

Essay

Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman

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Words cannot do justice to the man who has transformed the lives of so many of us who have gathered at the Yale Law School today. But words are all we have to share our feelings, as we must, over space, and over time.

Michael Reisman is the man we have the pleasure and deep satisfaction to honor and to celebrate: our teacher, our guide, our mentor, our friend. He has touched our lives in a variety of ways. In my case, the introduction to his magnificent work was made by a young South African scholar at the Peace Palace in The Hague, and I never looked back. His jurisprudence of insight and empowerment was a liberation indeed—a fountain of truth on how law is really made and changed, and a treasure trove of wisdom on what considerations should guide the decisions we consciously and unconsciously make. He made us, who call themselves professionals of the law, realize that we are not mere *bouches de la loi*; he challenged us to live up to the role we actually play in society and to assume the responsibility that comes with leadership. This statement of friendship and respect is designed to highlight our honoree's distinct place in the pantheon of jurisprudence (Part I); his keen sense of observation and analysis (Part II); his consummate skills of communication (Part III); and his abiding quest for a public order of human dignity (Part IV).

I.

The subtitle to Michael Reisman's book *Jurisprudence* says it best: Jurisprudence is about "understanding and shaping" the law.¹ Understanding what is called "the law" means going outside of our inherited lenses of observation narrowed to commands of the sovereign in the modern nation-state; it means removing those blinders and setting out to grasp the reality of what is called "the law" in the "manifold of events" that constitute the social process on this planet.² Law is a process of authoritative and controlling decision;³ within that process, the lawmaking function is essentially a process

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1. W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1986).

2. HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 240-67 (1930) (focusing on events within and among individuals that engender social process of communication).

3. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 *J. LEGAL EDUC.* 253 (1967).

of communication.⁴ It focuses on messages of policy content, i.e., decisions, sent by persons with authority within a certain community to members of that community, messages backed up by a threat of severe deprivation of values or a high expectation of indulgences or benefits.⁵ It allows us to move from theories “of” law, in the vein of Kelsen, Montesquieu, von Savigny, and Rawls, to, more appropriately, theories “about” law⁶—in diverse communities over space and time, from the global to the local, from the personal to the territorial, from the permanent to the short-lived⁷—beyond, but including, the community that is still key to the distribution of values and resources today: the nation-state.⁸ Within those communities, it demands a focus on the realities of authority and control, eschewing naked power and pretend law.

This opening of the eyes of lawyers to the empirical context of their professional lives was originally conceived in the most fruitful cooperation between Harold Dwight Lasswell and Myres Smith McDougal,⁹ a collaboration that started in the 1930s. They shattered the walls of separation between their original home disciplines—political science and psychology (Lasswell) vs. the law (McDougal)—as they developed a powerful intellectual framework for the analysis of social problems and the development of solutions to them through law, a framework that included the orienting concept of eight human values encompassing the totality of human aspirations. In the early 1960s, Michael Reisman joined this creative enterprise that has come to be known variously as the “New Haven School,” “Policy-Oriented Jurisprudence,” or “Law, Science, and Policy.”¹⁰ He has left his imprint on that theory about law. It is centered around him today.

II.

Michael Reisman’s unique contributions have been fueled by his keen and incorruptible sense of observation which helps him analyze most

4. W. Michael Reisman, *International Law-Making: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101 (1981).

5. See W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575 (2007).

6. W. Michael Reisman, *A Theory About Law from the Policy Perspective*, in MARK MACGUGAN ET AL., *LAW AND POLICY 75* (David N. Weisstub ed., 1976) [hereinafter Reisman, *Law from the Policy Perspective*]; W. Michael Reisman, *Theory About Law: The New Haven School of Jurisprudence*, 1989/90 WISSENSCHAFTSKOLLEG JAHRBUCH 228 [hereinafter Reisman, *Theory About Law*].

7. For an overview, see Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988).

8. While other communities gain ever more importance, states remain the primary organizations and value providers. W. Michael Reisman, *Designing and Managing the Future of the State*, 8 EUR. J. INT’L L. 409, 416 (1997).

9. For details of their cooperation, and the content of their jurisprudence, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992).

10. These terms have been used interchangeably to designate this unique configurative, problem- and policy-oriented theory about law. See, e.g., Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188 (1968); Reisman et al., *supra* note 5, at 575 n.2 (referring, inter alia, to the classical statement of the approach in LASSWELL & MCDUGAL, *supra* note 9); Reisman, *Law from the Policy Perspective*, *supra* note 6; Reisman, *Theory About Law*, *supra* note 6; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT’L L. 96 (2001).

effectively the special process of communication that the law constitutes. Some of the most compelling samplings of his observations are to be found in the book *Law in Brief Encounters*.¹¹ As he describes how law, albeit “micro-law,” is made by the signaling of expected behavior between ordinary persons who look, gaze, or stare at each other, or just happen to stand in line (i.e., law made in quite fleeting types of momentary community), one can only marvel at the acuity with which Reisman isolates pertinent types of conduct, articulates the motivations underlying them, and draws inferences from those observations regarding normative expectations among the group’s members. Like all those using the approach, he is interested in real encounters, real people, and real relationships; the discussion is about real resources and the distribution of real values.

This extraordinary faculty of discerning observation may also have spurred him to develop the genre of incident studies,¹² a useful tool in determining lawfulness of conduct between states as they signal approval or disapproval of certain unilateral claims put forward by other states in justification of certain key actions, called “incidents.” This process may help to clarify the content of what traditionally is called “customary international law” in the field.¹³

More generally, his quest for empirical truth has led him to sharpen the distinction between the “law on the books” and the “law in action,” deepening Karl Llewellyn’s contribution with the difference between what Reisman has called the “myth” and the “operational code.”¹⁴ This realist view of the law is applied, most convincingly, in his contribution to the 1981 *International Law Essays* book, co-edited with McDougal,¹⁵ where Reisman uses the approach to determine the real figures of authority and control in an imagined community—a quest far beyond the inherited search for written constitutional or statutory legitimacy. *Folded Lies*,¹⁶ a book about bribery translated into a number of languages, including Spanish, Russian, and Japanese, confirms, as the example of corrupt societies vividly illuminated, the global validity and appeal of such a distinction between what the law pretends to be and what it really is. Whether the incidents put forward are historical or imagined, Michael Reisman uses them most skillfully to make his point—the hallmark of a superb communicator.

As appropriate, and highlighted by science itself, Reisman acknowledges inherent limits to the claim to objectivity of the scientific method. He recommends that the observer take a thorough look inside him or herself and clarify his or her “observational standpoint”¹⁷ vis-à-vis the objects

11. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

12. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1 (1984).

13. W. MICHAEL REISMAN & ANDREW R. WILLARD, *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (1988).

14. W. Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229 (1977).

15. W. Michael Reisman, *Law from the Policy Perspective*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 1 (1981).

16. W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* (1979).

17. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 120 (1992).

of observation. Those lenses might be skewed by genetics, upbringing, class, gender, race, location at the center or the periphery of society, etc. He does not suggest a goal of a total exclusion of such predispositional factors from the process of decisionmaking, as this would be unrealistic. Rather, he would recommend that the observer and, in law, the decisionmaker, make him or herself aware of these factors, particularly potential biases that might distort or otherwise influence his or her decision.

Upon this critical self-assessment, Reisman then recommends that the scholar perform a number of important tasks that would help him or her achieve the goal of solving problems in a most rational and comprehensive, or as the classical New Haven School would say, "configurative," way. These tasks include: (1) the exact delimitation of the problem in the light of all of its parameters in order to reach the intended goal; (2) the analysis of conflicting claims, claimants, perspectives, identifications, bases of power, etc.; (3) the identification of past trends in decision in light of their predispositional and environmental conditioning factors; (4) the prediction of possible future decisions based on developmental constructs oscillating between the most pessimistic and the most optimistic scenarios; and (5) insofar as the projection of probabilities suggests a discrepancy from goals, the invention of alternatives and the recommendation of solutions.¹⁸ Those who use the techniques of the New Haven School are always guided by the overriding concept of a global public order of human dignity, which sets as its goal the maximization of access by all to all the values humans desire,¹⁹ i.e., the things they want out of life (and not just those things they need as determined usually by someone other than themselves).

The unique virtue of this intellectual framework is that it allows all aspects of a problem to be addressed—to know the entire playing field and all the players. Legislators are well served in undertaking this analysis before prescribing solutions to pressing social problems. More often than not, their view of the issues is clouded by lobbyists representing powerful organized constituents; the interests of many in the public at large are overlooked because they are not effectively represented. Applying the New Haven approach would make sure that all the conflicting claims and claimants are being taken into account. However, whereas McDougal and Lasswell have put great emphasis on the importance of the use of the metalanguage needed to convey this taxonomy to achieve a measure of ever greater precision, Michael Reisman—outside of his writings dedicated to theory—often does not apply the framework and its terminology expressly. While this empowering methodology undergirds much of his writing, he does not feel compelled to always use some of its specific terminology, and does what he does best:

18. See *id.* at 123-24.

19. W. Michael Reisman, *Development and Nation-Building: A Framework for Policy-Oriented Inquiry*, 60 ME. L. REV. 309, 311-12 (2008); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 26 THESAURUS ACROASIAM 129, 144-45 (1997); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 333-34 (1999).

capture the audience with his unmatched mastery of the English language and any subject matter he chooses to address.

III.

When Michael Reisman starts to speak, the room falls silent. Any sentence he utters on a podium can be safely entered into an article or a book. He does not need a teleprompter or a manuscript to achieve this effect. His skillful and precise use of words from an immense vocabulary—not only in his native tongue, but also from the numerous other languages he speaks—stills the audience into rapt attention. Most recently, he came to Miami to speak on the Cuban embargo. To a mesmerized audience, he declaimed: “Keep in mind that when you destroy an economy, you destroy lives. You destroy families. It’s not peaceful.”²⁰ More often than not, he sees aspects of the problem that others have overlooked.

This attention he commands is not only due to his uncommon skills of oratory. Audiences listen to Michael Reisman because they sense the authenticity of his convictions and the wisdom of his message. His commitment to the truth and human values shines through every word he speaks. He is beyond pettiness and dedicated to the rationality of the discourse. That is why even many of the natural opponents of the New Haven approach hold him in highest esteem, as is reflected in the enthusiastic response we have received from amongst international lawyers of all jurisprudential stripes to the project of a *Festschrift* in his honor.

Michael Reisman is convinced of the analytical power and the creative potential of the New Haven approach. No other approach holds similar promise if the task of lawyers is seen as devising solutions to social problems. He is, however, open to any other frameworks or suggestions that might do a better job. Referring to Chairman Deng Xiaoping and the Chinese proverb he made famous, he stated recently:

It does not matter whether a cat is black or white but whether it catches mice. Our loyalty is to the values of human dignity and our goal is a world order producing and distributing those values. The New Haven School was established to refine and apply tools to achieve that goal. If there is a better cat around, we would be the first to use it. As far as we have been able to tell, there is not.²¹

The touchstone of a good theory is its practical application. Or, as Reisman quotes Kurt Lewin in the introduction to his *Jurisprudence* book: “There is nothing so practical as a good theory.”²² In the practice of law, beyond the area of explicit legislation or regulation, the application of such prescriptions often takes place in a highly institutionalized environment which mandates adherence to certain pressures of role and structure of argument. In order to reach the goals the explicitly value-oriented New Haven School postulates, such environmental restrictions need to be heeded to be at all

20. Ana Rodriguez-Soto, *Cuban Embargo: Right or Wrong?*, FLA. CATH. ONLINE, Oct. 30, 2008, http://www.thefloridacatholic.org/mia/2008_mia/2008_miaarticles/20081107_mia_embargo.php.

21. Reisman et al., *supra* note 5, at 582.

22. REISMAN & SCHREIBER, *supra* note 1, at 1.

effective. That is why it is not surprising that Reisman applies traditional legal methodologies to the solution of problems he has to solve when he performs the function of an arbitrator²³ or when he addresses courts both domestic and international. The parties come to these highly structured fora with expectations about the content of the prescriptions applied to their dispute, and they ought not to be surprised by a decision *ex aequo et bono* when they have not accorded the decisionmaking body any such power. Thus it comes as no surprise that Reisman has applied traditional forms of legal argument, especially interpretation, in the many cases he has been called on to serve as an arbitrator or as counsel to arbitration and litigation. That is the dialect spoken in these fora; it is the only cat around. To the extent that it allows for creative argument, e.g., regarding the policy interpretation of open-ended prescriptions, it still leaves room for effective use of New Haven's configurative jurisprudence.

IV.

Ultimately, Michael Reisman is dedicated to the goals of a world order of human dignity. He does not content himself with mere observation and empirical research of interesting phenomena. He makes judgments on whether the phenomena described, in particular, certain types of human conduct, by individuals or groups, should persist in light of the values of human dignity.²⁴

This position in favor of a world order of human dignity has been caricatured as serving as the international legal spearhead of the U.S. government, or at least its handmaiden, in the Cold War. Certain stances taken by McDougal and Reisman were controversial, particularly regarding instances of American use of force.²⁵ Strong battles of opinion raged over the

23. Michael Reisman laid a solid foundation for his influential arbitral practice in his magisterial J.S.D. thesis, W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971). *See also* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992); THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008).

24. W. Michael Reisman, *Autonomy, Interdependence and Responsibility*, 103 YALE L.J. 401 (1993) (commenting on Walter Otto Weyrauch & Mauren Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993)).

25. *See, for example,* McDougal and Reisman's advocacy of humanitarian intervention to stop mass slaughter, genocide, and other massive violations of fundamental human rights—as in the case of Biafra—or to rescue nationals, as in the Entebbe and Tehran Hostage Rescue incidents. W. Michael Reisman, *Humanitarian Intervention To Protect the Ibos*, reprinted in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973) (prepared in 1968 as a petition to the United Nations written with the collaboration of Myres S. McDougal) [hereinafter Reisman, *Ibos*]; Myres S. McDougal & Michael Reisman, Letter to the Editor, *The Entebbe Rescue and International Law*, N.Y. TIMES, July 16, 1976, at 16; Michael Reisman, *Exchange: The Rescue Mission: Humanitarian Intervention*, 230 THE NATION 612 (1980); *see also* W. Michael Reisman, Editorial Comment, *Coercion and Self-determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990). For more recent, significant statements on the lawfulness of the use of force, *see* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-defense*, 100 AM. J. INT'L L. 525 (2006); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); and W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (2004).

Vietnam War, even amongst early adherents of the approach.²⁶ What is often overlooked in the evaluation of these struggles is the fact that the approach's guiding light, defined as an order which maximizes access by all persons to all the values of human dignity, is much more complex and multifaceted than many critics care to explore.

Throughout his life, Michael Reisman, has adhered to the principle that an ideal legal order should allow all individuals, and particularly the weakest among them, to realize themselves and accomplish their aspirations. His early writings, in 1968, articulate the lawfulness of international concern over Ian Smith's Southern Rhodesia²⁷ and the situation in South West Africa.²⁸ With Myres McDougal, the same year, he asserted the continuing validity of humanitarian intervention—now a staple of international law, after Kosovo and Rwanda—in the case of the bloodily crushed attempt of the Ibos to secede from Nigeria,²⁹ hardly an imperialist proposal. In 1971, he promoted ratification of the International Convention on the Elimination of All Forms of Racial Discrimination,³⁰ as well as taxing businesses for human rights.³¹ His consistent struggle against bribery³² makes him scarcely a proponent of Washington realpolitik. He was concerned about unauthorized coercion in 1983,³³ and he issued a passionate plea for an absolute prohibition of torture in 2006.³⁴ He thought and wrote about some of the most vulnerable communities, indigenous peoples, since the early days of his career.³⁵ He suggested listening to their voices, to explore their “inner worlds,”³⁶ to heed their cries about the taking of their lands, the disappearance of their language, the termination of their ways of life. As the President of the Inter-American Commission on Human Rights, he oversaw the drafting of a proposed American Declaration on the Rights of Indigenous Peoples³⁷—a project that, unfortunately, has languished since his departure and sterling leadership. He drew attention to the often dire effects of economic sanctions on the people of

26. Compare JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* (1972), and John Norton Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 1061 (Richard A. Falk ed., 1969), with Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW*, *supra*, at 445. Reisman was not an active participant in that debate.

27. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1 (1968).

28. W. Michael Reisman, *Revision of the South West Africa Cases*, 7 *VA. J. INT'L L.* 1 (1966).

29. See Reisman, *Ibos*, *supra* note 25.

30. W. Michael Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 *DENV. J. INT'L L. & POL'Y* 29 (1971).

31. Michael Reisman, *Polaroid Power: Taxing Business for Human Rights*, *FOREIGN POL'Y*, Fall 1971, at 101.

32. REISMAN, *supra* note 16; W. Michael Reisman, *Campaigns Against Bribery*, *YALE ALUMNI MAG.*, Feb. 1979, at 17.

33. W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 *EMORY L.J.* 499 (1983).

34. W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 *AM. J. INT'L L.* 852 (2006).

35. W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 *ST. THOMAS L. REV.* 25 (1996).

36. *Id.* at 30.

37. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L./V/II.95, doc. 6 (1997), reprinted in 6 *INT'L J. CULTURE PROP.* 364 (1997); W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 *AM. J. INT'L L.* 350 (1995).

the targeted countries.³⁸ In his complete redrafting of the casebook *International Law in Contemporary Perspective*, that I had the pleasure of co-authoring, he decided to include a central chapter on human rights and place it ahead of the traditional section on the "Allocation, Protection and Regulation of Use of the Resources of the Planet."³⁹

The priorities are thus set straight: Michael Reisman, as he stated in his 2007 General Course on International Law at The Hague Academy, sees the international lawyer of the twenty-first century as a "world citizen."⁴⁰ For those of us committed to a world order of human dignity, he, however, is indeed more than a citizen: Michael Reisman, the realistic idealist, is a beacon of hope, a bridge between cultures, a light in troubled waters. We are blessed to know him, and to count him as a friend. We wish for many more years of his enlightened leadership.

38. W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86 (1998).

39. W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 445 (2d ed. 2004).

40. W. Michael Reisman, Hague Academy, General Course on Public International Law: International Law in the Twenty-First Century (Summer 2007) (unpublished Background Materials), available at <http://www.ppl.nl/summercourses/2007/reisman.doc>.