

INTERNATIONAL LAW ESSAYS:

A Supplement to International Law in Contemporary Perspective



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to

International Law in Contemporary Perspective

By

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and

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Yale University

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INTRODUCTION

One of the strengths of the American style of law teaching is that the student is immediately presented, if not bombarded, with the unrefined and largely unedited textual materials likely to be encountered in professional life. From the first day of study, the student is thus constrained to tease apart, digest and codify material in the same manner as the practitioner and the scholar. For all the advantages of this method, there is a danger of its losing sight of the forest for the trees, a danger reinforced and compounded by the common law's supposed preference for incrementalism and its well known aversion to theoretical formulations. Practitioner and scholar are ill-served by professional education, if skill in detail is not matched by an enlightened grasp of the larger context and a comprehensive conception of the tools and procedures the lawyer requires to discharge the intellectual tasks of his profession.

Teachers and students alike will appreciate how difficult it is to convey this totality in the fragments of reality that are arranged mosaic-style for quite cogent pedagogical reasons in the contemporary casebook. An understanding of the totality is, however, indispensable for relating the part to the whole in rational inquiry and decision. The significance of any particular fragment or detail of decision is commonly a function of its role in larger processes of decision and interaction.

A companion volume to our "International Law in Contemporary Perspective", "International Law Essays" has been designed to meet this need of supplying the larger context. Its purpose is to make more explicit the broad framework of theory with which we work and which we regard as indispensable to understanding and effective craftsmanship in international law. We have selected from among our prior publications, essays which have proved useful as supplementary readings in the basic course at the Yale Law School and at the New York Law School and which set in broader perspective many of the problems addressed through the medium of primary materials in the different parts of the coursebook.

In the essays here collected we attempt to relate the global constitutive process of authoritative decision to the more comprehensive processes of effective power and social interaction which establish and maintain it and to suggest a mode for inquiry about aggregate public order achieved through constitutive processes. In an ancient tradition we view law in any community as a process of authoritative decision by which the members of that community seek through a rich variety of institutions and procedures to clarify and implement their common interests. Our aspiration has been to suggest theory and procedures by

INTRODUCTION

which practitioners and scholars may improve their understanding of, and contribution to, this ongoing process in the global community.

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M.S.M.
W.M.R.

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INTERNATIONAL LAW ESSAYS

LAW FROM THE POLICY PERSPECTIVE *

W. Michael Reisman

I. A Practical Guide to the Law in Context

God, in his wisdom, makes some men rich; one of them is Sheikh Ibrahim ibn Fawzi.

Sheikh Ibrahim owns the little oil state of Darab on the Persian Gulf and he is a very wealthy man indeed. And an intelligent and reflective man. He is sending his children abroad for their university education and has decided to send his youngest son, Fuad, to an American school. Fuad is gifted at his studies and Ibrahim's concerns are not about intellectual adjustment, but Fuad's social integration. He wants Fuad to have his share of fun, but not to become another Persian Gulf playboy. For this reason, the idea of a college fraternity appeals to Ibrahim. As far as he can tell, a fraternity is a house in which many boys at a college live together under the apparently interlocking supervision of a house "mother," of the college authorities and of a national organization staffed by adults. Members of the fraternity call each other "Brother," help one another and engage in boyish pranks. But Ibrahim has the caution of a Bedouin and wants to know more. So he has hired you to observe and to describe to him how fraternity Theta really works.

You might contact the National Theta Society, get its documents of incorporation, constitution and by-laws as well as a list of current officers and then get comparable documents from the Theta fraternity of the University to which Ibrahim plans to send Fuad. You could summarize the documents in good memo style, bind the memo and the documents in an official looking folder and send them, with a bill, to Ibrahim.

Ibrahim would be less than satisfied. And with good reason. Suppose you had wanted to know how Darab really works and Ibrahim had sent you a copy of the Koran and a bill; would you be satisfied? Both Theta and Darab are much more than their official rules and though it sounds discordant, the law of each may have little to do with the official rules. In order to operate effectively in and influence, let alone understand, Theta or Darab, you will require a good sense of the processes in each in which policies are made, changed and applied and in which the good and bad things in life are distributed; a sense, in short, of what Ehrlich in a phrase of unfulfilled promise called "the living law."

* Reprinted from Weisstub (ed.),
Law and Policy (1976): 75, 79.

If you spent some time in Theta, you would discover that there are, indeed, "right ways" of doing things and that violations of some of those demands could involve serious punishments. But those "right ways" are not necessarily what has been prescribed in the by-laws drawn up a generation ago by men in the New York office. "Right way" is probably contemporaneously determined and redetermined by those who play some effective role in the life of the local Theta Society; perhaps the house mother, the student leaders, university authorities, local police, clergymen and so on. Bear in mind that those who play effective roles may not agree on what is "right" for every issue and that the possibility of punishment for deviation may vary depending on who you run afoul of: the house mother, the local police, the university authorities. And, of course, as Ibrahim well knows, it may depend on who you are. With all due respect to the equal application of the law, it helps to be the son of someone rich and powerful when you get into trouble.

Consider an example. Article 4(1) of the Constitution of the National Theta Society states that cheating is inconsistent with the ideals of the Theta society and is prohibited. Article 4(2) states that all members of Theta will immediately report cheating to the appropriate authorities in the University; Article 4(3) states that cheaters as well as those who fail to report them will be expelled from Theta. Observation of actual behaviour in Theta reveals quite a different pattern. Not only has no one ever been expelled under Article 4, but the one case of a complaint filed by a student led in effect to his own expulsion: the informer was utterly isolated and himself resigned after a month. In fact, Theta actually maintains a filing system of exams and papers and a basic operational principle of Theta is reciprocal student aid through that vale of tears called education: in a word, cheating. Though some professors don't take it seriously and others are too timid to apply sanctions against students who cheat, university policy is plainly against cheating.

Consider another example. House Regulation 9 prohibits females from staying in a resident member's room beyond 9 p. m., a decorous provision both in its purpose and its orderly assumption that properly raised ladies and gentlemen will not engage in sexual relations before 9 p. m. Regulation 9 was passed by the National Society in 1926 and a fine of \$10 was set. In its day, \$10 was a considerable sum and hence a sanction with real potential for deterrence and punishment. Alas, over the years both the U.S. dollar and Theta morality have depreciated precipitously. Now, the observer will discover that the regime of Regulation 9 has been transformed. Members of Theta regularly entertain their lady friends for the night and pay what is jokingly called (but seriously collected), the "shack fee"; it is half the price of a motel. Proceeds from the shack fund are used for an annual "Devil's Ball."

To argue that these examples are not Theta law, but persistent, indeed institutionalized, violations of Theta law will badly mislead Fuad and his father. Whatever you may mean by law, they have a practical interest in how things are done in a certain setting and by law they mean those expectations shared by relevant members of the group about the right way of doing things, expectations taken seriously enough by group members so that they will probably be sustained by some individual or group effort. By complying with the law as described in your well-bound memo, Fuad may discover that he has been expelled from Theta or the University.

If you compiled a code of the expectations actually held by the relevant members of Theta, you would be supplying Ibrahim and Fuad with much more relevant information. Sitting 7,000 miles away in Darab, they would have a much better idea of life in Theta. But the picture would still be incomplete, for it would be quite static. No code is self-creating or self-applying and Ibrahim, a law maker and law-applier in his own right, knows well that the personnel and procedures of the system may be as important as the content of the norms themselves. How are the norms of Theta created and sustained over time; how are they challenged and vindicated or terminated? How are they applied in concrete cases, sanctioned and reviewed?

The written by-laws may prescribe for these matters, but as before, one must check words against practice before inferring the expectations of the effective and relevant actors in Theta. The by-laws may say, for example, that the rules of Theta must be made in the New York office. In practice, most of the rules are made regularly in the local chapters. The by-laws may prohibit discrimination in recruiting members; in practice, there may be absolute discrimination in certain chapters. The point is not who should be making these decisions according to certain texts, but who is actually making them.

These questions cannot be resolved by inquiring of a text but only by an inquiry into a social process. Terms such as "process" or "system" have been developed in modern social science to refer to the many interrelated features—social, psychological, biological, ecological—of human behaviour. Theta can be understood as a collection of people, with some overlapping and some conflicting perspectives, interacting in situations which can be characterized in terms of spatial location, degree of organization and institutionalization, duration and perception of crisis, drawing on bases of power which may be tangible and symbolic and using those bases in a variety of strategic programs with a variety of outcomes and longer range effects.

The process of Theta does not take place in a vacuum or within hermetically sealed social boundaries. Much of the behaviour within Theta cannot be understood without extending the focus of observation to take account of factors which might not appear directly relevant to Theta, but which closer examination would show to be very influential. For example, pervasive cultural values may have important effects on Thetan behaviour. Theta₁ may be located at a Baptist College in a small town with a unique, intense religious ethos. Theta₂ may be in a region which practices sharp and open discrimination in virtually all social sectors. Theta₃ may be in an urban environment which imparts more cosmopolitan values to every aspect of university life.

Insofar as an observer detailed these specific and more general features of Thetan life in the terms I have suggested, Ibrahim with his own political sophistication would have a rounded and almost breathing sense of the fraternity. But not a sharp sense of how Theta decisions are made; and this is extremely important to Ibrahim. The inclarity here would derive from the generality of the word "decision." A decision, of course, is a choice and a lawful decision is a choice made in conformity with appropriate procedural and substantive norms. But one does not just "make a decision." A variety of distinct functions or operations are concealed in the word "decision" and any

one who aspires to a fundamental understanding as well as a minimum effectiveness in influencing decisions will have to unpack that term. My colleagues and I have found it convenient to speak of seven sequential operations or functions of decision-making:

- the gathering, processing and disseminating of *intelligence* relevant to the making of choices.
- the *promotion* or recommendation of policy.
- the *prescription* of one of competing policies as “law,” as the authoritative policy of the community in question.
- the provisional characterization of deviation from prescriptions and the *invocation* of an authoritative response.
- the *application* of policy to an alleged deviation and the specification and formulation of a sanction program.
- the *termination* of pre-existing prescriptions and the disposition of the various disruptions that attend social change.
- the ongoing *appraisal* of the general performance of the group’s decision-making functions.

In Theta, as in many different groups, each of these functions may be performed in a variety of formal and informal settings. Some, such as application, may often be quite institutionalized and organized; for example, a court of honour expelling a member. But there will also be a very subtle and informal application of norms. Appraisal may be performed officially at a biannual national meeting of all Theta societies and spontaneously at rap sessions in each chapter. Prescription and termination of norms, as we have seen, take place both formally and informally.

If the Theta decision process were detailed along these lines, Ibrahim and Fuad would have a rather exact picture both of the norms of Theta, “the way things are done,” as well as the way those norms are created, maintained, applied and changed.

The Theta experience might be distilled into a more abstract model which could be applied to many other decision situations, from the way world decisions are made through every level of social organization down to sporadic two-member or diadic groups. (And these groups have a law system: Lev Petrazhitski, an innovative legal thinker, actually tried to detail the legal structure of a love affair.) Schematically, the model would be presented as follows:

| | |
|----------------|--------------|
| Participants | Intelligence |
| Perspectives | Promotion |
| Situations | Prescription |
| Bases of Power | Invocation |
| Strategies | Application |
| Outcomes | Termination |
| Effects | Appraisal |

People who have a substantial interest in knowing what the “law” is or “the way things are done” in a group in which they have or anticipate some

interest really want to know the sorts of things that Ibrahim and Fuad sought in regard to Theta. What they learned from an empirical examination of Theta was a richer, more dynamic and more realistic picture of the way things are done in that group. While it provided a rounded sense of the process there, it did not provide the sorts of apparently clear and unequivocal guidelines that a codification of the formal law would seem to supply. Members of Theta, like members of virtually all groups, are integrated in a web of many other groups. Each is characterized by a normative system and each may make simultaneous demands for different sorts of "right" behaviour and may sanction deviations without regard to the fact that the "deviation" was taken in order to conform to the demands of another relevant group. The member of Theta who was expelled for informing on a fraternity brother who had cheated, conformed to the written code of Theta and of the University, but violated the actual code in accordance with which Theta members insisted on living. Conformity to Theta's actual code, however, might have led to violation of the University's code and expulsion. In the same manner, conformity to the operational code of a group which is changing may also render a person subject to sanctions under the newer regime. Though this may seem confusing, it is a rather common problem. We are all simultaneously members of different groups each of which may make conflicting demands. We are obliged to choose, like the early Christians, between matters properly of God and of Caesar; mistakes despite good intentions may occasion the most serious sanctions.

Most groups, in competition for the loyalties of individuals, develop certain "allocating" principles akin to the rules of conflicts of law, according to which the pre-eminence of different groups will be recognized for certain social sectors. But virtually all groups claim pre-eminence for their norms in some sectors deemed intimately important to group life. Conflicts between these demands may ultimately be resolved by effective power, if they are resolved at all. The deterioration of feudalism and the rise of the nation-state, involved efforts to make the norms of "the state" (or more accurately the elites who claimed proprietary rights in those symbols) pre-eminent over those of all other groups, but this was challenged by the "philosophical radicalism" of the middle classes of the 19th century and the liberal movement of the 20th. The issue of pre-eminence has not been resolved and, indeed, may never be resolved, for the formation of groups and the generation of loyalties seem to be inescapable components of social interaction.

For the impatient individual not given to reflection, the problem is elusive if not invisible. A member of a social stratum who feels that his law is challenged by the nonconforming behaviour of another is likely to characterize the behaviour as "deviant" and to term the deviator, in Szaz's "rhetoric of rejection," an anomic or unintegrated personality, a miscreant or someone sick. A more disengaged observer, however, may identify competing normative systems, in which relative pre-eminence is not clearly established in the phenomenal world of the members; choices of "right" behaviour in a context will pose special problems.

The relationship between Theta law and University law is hardly unique to what we characterize as pluralistic industrial societies. Professor Leopold

Pospisil has demonstrated the legal levels and multiplicity of legal systems in even the so-called primitive societies. From Ibrahim's standpoint and from that of anyone who is sensitized to multiple and incompatible normative demands, effective operation within a setting will require sophisticated assessments of which of a number of competing normative systems is most relevant and most likely to have sanction potential. From the student's standpoint, it raises questions about the relation of power and law and the role of personal moral responsibility. We will address both of these questions.

For the moment, however, let us emphasize the features of social integration and change in the phenomena we generally call law. For a variety of reasons, deriving from culture, inertia, professional self-interest or ignorance, we tend to think of the law as a thing found in a book, a sort of autonomous control system which is preprogrammed and which can be predicted by logic or professional hunch. But it is not. It is a process of making decisions in conformity with the expectations of appropriateness of those who are politically relevant: more concisely, a process of authoritative decision. Who is politically relevant in a particular setting, whose norms "apply" is never self-evident; complex assessments are involved and they themselves become factors in the outcome. While the norms of a contemporary industrial-based system can be codified at particular moments, they are in a constant flux with pressures for stasis and change from the many features of the process. Understanding the system or operating effectively within it in a professional or lay role requires a rich sense of the process as well as the more general principles or postulates that animate it.

II. The Relevance of Power

Decisions are effective social choices about dividing up the good and bad things of life. Politics are the processes by which decisions are made and law, in common parlance, refers to certain unique political processes, distinctive because of their techniques for recruitment of personnel, their manifest and latent criteria of choice, their situations, the special symbols deployed and so on. The conventional wisdom, which runs very deep in the myth system of our civilization, holds that there is a sharp distinction between law and politics, a mutual exclusiveness, even an antithesis. Law is decision according to principles, we are told: reasoned decision. Politics is decision according to power. If you are a lawyer, the word "politics" or "political decision" often has a pejorative tone. Politicians, for their part, have scant respect for judges who try to restrain or refuse to aid their own programs. Theodore Roosevelt, who had appointed Holmes to the highest bench, later fumed that he "could carve out of a banana a judge with more backbone" than that supporting Holmes' slender frame.

A moment's reflection will show that this distinction between law and politics is artificial, even preposterous. Notions of authority, expectations of what is right with regard to social choices, play a major role in politics; conversely power is a very critical and indispensable factor in law. As we saw in the Theta case, assessments, on a personal psychological level, of what the law is, which are made in order to guide our own behaviour and to assess others, are influenced by conjectures of the comparative effectiveness of different norms. This does not mean that every exercise of power is lawful or that

every putative act by someone in a manifest law role is effective. But it does mean that lawful acts, to be such, will require a minimum degree of effectiveness and that, over time, effective acts are likely to be deemed lawful. Power and authority are always co-present in varying degrees. This notion of the co-presence of authority and power or control is fundamental to legal theory and absolutely necessary for the performance of legal functions. Let's explore it for a moment in an example: a friendship group.

Imagine eight individuals who over the years have formed a rather intense friendship group. It meets several times a week, but always in Jones' house. People drop by informally, chat and drink, sometimes go out to dinner and at times plan more ambitious outings. As far as we can tell, the associations and affection provided by the group are extremely important to each member. Indeed, some members have refused offers of more attractive work elsewhere because it would have necessitated withdrawal from the group.

Spatial locus is as important for informal groups as it is for peoples in search of statehood. Let's dwell for a moment on the locus of the friendship group. The members meet at Jones' rather than by rotation because Jones has a spacious home which is large enough to accept regular invasions without really infringing on Jones' privacy; in fact, Jones lives in an apartment in one part of the house. And Jones has a live-in domestic, who can let friends in at any time. There is another, rather indelicate reason. Jones is considerably wealthier than his friends; the regular and heavy drain on his liquor cabinet is really no drain on him at all.

As we saw in our consideration of the Theta case, all groups, global, national or microsocial, develop ways of making decisions indispensable to the group's existence and aims. These ways have a social continuity because they come to be expected and demanded by group members, conditioning their own behaviour as well as the demands they make on others. The expectations relate to who ought to make decisions and how the decisions ought to be made, to how information is processed and particularly what is talked about and what tabooed, about how different plans and group projects are recommended and how some are adopted as real group plans, how conflicts about these plans and about any practice in the group are dealt with and resolved, how existing practices are changed and how a variety of group activities are regularly or sporadically appraised. The Theta case hinted at the possibility of a discrepancy between what people believe they believe to be the right ways and what their behaviour indicates they actually believe; peoples' self-perception of their law may be quite different from the code which an observer would construct to explain and predict their actions.

In informal groups, members rarely think of "the way we do things" as group law; in fact they probably have never made express "the way we do things." These expectations are implicit in the very fabric of group interaction. But a new member of the group or a close observer could rather quickly infer from statements and comparative regularities in behaviour the normative code or "law" of the group.

In the friendship group, some members tend to be initiators; others, for the most part, follow. But everyone feels equal, endowed with an equal

share in making group decisions. This sense of equality is emphasized and obscured by the apparent decision procedure. There are no formal votes, but a type of consensus procedure emerges. Particularly in choice of activities, individuals often defer to the strong preferences of their friends, apparently in the expectation that they will receive a comparable deference when their preferences are strong.

We seem to have here a happy example of a democratic group. But if we look closely at what Karl Llewellyn called "trouble cases," we will discover that there are factors at play which don't fit into the code we have formulated. When one member, for example, suggested the induction of someone new, who was known and presumably liked by all other members, Jones indicated some reservation and those who were proposing the new member simply dropped the suggestion. From scattered cases such as these, it becomes clear that Jones' equal choice is sometimes more equal than that of other members of the group. This may arise from the fact that Jones' contribution is quite critical to the group's existence. Though never mentioned and perhaps only dimly perceived by the group members themselves, Jones' importance operates regularly and members probably do not even press matters which would be lawful under the group code but which would be unacceptable to Jones.

Jones is by no means a *caudillo*, a strong man who has the group do anything he wants. He rarely presses his potential predominance, for he too accepts the general group code and realizes, moreover, that confrontations could break up the group; the friendship group is as important to him as to all other members. Nonetheless, it is clear that Jones' heightened importance is a dimension of all group decisions. By power we mean the capacity to influence. Jones has a proportionately greater power in the group, in a way inconsistent with the group code. Because Jones also accepts the group code, he rarely presses his advantage in an overt or obvious way, but it still is a regular part of group life.

There are dramatic instances in which the authority process and the power process of a group seem sharply separated. Harold Lasswell cites an example familiar to Americans. If you go to an American town, as a journalist or perhaps a lawyer sent by a client considering moving his plant there, your first question will be, "Who's the mayor?" Your second question will be, "Who's the boss?" Your questions bespeak a keen recognition of the fact that the process of law and the process of power, as popularly conceptualized, need not and often do not overlap. Because you are interested in really understanding what is going on or in getting things done, you wish to identify those social sectors in which decisions are made by authority and those made with little reference to authority.

In the friendship group we examined, there is no sharp cleavage between processes of authority and power. Both elements are there, but quite integrated. For that matter, there is probably an integration of the two elements even in the American town. Whatever the relation, it is plain that power and authority are in a sort of symbiotic relationship. Now it is probable that discrepancies between power and authority over an extended period of time will lead to readjustments in peoples' minds as to what is authorita-

tive. Power can "legitimize" or "authorize" itself. For example, Jones may, because of the significance his wealth has for the group, become a preponderant decider and even dictate group decisions. Don't forget: that can be a lawful system if those affected by it tend to view it as such: *quod voluit Caesar habet vigorem legis*. Some members who resent the change may, of course, leave the group or disrupt the group and it is quite possible that the group will be terminated. And in our other example, many people in town may come to view the boss' sector of control as quite as proper as the mayor's, itself governed by expectations of authority. Some matters are decided by the mayor and some by the boss; for some problems you go to Constantinople, for others to Rome.

At any particular moment, it may be hard to determine accurately where authority ends and power begins in the expected handling of certain matters. We are not now concerned with where or how the line is drawn between them, but rather the very intimate and permanent relationship between them.

From the most inclusive international arena to a tiny social circle like the friendship group, there is always a power elite: individuals who draw on resources—military, economic, charismatic and so on—which give them in a particular social situation predominant power. Anyone who wishes to operate effectively, within a group, and *a fortiori* the lawyer, must develop a keen sense of where the power elite is and the structure of the processes through which it operates. The lawyer cannot afford to become hyper-realistic and overlook the authority component, for just as it is influenced by power, it too influences power. It is this interaction and interinfluencing which C. W. Mills in his excellent and influential study, *The Power Elite*, fails to take account of and it mars his conclusion. Nor can the lawyer afford to become excessively "proper" and refuse to take account of the power realities. What is called for is a balanced focus on both authority and control.

I am describing a phenomenon and not appraising its moral dimension. That, international law notwithstanding, a large state will intervene in the affairs of a smaller state if it deems its own security threatened does not mean that it is right for it to do so. (Or wrong for it to do so: we will examine the problems involved in these assessments later.) It does mean that people in the smaller and larger state who are trying to develop a realistic set of matter-of-fact expectations of future probabilities and possibilities in order to maintain wealth, security and life itself, will be wise to put this possibility into their reckoning. This is certainly the case with regard to lawyers who would claim expertise in planning and implementation for others.

III. *The Constitutive Process*

Since decisions are social choices about the production and allocation of the weal and woe of social life, particular decisions are of importance to individuals to the extent they signal real personal indulgence or deprivation. Decisions about the continuity of a group and its basic pattern of making decisions, though rarely perceived as vital or personal, are of special interest and importance to anyone concerned with understanding, operating effectively within a group or changing it. These are decisions about decision-making itself, establishing who may make which decisions or perform which functions