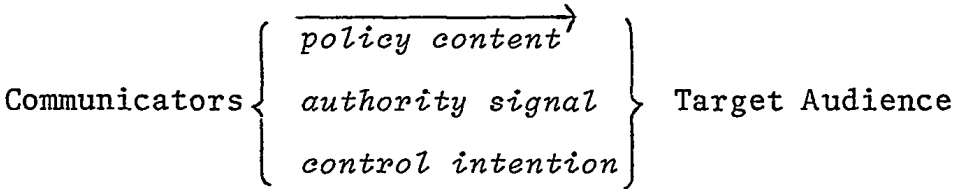
1. H. Hart, The Concept of Law 208-31 (1961).

2. J. Austin, The Province of Jurisprudence Determined 12, 127, 142, 201 (1954).

made and, even more to the point, of how to make it, becomes a matter of greatest practical urgency. In any community how law is made immensely affects the shaping and sharing of all values.

The making of law is a decision function[3] which may be conveniently described as prescription. By prescription, we refer to a process of communication which creates, in a target audience, a complex set of expectations comprising three distinctive components: expectations about a policy content; expectations about authority; and expectations about control.[4] Schematically, these indispensable, coaxial expectations may be indicated as follows:



Each of these expectation components may itself be complex. In a heterogeneous community of varying

3. Prescription is one of seven component functions which comprise the various types of decision: intelligence, promotion, prescription, invocation, application, termination and appraisal. A functional approach to decision-making offers the student of authoritative decision an alternative to the traditional more limiting organic approach (popularized by Montesquieu) which focuses on the institutional divisions of formal government: the executive, legislature, judiciary and administration. The major shortcoming of an organic analysis is that it does not discriminate clearly among the many different types of authoritative decision; the same organ characteristically engages in a multiplicity of types of decision. *See* McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pt. 2), 19 J. Leg. Educ. 403, 415-37 (1967) [hereinafter cited as *World Constitutive Process* II].

4. With the exception of historicalists and certain cults of naturalism, virtually all jurisprudential schools have recognized a distinctive policy component in prescription and, with varying degrees of clarity, have appraised that content in terms of its contribution to the achievement of minimum and/or optimum public order. It was the positivism of John Austin, curiously, which underlined the control element as one of the distinctive indicators (in Austin's view exclusive) of prescription. J. Austin, *supra* note 2, at 16-18, 24, 26. But Austin had little conception of the authoritative component in the sense of community expectations.

levels of interaction, the authority signal may have to incorporate, either simultaneously or sequentially, many different authority systems. Similarly, control intention communications may involve complex packages of promised indulgences and threatened deprivations directed to different audiences. The point of emphasis is that all three components must be copresent if we are to speak meaningfully of law.

The relative importance, within the prescribing function, of the control and authority components may vary with, among other things, the type of prescription being communicated, the level of crisis, and the nature of the community. In an integrated community in which authority is relatively stable and internalized in participants, authority may be the major sustaining and characterizing factor in prescription; behavior not conforming to authoritative communication is likely to cause dysphoria in the deviating actor and may trigger autopunitive responses. In a less integrated community, control may be the primary characterizing and sustaining element of prescription. The interplay between the authority and control elements of prescription is complex and variable.[5] Anticipation of the probable means of application of power does not necessarily lead to expectations of authority; on the other hand, stabilized patterns of control may tend to shape authoritative expectations.[6] In certain marginal situations, authority may constitute the sole base value for a particular process of prescription. This may be treated as prescription only if the requisite element of control is subsequently brought into play, thus creating in the audience the expectation that certain behavior not only should be followed but will indeed be required.

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5. This interplay, furthermore, is frequently overlooked. To be sure, many theorists are aware that a prescriptive theory cannot rest on authority alone. Rather than recognizing a control component, however, they will often fill the lacuna by turning to further authority. *See, e.g.*, Parsons & Shils, *The Social System*, in Toward a General Theory of Action 202-03 (T. Parsons & E. Shils ed. 1951)(social integration depends upon the internalization of common values and the enunciation of "role expectations by occupants of responsible roles").

6. *See* H. Lasswell & A. Kaplan, Power and Society 133-34 (1921)(analysis of role of control and authority in structure and practice of political processes).

The concept of prescription is broader, and more precise, than the commonly used term, legislation. Legislation rests on an organic and structural conception, deriving from the assumption that law is made solely or primarily by centralized legislatures. This orientation is patently inadequate for the study of international law with its dearth of centralized legislative bodies. Even within a more highly organized community, legislation is often no more than a procedural label, with little or no relevance to the creation of expectations of authority and control in the rank and file audience to which it is directed. A significant amount of legislation is not prescription: it is no secret that the legislatures of certain states are notorious for producing voluminous legislation but no prescription. Nor does all prescription, properly so called, derive from legislative bodies. As Maine observed, to limit law to the legislature is to exclude from scholarly focus many of the most vigorous sources of authority; systems that do not have institutionalized legislatures have law, but not legislation.[7] Even in systems in which there are legislatures, the abundance of prescriptive creativity far outruns any specific institution. The mongrel term "judicial legislation," for example, is so common that it no longer astonishes our lexical sensibilities.[8] Observers and participants accept the fact that many governmental agencies which are not legislative make law. The point of emphasis is that the concept of prescription allows scholarly examination of all the processes of creating expectations about authority and control, whereas a focus on "legislation" tends to restrict the observer to the specific actions of a legislature.

In the global community, as in its lesser component communities, the processes of communication by which prescriptions are generated range from the most formal, organized, and specialized through many gradations to the most informal, unorganized, and non-specialized.[9] When prescriptive processes are most

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7. H. Maine, Ancient Law 20-42 (1875).

8. *See* B. Cardozo, The Nature of the Judicial Process 98-142 (1921)(legislative rules derived from judicial decision-making).

9. *See, e.g.*, W. Sumner, Folkways (1906)(discussing the informal, non-specific ways in which laws can be made). Contemporary sociology and social psychology, particularly role theory, are permeated with the suggestion of informal, unorganized and non-specialized normative systems. A writer such as Goffman has developed extraordinary sensitivity to the most subtle codes of normative

formal, organized, and specialized, they may be conveniently analyzed in terms of a sequence of four distinctive steps or phases: the initiation of the process; the exploration of relevant facts and potential policies; the choice and formulation of the policy to be projected as authoritative for the community; and the communication of the prescriptive content and expectations about authority and control to the target audi-

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9. (continued)
behavior. *See* E. Goffman, Relations in Public (1971). *See also* Gibbs, *Norms: The Problem of Definition and Classification*, 70 Am. J. Soc. 586 (1965). Significantly, in virtually all of this literature, though the existence of norms is taken for granted, there appears to be no concern with how they are made, or more important, how power is used to sustain them through time. *But see* M. Sherif, The Psychology of Social Norms (1936)(study of the psychological factors affecting the formation of social norms).

In earlier studies we sought to generalize the process by which vaguely formulated customary law is made in terms of the reciprocal claims and mutual tolerances of states in the course of cooperative activity. *See* McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 Am. J. Int'l L. 356 (1955) (continuous interaction of nation-state decision-making is critical to formation of law of the sea)[hereinafter cited as *Hydrogren Bomb Tests*]; McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 Yale L.J. 648 (1955)(discussing process of claim assertion and adjustment in development of law relating to nuclear testing). In emphasizing the importance of the expectations of the communicatees of a prescriptive message, we indicated that it was not so much the initial claims as the combination of such claims and reciprocal tolerances which created the "expectations of pattern and uniformity in decision, or practice in accordance with rule, commonly regarded as law." *Hydrogen Bomb Tests, supra*, at 358 n.7.

This "process of communication" description of the development of customary law has been adopted and elaborated by a number of subsequent writers. *See* K. Wolfke, Custom in Present International Law 63 (1964)(on development of law through continuous process of claim assertion, appraisal, and acceptance); MacGibbon, *Customary Law and Acquiescence*, 33 Brit. Y. B. Int'l L. 115 (1957) (on role of acquiescence in development of customary rights and obligations).

We seek here to extend this mode of description to all types of international lawmaking. It would seem facilitative of the rational performance of the various intellectual tasks which both decision-makers and observers must perform to think of prescription as a continual process, in which both formulated and non-formulated components are merged, each affecting the other.

ience.[10] Even when a prescriptive process is highly informal in procedure and implicit in its communication, some rough approximation to these phases may be observed. The most realistic description of the prescribing function requires, however, its relation to other decision functions in the global community's more comprehensive process of authoritative decision.

I

Focusing on the various component functions of authoritative decision should not obscure the fact that each function contributes to the performance of every other and that, at a microscopic level of analysis, all decision functions are, in fact, replicated in the performance of any single one. Thus, the intelligence function delivers to the prescriber's attention the aggregate of community goals likely to be affected or approximated in a proposed prescription, appropriate trend and condition data on how past efforts to secure such goals have succeeded or failed, and possible alternatives in prescriptive programs, including information about the possible social effects of such alternatives. In its shaping of expectations about the future, emphasizing or de-emphasizing possible choices, intelligence affects both demands and identities. Insofar as a prescriber has the structural and temporal capacity to digest and relate intelligence to the prescriptive tasks before him, the rationality of prescription will be enhanced. Conversely, through prescription, intelligence pathologies will, in the long run, be inflicted on the larger social process.[11]

The promotion function is particularly critical to the overall performance of prescription. By facilitating both formal enactment and the development of informal expectations about authority and control, promotion contributes the intensities in demand and, properly

10. A sequential analysis is often useful in analyzing all decision functions. *See, e.g.*, Lasswell, McDougal & Reisman, *The Intelligence Function and World Public Order*, 46 Temple L.Q. 365, 368-70 (1973)(any given intelligence task can be broken down into three sequential stages).

11. For a detailed treatment of the intelligence function, see *id.*

regulated, adds new sources of information about goals, trends, and conditions. Where promotion misfunctions, the predominance of one or more power groups may serve to attenuate the flow of information to prescribers and, in extreme circumstances, may reduce the prescriber's role to the mere formality of endorsing with tokens of legitimacy the demands of those with naked power.

Every decision function is subject to a complex set of authoritative expectations. Compliance with these expectations determines, in part, the lawfulness of the performance of that decision function within the larger constitutive process. The prescribing function prescribes for the other functions; that is, it is constantly engaged in establishing authoritative principles of content and procedure for the performance of all other decision functions. Thus, for example, procedures and substantive priorities are prescribed for the intelligence function, and every phase of the promotional process is sustained by a network of authoritative prescriptions. Prescription also prescribes for itself, that is, the prescribing function itself is subject to detailed regulation. This ongoing internal procedure involves a continuous feedback and reappraisal of the conformity of actual prescriptive effects with prescriptive goals.

Both invocation and application involve the implementation of prescribed policies in social process. The efficacy of these decision functions will thus determine whether prescription is a controlling or merely verbal operation. Repeated invocations and applications, whether formal or informal, may reinforce diffuse expectations and, by creating expectations of future uniformities in decision, add certainty to other indices of expectation. In particular, the way appliers ascertain, supplement, and integrate past prescriptions very directly affects the course of future expectations about authority and control. The prescriber's image of the degree of the probable effectiveness of his own function will obviously influence his efforts, including the social sectors which he chooses to prescribe for, the content of prescriptions, and the sanctions provided. A prescriber's sense of futility and meaninglessness need not manifest itself in inactivity; it may also express itself in wildly unrealistic prescriptions which have no chance of implementation and which further erode community expectations about the effectiveness of the prescribing function.

The quality of the termination function may have subtle but important impacts on prescription. Even

proposals for termination or failure in efforts to terminate may reinforce other indices of expectation. The realistic prescriber, oriented in a social process of continuous change, expects a continual redefinition of prescription. Hence he realizes that the contribution of his function to the aggregate goal realization of the entire decision process depends upon the subsequent termination of many of the prescriptions to which he now attaches high symbols of authority. In the absence of such termination, prescriptions that were rational at some point in the past but that are no longer so become obstacles to goal realization and, as the power process shifts, may engender nonauthoritative change. Such change erodes prospectively the authority of the prescriptive process.

The appraisal function, examining past successes and failures, tests the aggregate performance of prescription and affects predispositions about future acceptability. Where there is persistent goal deviation, personal or structural responsibility is imputed. The self-regulation of prescribers for effectiveness will, hence, depend upon appropriate appraisal.

II

It should be no cause for surprise that the major jurisprudential theories have made little contribution to realistic description of transnational prescribing processes.[12] The "natural law" emphasis has been more concerned with search for the "bases of obligation" or "validity" of law in general than with inquiry about the empirical paternity of particular prescriptions.[13] Even when it has concerned itself with particular prescriptions, this emphasis has encouraged the illusion

12. For a more detailed critique of the contributions of the major jurisprudential theories of international law, see McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1968) (outlining suggestions for a more viable theory of international law) [hereinafter cited as *Theories About International Law*].

13. The quest for "source of obligation" or "binding character" or legitimacy, or any of the multitude of equivalents, can quickly take on aspects of mysticism or of "infinite regress" when not accompanied by the specification of operational *referents* in terms of the empirical expectations of community members about

that the appropriate quest is not for the means by which law is in fact created, but rather for the "sources" of a law somehow mysteriously preexisting, which the naturalist commonly locates in inaccessible transempirical realms.14 Plainly the word "source" can be no more than the vaguest reference to certain social processes. In tautological fashion, the naturalist assumes and then discovers a source, but never describes nor explores its social dynamics.15

Despite its emphasis upon uniformities in behavior, the historical approach, with its distinctive disdain for conscious law-creating processes and concern for mythical, national groups with inbred *volksgeisten*, does not appear to have formulated a comprehensive theory

13. (Continued)
authority and control. *See* Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 Mod. L. Rev. 1, 8-13 (1956)(search for source of obligation akin to search for "a sort of will-o'-the-wisp, an *ignis fatuus* that only recedes further into the distance as one approaches it, and that can never actually be reached"). *See also* Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 Brit. Y.B. Int'l L. 1, 8-18 (1953) (discussing valid regulatory power of international law)[hereinafter cited as *Law and Procedure of the International Court of Justice*].

14. The word "sources" has multiple and ambiguous uses. Briggs for example identifies (1) the "*basis* of international law," which includes derivational exercises from assumed theories; (2) the *causes* of international law, including factors such as "reason, convenience, tradition, policy, necessity, and concepts of justice or of social solidarity" which influence "the development of international law" but which are said, curiously, to be irrelevant to providing "working criteria by which to distinguish law from practice or from opinions of what the law should be"; (3) the "evidences of international law," sometimes referring to "substantive rules" and sometimes to the "documentary sources" in which such rules find expression; and (4) the "methods or procedures by which international law is created," which the author prefers. The Law of Nations 43-52 (2d ed. H. Briggs 1952).

15. Grotius contributed to secularizing the notion of authority with his reference to state practice and his theory that the "impelling desire for society" constituted the source of law. Grotius, De Jure Belli Ac Pacis §6 at 11-12 (1925). *Quoted in Theories About International Law*, *supra* note 12, at 223. However, Grotius failed to distinguish the components of authority and control implicit in his conception and did not use them when performing relevant juristic tasks. Some later naturalists recognized the significance of effective power, but failed to identify a workable model linking it with their notion of authority. *See id.*

about how such uniformities create transnational expectations about policy, authority, and control.[16] The analytical or positivistic emphasis has had understandable difficulty in organizing and conducting inquiry about the creation of a kind of law whose existence it frequently denies.[17] Ignoring the realities of contemporary transnational prescription, this emphasis has tremendously exaggerated the image and importance of the autonomous nation-state, often confining law creation to the activity of state officials and stipulating the consent of every affected state to the making of law.[18] Moreover, the positivists have commonly confused function with structure, in insisting upon the indispensability of centralized legislative bodies to the creation of "genuine" law.

Despite its concern with the causes and consequences of decision, the sociological emphasis would appear to have taken its technical concepts largely from the analytical school and, hence, often to have succumb-

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16. The historicalists offered an empirical approach in their analysis of community, which they found to consist of "individuals interacting in a given geographical area at a minimum level of intensity and sharing a number of critical perspectives." *Theories About International Law, supra* note 12, at 234. However, the historicalists failed to apply their factor analysis to an exploration of the "manifold of social events conditioning behavior." *Id.* at 240. Rather,

> [t]rend projection for the historicalist is simply the elusive assumption that the mechanisms of development characteristic of the group spirit will continue to be refined, and that prescriptive efforts that diverge from group spirit will be rejected in the course of time.
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> Given this orientation, historicalism was not concerned with strategies of invention. In the historicalist frame of reference, the human actor is subservient to his group and physical environment; hence any activity aimed at realizing preferences not in conformity with the group spirit is an exercise in futility.

Id.

17. *See* Austin, *supra* note 2, at 140-42, 200-01 (international "law" not truly law because lacks determinate author).

18. *See* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 Calif. L. Rev. 418, 427-28 (1961)(concept of customary norms contradicts generally recognized principles of international law) [hereinafter cited as *Customary Norms*].

ed to the same parochial cultural presuppositions.[19] Some of the proponents of the "realistic" emphasis have, unhappily, carried their notions that law is only what courts or officials do to the extreme of completely fusing the functions of prescription and application: there can be no authoritative community expectations about a matter, they contend, until some judge or other official applies them in a particular instance.[20]

III

The more detailed contemporary description of the transnational prescribing process is something of a mélange of these various inherited confusions. It has become almost ritual presentation among commentators to make Article 38 of the Statute of the International

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19. Strictly speaking, there is not so much a sociological school of international law, as a sociologistic fashion or style of communication. The common feature of sociologistic jurisprudence is concern with the identification of conditioning factors and a consensus, at least on the verbal level, that these factors are to be found in the predispositions of the human being and various environmental factors. The majority of sociological jurists has sought to understand how law comes about, with little regard for the ends and consequences of that process. In this latter respect, the sociological perspective adds little to that of the analytic school. *Theories About International Law, supra* note 12, at 260-61.

20. *See* J. Gray, The Nature and Sources of Law 82-83, 85-86, 90-93, 101 (1909). For an application of this view, see Justice Cardozo's opinion in New Jersey v. Delaware, 291 U.S. 363, 383 (1933) ("International law ... has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, until at length the *imprimateur* of a court attests its jural quality.")

The legal realist school was in many ways a flamboyant expression of sociological jurisprudence, but it was more concerned with ends and more polemical and iconoclastic than its parent movement. Current international realists such as Carlston and Ross, *see, e.g.*, K. Carlston, Law and Organization in World Society (1962) and A. Ross, Constitution of the United Nations: Analysis of Structure and Function (1950), are distinguished by the strong behavioralist strands in their work, by their emphasis on operations and control, and by their continuing gnawing doubt about the existence of international law.

Court of Justice, a specification of the competence of the court, the central focus of exposition. This Article is commonly regarded as of the "highest authority" and as expressing "the duty of any tribunal which is called upon to administer international law."[21] It may be recalled that the Article reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
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> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[22]

Once, however, this focus is established, all agreement among commentators ends. It is furiously debated whether the itemization of "sources" is comprehensive; what the priorities, if any, are among the different sources; whether different sources are "formal" or "material"; what the precise wording in the different itemizations of the Article means; and how the significance of each itemized source is to be determined and assessed in particular instances of controversy.[23] Unhappily, amidst all this debate, little attention is given to the difficult intellectual tasks confronting decisionmakers or observers in the common case in which

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21. J. Brierly, The Law of Nations 56 (6th ed. 1963).

22. United Nations, Statute of the International Court of Justice art. 38.

23. For discussion of this debate, see K. Raman, Prescription of International Law By Customary Practice 697 n.29 (1967) (unpublished thesis in Yale Law School Library).

the sources are ambiguous, incomplete, or contradictory or in which they create expectations inimical to basic community policy.

The initial itemization of "international conventions" prompts some commentators to champion agreements as an important "direct, conscious, and purposive"[24] modality for law creation, offering the closest approach to the deliberate and explicit formulations of legislative processes in national societies. From this perspective, agreements may be both "formal" for the parties and others, and "material" or "evidentiary" sources of the expectations about authority and control which comprise customary law. Other commentators, however, find it difficult to understand how agreements, which in some versions of inherited international myth are supposed to "bind" only the immediate parties, can create "obligation" for third parties. Posing the problem as a quest for "consent" rather than for empirical expectations about the probable course of future decision, such commentators distinguish between the creation of "law" and the creation of "obligations," and insist that even agreements can derive their "binding" quality only from "a rule of customary law to that effect."[25] This would appear greatly to subordinate agreements to custom as an exclusive law creating modality.

The infelicities in expression of Article 38's reference to "international custom" are paralleled entirely by the imprecision of the conception which it seeks to communicate. The greatest difficulty for both decision makers and scholars is distinguishing the usage or practice that is mere extra-legal habit from the custom that carries expectations of general community authority and control. The comprehensive process of cooperative behavior through which expectations about authority and control are engendered is commonly truncated into two relatively exclusive "elements": a "material"

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24. L. Oppenheim, The Future of International Law 24 (1921). *See* J. Brierly, *supra* note 21, at 51 (positivism teaches that international law is sum of rules to which states have consented); M. Hudson, International Legislation xv-xvi (1931)(international law stems, *inter alia*, from agreements).

25. C. Parry, The Sources and Evidences of International Law 53 (1968). *See Law and Procedure of the International Court of Justice, supra* note 13, at 68.

element in a flow of behavior and a "subjective" element in a variously conceived *opinio juris*. There is, however, unending debate about 1) the degree of generality and uniformity a practice must have attained, including its geographical and temporal dimensions, 2) the content of the subjectivities (whether of preexisting law, mere ethics, unlawfulness, etc.) which must be established and 3) whether these subjectivities are required to be established by evidence independent of the behavior of the participants.[26] There is increasing argument about the relevance of resolutions of the United Nations General Assembly for establishing *opinio juris*, and both proposals and rejections of "instant" custom abound.[27] It is sometimes suggested, in complete contradiction of the flow of decision and expectation, that the only relevant practice is the practice of states and that the other important participants in transnational processes of effective power do not share in the creation of customary law.[28] Finally, it is occasionally insisted, conversely to the argument noted above about agreement,[29] that custom is not an independent mode of law creation, but rather requires a unanimous consent which makes it tantamount to explicit agreement.[30]

The provision for recourse to "the general principles of law recognized by civilized nations" has been no

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26. For an extensive discussion of the contours of the debate and each of the enumerated points, see Raman, *supra* note 23, at 275-371, 433-36, 482-545, 667-86.

27. *See, e.g.*, J. Castaneda, Legal Effects of United Nations Resolutions 168-77 (1969)(organs as broadly representative as General Assembly are particularly well qualified to determine when practices have become principles of international law); H. Bokor-Szego, The Role of the United Nations in International Legislation 49-67 (1978)(despite fact that resolutions of international organizations have no binding force, they are significant in effecting changes in process of custom formation and in establishing new norms through custom).

28. *See Customary Norms*, *supra* note 18, at 421, 423-26 ("*Opinio juris* signifies that the states treat this or that customary norm as juridically binding"); Restatement of Foreign Relations §1, Comment d, (1965)(where U.N. organs exercise lawmaking functions, such exercise constitutes concerted action of member states and not of an international entity).

29. *See* p. 261 *supra*.

30. *See* Tunkin, Theory of International Law 118-23, 126-28 (1974)(recognition by states is essential to legal status of custom).

less variously interpreted. Sometimes these principles are presented as natural law absolutes "having such inherent validity that they cannot be either contested or dispensed with" in any legal system,[31] sometimes as mere distillates of the more essential notions found in national law systems, and sometimes, overlapping with custom, as generalizations derived from the repetitive behavior of international and national officials.[32] It is simultaneously doubted whether there are any such principles, or whether any such principles as may be asserted are "law," or whether they constitute a distinctive source of law.[33] Sometimes it is insisted that the adjective "civilized" is invidious and unnecessary and that reference may be made to the practice of all states;[34] at other times it is suggested that only the practice of the more mature and developed states is relevant.[35] In this day of contending systems of world public order it is occasionally urged that shared principles are not likely to be found in the practice of states belonging to "two opposing social systems," and that "in consequence of the emergence of the socialist countries and the new states of Africa and Asia, the developmental base of general international law has contracted."[36] More positively, it is sometimes recognized that one function of the authorization of recourse to "general principles" is to afford a decision maker or other evaluator some latitude of creativity in supplementing or modifying "positive law"[37]: the decision maker

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31. Fitzmaurice, *Some Problems Regarding the Formal Sources of Law*, in Symbolae Verzijl 154 (1958).

32. *See Customary Norms*, *supra* note 18, at 419 ("Historically a customary norm of international law appears as a result of reiterated actions of states"); Raman, *supra* note 23, at 149-245 (detailed treatment of participation of nation-states in formation of international law).

33. G. Herczegh, General Principles of Law and the International Legal Order 24 (1969)(noted Western authors question the existence of "general principles of law recognized by civilized nations"); Parry, *supra* note 25, at 84 (questioning whether "general principles" are a distinct source of law "at all").

34. Herczegh, *supra* note 33, at 11 n.2.

35. B. Cheng, General Principles of Law 25 (1953).

36. Tunkin, *supra* note 30, at 34.

37. *See* Herczegh, *supra* note 33, at 34 (general legal principles affect the interpretation and application of law and may be used to fill-in gaps in positive law).

is to be "permitted to reason, though not to legislate" by the "application of analogies."[38]

The traditional interpretations of the authorizations for recourse to "judicial decisions" as "subsidiary means for the determination of rules of law"[39] would appear to undercut the importance in fact of the role of uniformities in adjudicative decisions, whether international or national, in creating parallel uniformities in expectations about authority and control which transcend national boundaries. It is commonly agreed that such decisions are "material" sources of law, but frequently questioned "whether they constitute formal sources of law."[40] In conventional myth, as Sir Gerald Fitzmaurice writes, "Judges . . . declare or formulate or clarify or interpret or apply, or possibly develop the law; but they do not create, change or repeal it: that is for the legislature."[41] The illusion is sometimes entertained, even by the highest authorities, that if a national court, in a case properly before it, declares what it thinks international law is or ought to be, it is engaging in unwarranted, unilateral lawmaking for the whole globe.[42] Additional confusion is caused by the stipulation in Article 59 of the Statute of the International Court of Justice that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Such an attempt to limit the impact of judicial decisions ignores the fact that even in the absence of a technical doctrine of precedent or *stare decisis*, judges, like other rational beings, commonly make reference to the lessons of past experience, and that the members of the communities they represent expect this of them. In light of these confusions, it is understandable that little has been done to develop appropriate principles of content and procedure for appreciating the genuine contribution of adjudicative decisions to the creation of transnational expectations about authority and control.

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38. Parry, *supra* note 25, at 83.

39. Art. 38, para. 1(d). *See* p. 260 *supra*.

40. Fitzmaurice, *Some Problems Regarding the Formal Sources of Law* in Symbolae Verzijl 168-69 (1958)(where decisions of domestic tribunals are binding, they are formal sources of law, but where, as with international tribunals, decisions have no precedential force they are merely material sources of law).

41. *Id.* at 169.

42. This illusion permeates Mr. Justice Harlan's opinion for the Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *Cf.* Tunkin, *supra* note 30, at 184.

The teachings of "the most highly qualified publicists of the various nations" cause less difficulty; it appears generally agreed that these are indeed "subsidiary means for the determination of rules of law."[43] Despite the flow of great books through the centuries and their repeated invocation and employment in instances of controversy, the writings of publicists are uniformly relegated to such categories as "material sources" or "mere evidences." It is also sometimes noted that the doctors often disagree.

The provision for decision "*ex aequo et bono*, if the parties agree thereto," seldom explicitly invoked in practice, has caused commentators some difficulty in effecting its reconciliation with an evaluator's creativity and more general freedom to appreciate other sources.[44] Thus, one writer has insisted that because of the stipulation for agreement of the parties, the International Court of Justice is not otherwise authorized to invoke the test of "reasonableness" in its comprehensive evaluation of the options in decision before it: only "intermediate decision makers" may have recourse to reasonableness.[45] Another scholar has suggested that decision *ex aequo et bono* in this context may refer to the possibility of some kind of political or compromise determination, beyond the considerable equitable discretion that the Court has in its application of the law to almost any conceivable case.[46] The author of a recent monograph suggests that "in opposition to the strict explication of legal rules equity means a balance and compensation of the interests of the litigants and has a function in mitigating the rigour of legal provisions rather than in filling the gaps of law."[47]

In light of the developments of recent decades, the most striking omission from the itemization in Article 38 is, of course, that of reference to the role of international governmental organizations in the

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43. Art. 38, para. 1(d). *See* p. 260 *supra*.

44. *Cf.* M. Habicht, The Power of the International Judge to Give a Decision "Ex Aequo et Bono" 67-69 (1935)(*ex aequo et bono* is extraordinary procedure that allows judge to base his decision exclusively on considerations of equity).

45. MacGibbon, *supra* note 9, at 134.

46. Ascribed by senior author to R. Y. Jennings and confirmed by Prof. Jennings in telephone conversation, Cambridge, England, Dec. 20, 1980 (on file with *Yale Studies in World Public Order*).

47. Herczegh, *supra* note 33, at 101.

creation of both explicitly formulated law and customary expectations. It is increasingly recognized that these organizations, and especially the United Nations, contribute to the creation of international law in many different ways and that any realistic description of transnational prescribing processes must take this contribution into account.[48] The contribution of such organizations, through the performance of the intelligence and recommending functions, the maintenance of established structures of authority, and the making of law through explicit agreement is of long standing knowledge. More recently, awareness has grown that the General Assembly of the United Nations, though explicitly endowed with only a recommending function, has, in augmentation of traditional processes of customary creation, come to provide a relatively universal parliamentary forum in which the peoples of the world can deliberately, with whatever comprehensiveness and precision they desire, proclaim what they think the law to be. Whether any particular resolution embodies the expectations about future decision necessary to constitute prescription must of course depend upon many variables, including the number and effective power of the states voting for and against the resolution, the compatibility of the policy content of the resolution with prior customary and conventional expectations and other contemporary communications, and the measures subsequently taken or not taken to put the resolutions into effective practice.

As indicated in the references above to "general principles" and "*ex aequo et bono*," some contemporary descriptions offer at least modest recognition that a decision-maker or observer, confronted with opposing claims about the content and authority of relevant prescription, must commonly consider and assess not merely some single source or tidbit of prescription, but the whole range or flow of sources and outcomes in prescription, and that these multiple sources and outcomes are often incomplete, ambiguous, and contradictory in their messages. Thus, Professor Brierly, in an eloquent discussion of "The place of 'reason' in the modern system,"

48. *See* Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 Am. J. Int'l L. 782 (1966)(General Assembly is endowed with and actually exercises a limited international legislative power); *Cf.* A. D'Amato, The Concept of Custom in International Law 3-4 (1971)(United Nations resolutions not usually recognized as binding by states that cast dissenting votes).

observes:

> [N]o system of law consists only of formulated rules, for these can never be sufficiently detailed or sufficiently foreseeing to provide for every situation that may call for a legal decision; those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle which medieval writers would have called natural law, and which we generally call reason. Reason in this context does not mean the unassisted reasoning powers of any intelligent man, but a 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established.[49]

Similarly, Bin Cheng writes: "In place of the theory of the logical plenitude or self-sufficiency of the positive law, the modern theory maintains that the positive law has always been and always should be guided, supplemented and perhaps even corrected by an unformulated law."[50] Kopelmanas appropriately emphasizes the high creativity in a finding of "custom": "We have already seen that the formation and existence of a custom depend on its conformity with the social needs of a legal order."[51] He adds, "Sometimes it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has not the character of a legal rule."[52] More recently, Sir Gerald Fitzmaurice has queried whether "*exceptional circumstances justify a departure from the normal rules*"[53] and pointed to the fact that the International Court of Justice in the *Norwegian Fisheries*

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49. J. Brierly, Law of Nations 66 (6th ed. 1963).

50. B. Cheng, *supra* note 35, at 16-17.

51. Kopelmanas, *Custom as a Means of Creation of International Law*, 18 Brit. Y.B. Int'l L. 127, 148 (1937).

52. *Id.* at 151.

53. *Law and Procedure of the International Court of Justice*, *supra* note 13, at 18.

case,[54] in its finding and application of customary law "based its Judgment very largely on such factors as the exceptional character of Norway's coast, the marked dependence of the population of northern Norway on fishing, and so on."[55] Unfortunately, however, this frank, if inconclusive and undeveloped, discussion of the different tasks confronting an applier or other evaluator of alleged prescription is still too often beclouded by abstruse infusions of a mystifying doctrine of *non liquet* and by fears that too explicit recognition of the creative necessities in decision would, in the contemporary decentralized world arena, impose too great a burden upon judges.[56]

Moreover, these commentators fail to recognize that the formulas of Article 38 are misleading not only because they direct the inquirer to an ambiguous and capriciously limited array of sources from which international law is alleged to derive, but even more seriously because they suggest to the inquirer that he or she may regard whatever emanates from these sources as, in fact, law. But this assurance may, in particular contexts, be belied by other communications or signals about authority and control. The product of a particular source may well be syntactic illusion, bearing little relation to genuine community expectations.

IV

One possible route of escape from our inherited confusions about prescription and its application lies both in the more explicit recognition and contextual description of the contemporary comprehensive process of transnational prescription, and in a more careful discrimination and specification of the several different intellectual tasks which must be performed by any applier or other evaluator who is confronted with an alleged prescription.

The diversity and abundance of the processes of communication by which prescriptions, that is, the projections of policy attended by expectations of authority

54. Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. 116.

55. *Law and Procedure of the International Court of Justice*, *supra* note 13, at 18-19.

56. *See* J. Stone, *Non Liquet and the Function of Law in the International Community*, 35 Brit. Y.B. Int'l L. 124, 152 (1959).

and control, are created in the contemporary world arena are staggering. The peoples of the world communicate to each other expectations about policy, authority, and control, not merely through state or intergovernmental organs, but through reciprocal claims and mutual tolerances in all their interactions. The participants in the relevant processes of communication, the communicators and the communicatees, range from the most specialized to the least specialized in prescription, and include not merely the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, private associations, and the individual human being *qua* individual, with all his or her identifications.

The perspectives of participants include those both most deliberately and least deliberately related to prescriptive purposes, and exhibit demands, identifications, and expectations with every degree of compatibility or incompatibility with common interests and basic general community policies. The situations of interaction and communication are both official and non-official, organized and unorganized. The organized situations include the familiar diplomatic, parliamentary-diplomatic, parliamentary, adjudicative, and executive arenas and all situations are characerized by differing degrees of institutionalization, temporal duration, geographic range, and expectations of crisis. The different participants bring many varying base values,[57] in terms of authority and controlling power, to bear upon particular interactions. The strategies employed by participants in the management of their base values display every possible degree of explicitness or implicitness in relation to prescription, range along the whole spectrum of coercion and persuasion, and include, not merely the modalities suggested in Article 38 of the Statute of the International Court of Justice, but the entire complex of procedures employed in the varying types of power arenas and all the strategies characteristic of the different value processes. The culminating outcomes of all this communication represent a very great range both in the facts about shared perspectives in relation to policy, authority, and control and in the

57. Any value cherished in a community may, of course, serve as a base of power, as well as be a demanded value. *See* McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pt. 1), 19 J. Leg. Educ. 253, 289-300 (1967). For an illumination of the concept of base value, see H. Lasswell & A. Kaplan, *supra* note 6, at 83-84.

evidences of such perspectives in the shape of explicit formulations and unarticulated assumptions. The most important point is that the outcomes in shared expectations, in whatever degree they approach prescription and however they may be evidenced, are a function of the total configuration of factors that affect and produce them.

From this perspective of the process by which international law is made, it is now possible to identify in a more discriminating and precise fashion the inescapable intellectual operations performed by any evaluator, including members of a target audience and especially official appliers of alleged prescription. It may be emphasized that the subjectivities of communicatees are an indispensable component of prescription and that authoritative appliers are important members of the target audience of prescription. It is impossible to describe prescription comprehensively without making reference to application, since the subjectivities of appliers are a necessary component of prescription. Any realistic description of a process of prescriptive communication requires reference, beyond the strategies and subjectivities of communicators, to the subjectivities of the communicatees and the intellectual operations incumbent upon them. It is suggested that these operations may be conveniently categorized in three-fold fashion.[58]

(1) *Ascertaining expectations about content, authority and control*

This task requires a genuine effort to achieve the closest possible approximation to the effective aggregate general community expectation about the content, authority, and control of alleged prescriptive communications. The adequate performance of this task demands a disciplined systematic survey and assessment of all features of the process of communication and its context that may affect expectation. The task and procedures are substantially comparable whether the expectations sought are those of the general community, of some lesser regional community, of simply a number of participants, or even of the immediate parties to a controversy.

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58. These operations are, of course, integral goals of the application function. *See* McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 Va. J. Int'l L. 387, 394-96 (1974).

(2) *Supplementing incomplete and ambiguous communications*

This task requires the remedying of the inevitable gaps and ambiguities in prescriptive expectation by reference to more general, basic community policies about the shaping and sharing of values. In conventional presentations this task is sometimes described as the exercise of "reason" or the invocation of analogies. Its adequate performance demands, however, the disciplined employment of a comprehensive set of procedures, including: specifying each of the opposing claims about prescription in terms of the interests sought to be protected and the particular demands for authoritative decision; formulating the different options open to the relevant decision-maker or other evaluator (which may be more extensive than the decisions demanded by the opposing parties); estimating the consequences of alternative choices upon the aggregate inclusive interests of the general community and the exclusive interests of the particular parties; and choosing the option which promises to promote the largest aggregate long-term common interest, inclusive and exclusive.

(3) *Integrating expectations with basic community policies*

This task requires decision-makers or other evaluators, recognizing that they are responsible for the total policy of the community which they represent or of which they are members, to reject even the most explicit, precisely formulated expectations when such expectations are inimical to basic, more intensely demanded community policies. This task is made authoritative with respect to international agreements both by the newly formulated constitutive prescription about *jus cogens* and by the rapidly emerging global Bill of Human Rights. The considerations that prompted the making of the prescription for international agreements apply, however, no less cogently to the less deliberately formulated prescriptions of customary law. The adequate performance of this task demands procedures comparable to those recommended for supplementing expectations, with explicit specification of the more intensely demanded general community policies and deliberate rejection of any prescriptive intimations that contravene these policies.

Effective performance of these three operations, and indeed of any decision component, requires the application of a series of interrelated intellectual tasks, including: suggesting the broad policies appropriate for a global prescribing process, examining the

degrees of approximation to the policies in past trends in practice, identifying the factors that appear to have affected past practice, projecting possible future patterns in practice, and recommending possible improvements in constitutive prescribing structures and procedures.[59] Part V of this Article focuses on the first of these tasks; it offers a provisional specification of appropriate policies for the global prescribing function.[60]

V

Students of the prescribing function frequently ask of a particular norm if it is "good law," that is, they seek to appraise a prescription for its consonance with the common interests of the relevant community. But there is an anterior question, which is larger and more enduring than the question of the quality of a particular norm. It is the clarification of basic community policy for the making of prescriptions at the constitutive level. This anterior question recognizes that the prescribing function in any community is part of its more comprehensive constitutive process, and thus focuses not on the content of particular norms, but on the process by which such norms are made.

The focus upon constitutive process is not a theoretical exercise. From time to time, international lawyers have the opportunity to participate in a major and explicit "constitutional" case in which basic policies about lawmaking itself are considered and perhaps changed. Key issues in the *Certain Expenses* case[61] and in the *Namibia* case,[62] for example, were whether participation in international lawmaking within the United Nations should be extended from the restricted membership club of the Security Council to the more inclusive

59. A more detailed exposition of these intellectual tasks is offered in *Theories About International Law*, *supra* note 12, at 204-06.

60. What we seek is the specification, rather than the derivation, of relevant policies. *See Theories About International Law*, *supra* note 12, at 207.

61. Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151.

62. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

General Assembly. In addition to these dramatic cases, virtually every controversy and all practice has a constitutive dimension in which the question of prescription and its structuring is inherent. The lawyer cannot effectively perceive and exploit these opportunities and the scholar cannot appraise the choices made without a clarification and specification of the basic community policies pertinent to the prescribing function. The most general question is what basic policies would we wish to see implemented if it were possible to design an optimum prescriptive process.

The securing of appropriate world public order, minimum and optimum, requires the establishment and maintenance of a prescriptive process whose outcomes--norms prescribed and potential norms rejected--are effective, rational, and inclusive. Effectiveness does not require the absolute application of every norm. Rather, it imports the maintenance of a contextually appropriate level of uniformity and stability in interaction which is substantially consistent with and popularly attributed to expectations of control as well as of authority. Rationality demands that prescriptions express common rather than special interests, with an appropriate balancing of protection for both inclusive and exclusive interests.[63] Inclusivity requires that prescriptions extend to all interactions, whoever the participants and whatever the geographical locus of activity, insofar as the interactions affect common interests. The achievement of effective, rational, and inclusive prescriptions depends upon an aggregate process, each feature of which is structured so that it contributes to the preferred outcomes. Hence, we consider *seriatim* the policies for each feature which may be instrumental to achieving prescriptive outcomes facilitative of a world order of human dignity.

A. *Participants*

The policy stipulating a wide sharing of power for each decision function in the constitutive process applies equally to the prescribing process. Every participant affected by the outcomes of decision processes should have the opportunity to influence their content, while no participant or small group of participants should be allowed to prevent others from prescribing in the common interest. We reject the seductively simple doctrine of a unanimity requirement which, under the guise of the

63. *See* p. 275 *infra*.

maximum sharing of power, vouchsafes a veto to an entrenched minority and enfranchises a single participant or a small group with the power to paralyze both the formal and informal prescriptive processes of an entire community. Such a veto in fact involves a concentration rather than a wide sharing of power and should be eschewed in all but the most exceptional circumstances.

A commitment to a representative prescriptive process cannot be translated into a general and unswerving loyalty to a particular set of political institutions or practices. The test of any institution or practice is the degree to which it provides maximum possible participation within the specific context, having due regard for the shifting complex of policies necessary to the maintenance of the desired public order. Hence, preferences for such specialized institutions as referendum, proportional representation, varying formulas of weighted voting, and direct and indirect democracy must always turn upon a contemporary and particular correlation of basic policy and context.

The informality of many parts of the transnational prescriptive process, in which expectations about policies, authority, and control are created by both official and non-official cooperative behavior, often yields an appropriate inclusivity. When this inclusivity is achieved, such processes present a preferred democracy and representativeness in that they involve a constant accommodation of the interests and behavior of all participants who are affected by the prescriptions being created. But neither in procedure nor substance does custom assure prescriptions in conformity with minimum or maximum order needs of human dignity; there are, unfortunately, no rational, invisible hands that automatically guide social interaction toward desired values. Hence, the application of a customary prescriptive process may require the same supplementation and policing as does the application of more formal prescriptions. Customary processes do, nevertheless, often provide a higher degree of democracy and representativeness than do many more formal prescribing processes.

B. *Perspectives*

The perspectives appropriate to the rich diversity of potential lawmaking activities in the contemporary global arena range between two extremes in consciousness of lawmaking. On the one hand, prescription refers to those activities deliberately and manifestly designed to

make law, such as attend participation in multilateral agreements or formal bilateral agreements. Yet, it also includes those activities least deliberately so designed, indeed even those manifestly purporting to flout the products of past prescribing processes, no less than those accompanied by *ex gratia* disclaimers.

The perspectives of community members, that is, the objectives for which they establish and maintain the constitutive process, have been appropriately considered a crucial element in prescription. Indeed, a certain constellation of perspectives about policy, authority, and control is what is commonly meant by prescription. Even traditional theories about the making of international law have seldom pushed to the extreme of behavioralism, with emphasis exclusively upon externally observable operations. But the uncontrovertible statement that subjectivities are important in both process and outcomes of lawmaking is not enough. What is required beyond this explicit recognition of the relevance of perspectives is a more detailed specification of the demands, identifications, and expectations appropriate to a preferred prescribing process.

1. *Demands*

An observer may characterize the claims of states and other participants--however they justify themselves --in terms of common or special interests. The former serve the interests of the entire world community; the latter do not, but are asserted irrespective of the interests of others. Where demands for comparatively high or complete national control serve the interests of the world community, we term them common exclusive interests to distinguish them from both special interests and claims for more inclusive or shared control. In a public order aspiring toward human dignity, the demands of participants in transnational prescriptive processes must achieve, above all, a commitment to common interests and a rejection of special interests. It is within this broad commitment that an accommodation must be sought between the inclusive interests of many participants and the exclusive interests of particular participants.

Demands for particular policies--even about common interests--may vary in their intensity; intense recognition of common interests in certain standards, such as those relating to minimum order, is a prerequisite to community. This category of most intense demands includes the emerging legal formula of *jus cogens*, with its insistence upon the overriding necessities of controlling un-

authorized violence and coercion and the very recent conventions concerning the basic human rights of the individual. We urge explicit recognition and continuous appraisal of such preemptory demands, testing them through time for their instrumentality and utility in the achievement of minimum and optimum order in particular contexts.

2. *Identifications*

Social interaction is not discrete; it is physically continuous and psychically integrated. Hence, individual performance in the most nuclear of exclusive groups may significantly determine perceptions and performance in other groups of increasing inclusivity. Because the conception of human dignity that we recommend involves, perforce, the widest participation in the shaping and sharing of all values, it is often arenas of primary and direct rather than secondary and representative interaction that determine the level of human dignity an individual can achieve. For this reason, policies about appropriate identifications for prescriptive functions should avoid emphasizing either inclusive or exclusive identifications at the expense of the other. What is required is an appropriate balance, permitting the individual to recognize that the realization of the common interests of the most comprehensive community of which he is a part is a function of his routine operations in diverse groups of varying inclusivity or exclusivity, and vice versa. Identification with the most comprehensive inclusive community thus does not import repudiation of membership and loyalty in the many less inclusive groups in which the individual's life transpires; it may, however, require revisions in the priority and intensity of the diverse loyalties of the self-system.

3. *Expectations*

At every level of social interaction, the policy content people seek to prescribe and the techniques they employ to assemble and communicate the authority and control components of prescription are deeply affected by the matter-of-fact expectations they entertain. As in the performance of every other decision function, we urge that matter-of-fact expectations about social process, effective power and authoritative decision be made realistic and contextual. Such realism and contextuality can avoid the Scylla of cynical despair over possibilities of prescribing changes in the world arena and the Charybdis of giddy utopianism which assumes that every necessary change can be effected by prescription. Realistic expectations can aid in the identification of

proper targets and the setting of appropriate timetables. Prescribers who do not orient themselves realistically and contextually in the manifold of events of which they are part and which they seek to effect, sacrifice not only the potential effectiveness of their own purposive behavior but, in the aggregate, enlarge the gap between authority and control, enervating and ultimately extinguishing the process of authoritative decision within which they operate. An effective intelligence function is indispensable to an effective prescribing function.

C. *Arenas*

Prescription is an interactive communicative process; the features of the situations in which it takes place--structural, temporal, geographical, or spatial--have subtle but pervasive and important impacts on outcomes as well as pre-outcome phases. Hence, it is important to project a complex of preferred policies for prescriptive arenas so that advantage may be taken of every potential in the management of situational features.

1. *Organized and Unorganized Arenas*

The assumption that organized institutions always perform tasks more efficiently than the non-organized is incorrect. Any rational effort toward improving the global prescribing process must appropriately balance both organized and unorganized arenas. The tremendous potentialities of the United Nations bodies, the specialized agencies, the regional organizations, and specially organized multilateral conferences for the clarification and articulation of common interests have scarcely begun to be exploited. At the same time, both scholars and general community decision makers must take fuller and more positive account of the generation of customary law in the many unorganized arenas of the global process.

Every interaction of even the most minimal duration generates, reinforces, and changes one's expectations and demands on oneself and others regarding the full range of values being shaped and shared. Accordingly, a comprehensive theory of prescription cannot limit its focus to those organized situations which are specialized to lawmaking and dismiss the vast range of unorganized interactions in which customary expectations are created and sustained. Indeed, unorganized prescriptive arenas have, as already emphasized, often played an important

function in democratizing the lawmaking function. It is important that the authority of unorganized as well as organized prescriptive situations be recognized in order that assessments of law for both scholarly and decision-making purposes take full account of all situations in which authoritative expectations are shaped.

We recommend, further, clear recognition of the distinction between public order and civic order, the latter being a domain which is consciously demarked and reserved for relatively autonomous private decision.[64] Contextual investigation has shown that the maximum policy dividend in human dignity is gained by permitting participants themselves to regulate a large sector of their lives. This maximum realization of human dignity is assured only if delimitations of public and civic order are made after the full range of actual prescriptive situations is examined.

2. *Specialized and Non-Specialized Prescriptive Arenas*

Analytical positivistic categories of jurisprudential thought have often attempted to restrict attention to a limited number of specialized prescriptive arenas as the exclusive sources from which "law" comes. As Eugen Ehrlich emphatically showed, however, any scholar who has limited his attention to certain ritualized activities of a legislature has covered only a minuscule segment of the creative processes by which expectations about policy, authority, and control are generated in social interaction.[65] Jurisprudential dogmatics aside, no serious observer limits attention to a single specialized prescriptive organ. "Judicial lawmaking" and such open-ended terms as custom, "general principles," and precedent force attention to a number of other prescriptive processes. As indicated above,[66] prescription need not be a specialized or purposive process. Because the creation of expectations is a consequence ancillary to almost all relatively stable interaction, a plenary conception of prescription cannot limit itself to so-called specialized prescriptive arenas. We therefore recommend that attention be directed to all interactive

64. For development of the concept of civic order (the areas of life in which the individual is subjected to the least public or private coercion), see M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 801 (1980); *see also* R. Arens & H. Lasswell, In Defense of Public Order 204-05 (1961).

65. E. Ehrlich, Fundamental Principles of the Sociology of Law 20-22 (1962).

66. *See* p. 252 *supra*.

situations in which expectations about value allocation are prescribed.

3. *Centralized and Decentralized Arenas*

Policies of representativeness, if they are to achieve their maximum realization without jeopardizing minimum world order, must accommodate prescriptive processes of varying degrees of organization transpiring in a broad range of geographical arenas, from the most centralized to the most decentralized. The social tendency of interacting individuals to generate reciprocal expectations relating to all the value exchanges involved in their specific interactions should receive authoritative encouragement in direct proportion to the degree of exclusivity of impact of their relations. The maximum direct and representative participation of all actors will be realized only if the prescriptive competence of the most decentralized arenas is fully employed. As the inclusivity of a flow of interactions increases, however, either in terms of direct participation or the diffusion of value effects, the competence of a more centralized prescriptive process should be recognized.

Recognition of the prescriptive creativity of all social interactions of minimum duration does not mean that the observer or decision-maker must accept the authority of all. The determination of an arena of authoritative prescription, whatever its degree of centralization or decentralization, is a function of constitutive decision and is taken with full regard for the unique features of the context as well as for the plenary range or policies of the community in question. The flexibility of both observers and constitutive decision-makers will be enhanced, however, by cognizance of the full range of arenas which are available.

4. *The Integration of Universal and Regional Arenas*

Intimately related to the policy of balancing centralized and decentralized arenas is the crucial constitutive policy of integrating universal and regional arenas into a coherent aggregate global process of prescription that promotes an ongoing dynamic responsiveness to the changing requirements of common interest. Overlapping and intersecting arenas, conveniently described as universal and regional, but often involving a richer geographical and interest variation, are constantly creating expectations; the challenge is to determine the

sectors in which prescriptive authority should be accorded to varying geographic and interest levels and constantly to appraise allocations of prescriptive competence in terms of the extent to which they realize inclusive goals and are productively integrated within the most comprehensive global community process. Fundamental policy recommendations are, then, the recognition of the prescriptive competence of diverse geographical arenas, the determination of such allocations on the basis of common interests, and the integration of prescriptive competence for value and spatial sectors in a manner most consonant with the interests of the world community.

5. *Continuous and Intermittent Institutions*

In the world community, as in any lesser community, the aggregate flow of prescriptions must be continuous if it is to respond effectively to the challenges of an ever-changing social and environmental context. Hence, we recommend the institutionalization of continuous prescriptive processes. A preference for continuity does not exclude allowance for and recognition of an authoritative prescriptive competence for intermittent processes which arise because of specific stimuli and, under certain circumstances, present the optimum form for procedural and substantial policy realization. Past practice has sought to meet this policy requirement within the limitations of its formal theory by indirect and often *sub rosa* recognition of the prescriptive competence of decision-makers who are not formally authorized to prescribe. Hence, the praetor was permitted his periodic edicts; in contemporary practice, the inevitable "legislative" role of the judge is recognized. These partial and informal recognitions of an intermittent prescriptive competence, however, do not fulfill the requirements of a rational and maximally effective process of authoritative decision because their very covertness prevents an ongoing appraisal of the conditions under which an intermittent prescriptive authority, deviating from established institutional patterns, should be recognized and the criteria by which its operation should be evaluated.

6. *Institutional Responsiveness to Crisis*

It is commonplace that institutionalized decision must be able to deal with extraordinary as well as with ordinary problems. Unfortunately, institutionalized processes frequently develop a rigidity, if not *rigor*

mortis, paralleled on the psychological level by a resistance to change on the part of entrenched elites. Ego involvement in a certain set of procedures may lead the individual to view any suggested change as a repudiation of the self and to regard every retention of established practice as a vindication of the self. Such inflexibility on both the personal and aggregate institutional levels handicaps optimal response to those situations of major crisis, in which the imminent loss of crucial values is perceived. The net result of this handicap may be to increase or accelerate the crisis while paralyzing institutional decision processes from rational and effective response. Constitutive processes of prescription should, by appropriate personnel and structural adjustment, be made sensitive to potential crises, anticipating them where possible and responding at the earliest appearance. This sensitivity should characterize both the most comprehensive global constitutive process and the comparable internal processes of its lesser constituent communities.

D. *Bases of Power*

A prescription is distinguished from other preferential statements in that it is viewed as authoritative by those to whom it is addressed and in that its audience concludes that the prescriber, or a surrogate official, intends to and, indeed, can make it controlling. The expectations of the target audience are of course inferred from the total context, including various features of the function of application. The putative prescriber must, therefore, seek authority and control upon which to base his acts. From the standpoint of public order, an appropriate prescriptive process requires both explicit and implicit authority and the optimal marshaling of bases in such manner as to create the necessary expectations of control in the promulgative sequences of prescription and its application. We consider each of these requirements *seriatim*.

1. *Explicit Bases of Authority*

The 19th century historicalist school of jurisprudence drew particular attention to the ongoing, indigenous process of prescription which attends any flow of interaction and which generates expectations of authority in the minds of participants without reference to official, organized arenas of prescription. From a policy oriented perspective, however, the fact that interacting participants ineluctably prescribe in no way discharges

observers and decision-makers from the necessity of rationalizing and optimalizing processes of prescription which fulfill the basic requirements of adequate world public order: effectiveness, rationality, and inclusivity. Consequently, in sharp distinction to the historicalist, we have emphatically recommended the establishment and maintenance of a wide and varied range of organized prescriptive processes, capable of considering prospectively, and by systematic application of the intellectual tasks of decision, the prescriptive requirements of a world public order of human dignity. Such processes patently require explicit bases of authority coextensive with the scope of their prescriptive aspirations. Explicit bases of authority, it may be added, are not identical with textual affirmations of authority. Although a text may be a tentative indicator of a base of authority, it is not sufficient unless it corresponds to shared expectations of elites relevant to the prescriptive aspirations of the process in question.

2. *Implicit Bases of Authority*

The demand for adequate explicit bases of prescriptive authority is balanced by a coordinate demand for full recognition of the fact of, and continuing potential for, the generation of implicit expectations of authority in the myriad patterns of social interaction. Policies of economy and representativeness are served not by a totalitarian incorporation of all sectors of life into the public order, but rather by reserving areas of social life for the prescriptive and applicative regulation of the participants directly concerned. Hence, the notion of implicit and regenerating authority in all social interaction must be recognized. Because authority, in its empirically referential sense, is simply expectations shared by individuals as to how decisions will be made, any attempt to inventory authority in the global or less inclusive arenas of the world will perforce be obliged to examine both explicit and implicit authority expectations.

3. *Effective Control*

We distinguish authoritative decision from pretended decision because the communications of the former in regard to policies for value allocation include sufficiently credible indications of an intention to render authoritative policy into controlling fact to create expectations of effectiveness in a target audience. There is, as we have emphasized, scant utility in speaking of law

in any community unless expectations of authority and control are copresent. If prescriptive processes in the world community are to be effective, rational, and inclusive, they must be buttressed by processes of effective control. Since control is never an arithmetical computation discrete from context, it is obvious that the components of effectiveness will vary from context to context and will be decisively shaped not merely by the allocation of base values, but also by the content of the prescription and in particular the groups it alternately indulges and deprives. Therefore, our recommendation is that inclusive prescriptive processes be girded with a control base in the relevant values adequate to secure common interests.

E. *Strategies*

The optimum policies for the strategic procedures involved in the characteristic sequences of prescription can be most economically considered in terms of exploration, characterization, and communication, the more important sequences which must be adequately performed for effective prescription.[67] We consider each briefly.

1. *Exploration*

The process of prescription is initially concerned with an examination of the facts, including the features of present and projected contexts relevant to future policy. It is also concerned with an inventory of the alternative policy choices which are available for prescription. Policies for this phase of exploration, as for any intelligence function, involve comprehensiveness, selectivity, dependability, and creativity. The achievement of these policies depends both upon the economy of institutional processes or unorganized routines and upon the base values made available.

2. *Characterization*

The median prescribing sequence entails a process of characterization of the products of systematic exploration in decision about what facts are to be regarded as relevant and what policies are to be projected into the future; this characterization moves, in its appraisal of the probable value consequences of different policies, steadily from provisionality to comparative finality. The policies relevant to rational characterization

67. *See* pp. 252-54 *supra* for a sequential analysis of prescription.

are those of deliberation and reasoned assessment in terms of common interest.

3. *Communication*

The final strategic sequence of prescription, often overlooked in jurisprudential models, involves communication to the target community of the policy content of the prescription, activation of authority signals, and the modulation of credible control intentions. The sequence of communication involves more than the legal concept of promulgation. Promulgation refers to a ritualized act without which an authoritative applier is not supposed to give effect to a putative prescription. Communication, by contrast, involves a set of techniques, varying with context, aimed at creating shared common subjectivities in the target audience. On the constitutive level, communication involves an ongoing mobilization of community attention for continuing interest in the prescriptive response to significant problems. Insofar as this general mobilization is successful, individuals will be constantly involved in participating in and monitoring prescriptive processes, demanding contextually and temporally appropriate prescription, accepting common and rejecting special interests, and testing inherited prescription for its contemporary contribution to community goals.

Conclusion

The examination of past trends in the global prescribing process for ascertaining the degree of approximation to recommended policies must, of course, require a systematic survey of the functioning of the different features of that process in relation to the outcomes in prescription achieved concerning all the important problems of constitutive process and public order. Effective inquiry about the factors conditioning past practice and possible projections into the future, with estimate of potential losses and benefits to policy, will depend upon the delicate, contextual assessment of a whole array of predispositional and environmental variables. The recommendation of more detailed, rational improvements in the global prescribing function, in the light of knowledge acquired through appropriate trend and scientific study, will require exploration of every facet, for identification of possible changes, both of the most comprehensive constitutive process of authoritative decision and the effective power processes which establish and maintain authoritative decision.