



The Evolution of Sovereignty

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Abstract

Law is a civilizing force that emerges and evolves as one expression of the process of societal development, transforming the power of physical violence into legal authority. This process has three interrelated dimensions – social, power and legal. Society progresses by increasing levels of social awareness that generate rising aspirations, which in turn release the dynamic energies of society for productive purposes. The development of social institutions organizes these dynamic energies which are converted into effective forms of power – political, economic, social, technological and cultural. This power process is institutionalized by a constitutive process into principles of authority, governance and law. These processes have evolved to a considerable extent at the national level resulting in modern societies with an unprecedented capacity for effective action and self-regulation. The evolution of the international community is far less advanced. A common global awareness and aspiration are only just acquiring shape. The dynamic energies of global society are only partially released. The institutions needed to organize global social energies into effective power are yet to acquire adequate strength and authority. And as a result, the constitutive process needed to generate a comprehensive framework for global rule of law is still in its infancy. Ideas evolve with the evolution of society and in turn drive that evolution. The principal obstacle to development of global society is adherence to an outmoded historical conception of sovereignty that accords inordinate legitimacy to the nation-state and only secondary rights to individual human beings and the global human community. This article traces the evolution of the concept of sovereignty to reflect the rights of individuals and the human collective, which is a critical necessity for the evolution of global society.

This article is a contribution to the Global Rule of Law project of the World Academy of Art & Science which has been a central theme at recent international conferences and seminars organized by the Academy in collaboration with The European Leadership Network, NATO, Pugwash, The Club of Rome and other organizations. The objective of the project is to frame a comprehensive, inclusive, integrated global perspective of the role of law in social development that is fully integrated with its political, economic, social, psychological and cultural dimensions. It encompasses the full range of social processes from the local to global level as a dynamic field of activity undergoing a continuous process of development and evolution in concert with the evolution of other dimensions and of society as a whole.

1. Sovereignty and Human Rights

Although no one realized it at that time, dramatic events unfolding in North America in 1861 were to have momentous consequences for the entire world throughout the 20th century. They remain a crucial determinate of global development even today. The United States of America as it was then constituted was on the verge of dissolution. A year earlier seven southern states seceded from the Union and declared themselves as a new sovereign entity, The Confederate States of America. Their number eventually grew to eleven states, with the addition of two states and two territories to the seven secessionist states. A year later it appeared to many Americans and Europeans that the once vast nation spanning the continent of North America would be permanently divided. Indeed, it seemed likely that the breakaway of these states would be the forerunner of similar moves by California and other states and territories, creating a fragmented patchwork of sovereign states similar to the pattern on the other side of the Atlantic. The southern states seceded in order to defend themselves against the repeated efforts by Northern abolitionists to halt the expansion of slavery and eventually outlaw it throughout the nation, as it had already been outlawed in England, France, Spain, Portugal, Canada, Mexico and in most of the other European and Latin American states. But the war itself was fought to preserve the union. At issue were the sovereignty of the nation and the human rights of its citizens. In the final analysis physical force rather than principles of justice determined the outcome. The North applied its superior demographic, economic and industrial power to suppress the revolt. Conscious that the southern states would again be able to defeat abolition in Congress, President Lincoln applied a combination of public support and political power to push through the constitutional amendment to abolish slavery while still at war, when the southern slave states were not represented in Congress to oppose it.

Today, the same issues of sovereignty and human rights are playing out around the world, nationally and internationally. Take, for example, Civil war rages in Syria, Afghanistan and Iraq. National governments vie with the aspirations and demands of their own citizens on the streets of Cairo, Istanbul, Brasilia and elsewhere. Growing legions of the unemployed vie with entrenched financial powers over economic policies and priorities. Claims of national sovereignty and constitutional legitimacy clash with counterclaims of democratic freedom and fundamental human rights. At the international level, the threat posed by nuclear weapons and climate change pits the claims of sovereignty against the humanitarian rights of individual human beings and humanity as a whole. Politicians apply political leverage to negotiate limits on carbon emissions with a view to their national advantage, rather than the rights of all human beings. States assert their sovereign prerogative to produce and possibly even use nuclear weapons, although the consequences could be devastating to their own people, to the innocent civilians of other countries, and possibly through untold environmental catastrophe to humanity at large.

2. Integrated Perspective of the Social, Power and Legal Processes

Everywhere, we find a complex interplay between the rising aspirations of society, the play of political and economic power, and the claims of constitutionality and legality. Society, political and economic power, and law are inextricably intertwined. Social process, power process and legal process are three levels or stages of a single movement. Society evolves

through an ever expanding awareness of possibilities which release and direct its energies and channel them through increasingly complex forms of social organization to fulfill its rising aspirations. Social energy channeled through social structure is converted into political, economic, technological and other forms of effective power for accomplishment. The social and power processes culminate in the conscious formulation and operation of law through a constitutive process that evolves in concert with the growing awareness, rising aspirations and ever changing balance of power in society.

This perspective is founded on an understanding of society as a conscious, interconnected network of relationships between people, organizations and activities integrated around core values, principles, beliefs and institutions. It recognizes the complex interdependence and interrelationship between individuals and the collective, perceiving both the individual's active role as pioneer and catalyst of social change as well as his passive role as recipient of inherited and distributed characteristics and benefits from the collective. Further, it is predicated on the ubiquitous role of choice and decision as prime determinates of all aspects of these processes. It also recognizes the value-based, goal-driven directionality of social processes moving ever outward from the local to global level guided by and endeavoring to realize a range of universal values.

The characteristics of the process described above apply to all levels and expressions of social change. However, at the local and national level these processes are so long established, deeply entrenched and inextricably interwoven that it is difficult to identify the live ends of the threads by which they are evolving. Whereas global society is still at an early stage of development, akin to pre-Civil War USA and the early days of nation-building for former European colonies after the Second World War, when the fabric of society was only loosely woven and its underlying structure more apparent than it is today. Therefore, it is in the international sphere that we can most clearly observe the interaction between the social, power and constitutive processes that govern the development of all societies at all stages. The on-going unfolding of this evolutionary process at the international level as in Europe today and at the global level have the greatest possible relevance to the future of humanity as a whole.

3. Foundations of Law

Law is a civilizing force. It is a central and essential instrument for the establishment, survival, growth, development and evolution of society. Law translates effective power into guiding mental principles. Law applies principles of authority and coercion to uncompromisingly preserve and advance the core social values and objectives of society. Law gives these principles operational effect through the exercise of authoritative and controlling decision-making undertaken by those in positions of leadership and responsibility.

Law manifests power. As the American Revolution, Civil War and countless other instances demonstrate, at its deepest roots law is a sublimated expression of the capacity for the violent exercise of power required to found, define and hold society together and to ensure the necessary level of conformity among its members to fulfill social objectives, such as those associated with self-defense, law and order, production, tax collection, etc. Physical power and authority to found and preserve a social entity evolve gradually into political power made manifest by the creation of a constitution and legal process. Constitutions embody

the prevailing principles for the exercise of power and the values on which these principles are based. Thus, authority comes to be defined and rooted in the expectations created by the constitutionalization of power. The very notion of a constitution is a critical symbol of authority in the processes of both national and global governance. Constitutions seek to define and legitimize the authority of the state both with reference to its own citizens and with reference to other states. The central role of power in the formation and existence of society raises the critical question of the relationship between authority and freedom in legal theory, which is especially relevant today for an appreciation of the evolution of international law.

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At a still deeper level the power of a society, whether democratic, monarchical or totalitarian, ultimately rests on the consent of its members, whether it be active and willing or passive and submissive. The Civil War suppressed a temporary violent attempt at secession, but the integrity and power of the USA today are founded on the willing consent and active participation of its constituent states and citizenry. It is self-evident in retrospect that massive colonial empires in India and elsewhere could neither have been established nor sustained for decades without the active consent or passive willingness of those who were thus colonized to accept foreign domination without resorting to incessant violence. Indeed, once people in India and other former colonies decided that they were unwilling to remain in subjection, no power on earth was capable of sustaining imperial rule, as illustrated by the ultimate effectiveness of the national civil disobedience movement in India. Thus, the deepest foundations of constitutional power and law reside in the consciousness of the people. Law represents a codification of the public conscience. The concept of sovereignty is central at this deeper level of social causality as well, for it defines the relationship of the organized state with its own members as well as with its external environment.

4. Sovereignty and the Global Dimension of Rule of Law

The evolution of democracy at the national level in recent centuries radically altered the basis for national sovereignty, shifting it from the rights of the monarch and responsibilities of the people to the rights of the people and responsibilities of those that govern. This process is at a much earlier stage of development at the international level, where the notion of sovereignty remains confined to the national level and the rights of humanity, the human collective, are yet to be fully recognized.

Sovereignty itself is commonly understood as a claimed monopoly over matters of national security. Such claims are tempered by the fact that national security remains insecure without some version of cooperative sovereignty between nations. But nation states are not the only legitimate claimants for security. The very rights asserted by nation states under the purview of sovereignty to protect their own security can and do represent real threats to other nation states and to the very survival of humanity. This is most clearly evidenced by the threat of use or actual use of nuclear weapons. So long as the existence of nuclear weapons makes possible their accidental or intentional detonation, there is no way to ensure that their possession does not threaten or undermine the security of other people and nations, and of humanity as a whole. Indeed, the catastrophic environmental effects of multiple detonations

could pose dangers to unborn future generations as well. Similarly, the sovereign right of any nation to develop and utilize nuclear energy could and does pose existential risks to the people of neighboring states, yet present international law offers no recourse to limit the free exercise of that right by each nation.

Thus, the issue of sovereignty raises the more fundamental question of whether global society should be solely considered as an aggregation of territorially independent sovereign states or whether it encompasses a range of participators that ultimately includes every human being on the planet. If the latter is true, then it is important for us to recognize that the ultimate authority of global decision-making on issues that may threaten or affect the destiny of all humanity cannot be confined to a few territorial sovereigns. Both the social foundations of law and principles of justice would dictate that humanity as a whole must be recognized as the ultimate sovereign authority of the global constitutional process and Rule of Law. In fact, recent developments in the field of international humanitarian law support this view and show that it is already in the process of becoming a reality, in spite of stiff resistance by nation states, most especially those possessing nuclear weapons.

5. Sovereignty in Global Public Order

Sovereignty maintains a critical position in the context of global social, power and juridical matters. Under current global conditions, theorists have insisted that no account of global law and global governance can be complete if its description is confined only to territorial sovereigns. Indeed, a current description of the global social process would recognize the emergence of a wide range of non-state, non-sovereign actors including the importance of the individual as a critical stakeholder in all of these processes. This evolution of a multitude of actors besides the state seems at least implicitly to limit in some measure the centrality of national sovereignty in the global scheme of governance. The emergence of the non-state sector of global society has been significantly facilitated by the global communications revolution as well as the dramatic expansion of international trade and international business following the end of the Cold War. Among the important outcomes of this process has been the emergence of new fora outside the boundaries of the nation state, described collectively as emergent global civil society. These developments are collectively referred to under the label of globalization.

However, notwithstanding globalization, the claim of national sovereignty still exercises important, inordinate influence over global responses to the challenges confronting humanity today. One recent example is the application by China and Russia of their super sovereign status as permanent members of the Security Council to block action by the UN regarding the ongoing civil war in Syria. Among the justifications they give for blocking intervention is that the Assad Regime that runs Syria is an official sovereign and whatever happens inside the territory of the sovereign is a matter that is insulated from international concern. Claims to national sovereignty clash with international efforts to strengthen the principle of international obligation.

6. Early Theorists on the Development and Evolution of Sovereignty

Tracing the development of the concept of sovereignty in an evolutionary context can help us account for the circumstances and pressures that have defined and modified it in

the past and are clashing today over its further evolution. Three of the earliest theorists to develop the modern idea of sovereignty were the French statesman, Jean Bodin; the English Philosopher, Thomas Hobbes; and the Dutch jurist, Grotius (Hugo de Groot). Bodin provided the foundations of the modern concept of territorial sovereignty. The primary forces that influenced his scholarship and practice were the disintegration of the Holy Roman Empire and the emergence of territorially-controlled political entities under localized elites. Bodin understood the importance of centralizing power over people and territory as a method of generating minimum order in the state. His work was in effect a justified order under the “Majestas” of the sovereign to prevent crimes against the people and the state. The only limit on sovereign absolutism was whether the sovereign was willing to subordinate his power to natural or divine law. Bodin believed in the natural law tradition as a limitation on sovereign absolutism, but this tradition was weakened by the sovereign’s monopoly over effective power. Clearly, Bodin did not endorse sovereign absolutism, but his limits were ones that the sovereign could easily ignore. His view of sovereignty, therefore, relies primarily on the capacity for coercion and to only a lesser extent on principles of authority.

Another version of the need for centralized coercion was advanced by Thomas Hobbes. Hobbes took the view that there was an implicit contract between the ruler and the ruled. The obligation of the sovereign was to protect his subjects, which was in turn the basis for the consent of his subjects to obedience toward the sovereign. Like Bodin’s, Hobbes’ view does suggest some modest limits to sovereign absolutism, but these limitations are very modest. The practical consequence was that the self-serving elite saw Hobbes as justifying a version of sovereign absolutism. Both of these theorists dealt with sovereignty and governance of a territorial community, in contrast to the approach of Grotius.

Grotius is regarded today as the father of modern international law. His approach to the problem of sovereignty concerned the role of the sovereign functioning in the context of a multitude of other sovereigns. Grotius was in part inspired by the early Roman law which had developed a system of law for the governance of Rome’s relationship with other nations. The foundations of this system of law were known as the *Ius Gentium* (the Law of Nations). This law was supplemented by the later developments in natural law theory. From these roots, Grotius wrote his most famous work, *The Law of War and Peace* (1625), in which he identified the problem of sovereignty at the international level. He suggested that although there was an identifiable common law among nations, which functioned in the context of war and peace, nevertheless, there was a complete lack of restraint by sovereigns in rushing to arms and causing atrocity and mayhem. Drawing upon the tradition of *Ius Gentium* and the natural law tradition of right reason, Grotius developed principles implicating common sense moral ideas as the basis for international obligation to which all sovereigns were bound. In short, Grotius insisted that reason and reasonableness must be the foundations of the law between sovereign states. This approach of Grotius has endured as an alternative paradigm to that of Bodin and Hobbes. These three views establish the importance of ideas, even conflicting ideas, that impinge on the objective world of reality when they are grounded in political and legal practice.

In 1648, the European sovereigns met in Westphalia and consummated a peace treaty among those attending. This agreement was essentially designed to end the wars of religious conflict within and among sovereign states in Europe. It institutionalized and gave a juridical

face to the sovereign territorial system of Europe. These sovereigns still adhered to a version of absolutism, even though they had agreed to the terms of the peace treaty, thereby subordinating their sovereignty based on a legal agreement. The Treaty of Westphalia initiated a paradigm of law and international relations that was rooted in the near-exclusivity of the territorial sovereign legal personality.

Westphalia started out as a Eurocentric paradigm of the centrality of the state in governance, but since then its evolution has been universalized so that the concept of sovereignty it defined is intricately woven into the fabric of global governance and global constitutionalism. Indeed, the prevailing paradigm of global governance is the globalization of a statist paradigm. The question for modern scholarship is whether there is an emergent and insipient paradigm that presents a compelling alternative to the entrenched statist paradigm.

7. Positivism or a Paradigm Shift

Theorists of the 18th Century grappled with the problem of sovereignty and the importance of higher values that might constrain or guide sovereignty in action. Their discourses were concerned with the authority aspect of sovereignty which could be diminished by sovereign absolutism. The 18th Century also saw the emergence of a stronger form of sovereign absolutism, which based its claim to legitimacy on the positivist viewpoint that emerged with the rise of modern science. Briefly stated, “In any legal system, whether a given norm is legally valid and, hence, whether it forms part of the law of that system, depends on its sources, not its merits.”¹ Legality was to be judged objectively rather than subjectively and the criterion was the presence of certain identifiable structures of government, not the extent to which law satisfies principles of justice or democratic values.² Positivists regarded law as a human construct identified with a specific social institution. Early theorists applied this view to suggest that only a very compelling justification could be used to undermine the idea of strong or thick sovereignty and such justifications, if rooted in morality, would be unscientific and invalid. This approach was applied to support a narrow version of law at the international level. International law could only be established by explicit sovereign agreement or by the practice of sovereigns as understood in terms of customary international law.

These views were still awaiting a developed theory to become institutionalized as conventional wisdom. The next great development was the emergence of a general scientific theory of law rooted in the sovereign itself. This is an important lesson in the power of ideas. An Englishman, John Austin, developed this rigorously scientific approach to law in his book *The Province of Jurisprudence Determined* (1832). Austin provided an elegant and simplified model that could explain all law in terms of the sovereign. In this model, law properly so-called is the command of the sovereign imposed by a sanction applied to a community in the habit of obedience. This model seemed intuitively correct according to common sense and eventually became the prevailing conventional view of law. Even today, it remains a powerful vehicle for the assertion of the most comprehensive powers that a state may seek to monopolize.

The power of Austin’s model lay in its simplicity, which meant that it provided a strong justification for the exercise of governing power in a scientific sense, uncontaminated by moral or value limitations. The model was logically rigorous. The sovereign could not be a sovereign if it were subject to a higher form of obligation. Thus, a sovereign could not be

bound by a constitution, because in doing so it would lose its sovereignty. Therefore, constitutions were not proper law; they were positive morality. International law could not impose obligations on the sovereign without the sovereign losing its sovereign status and, correspondingly, the location of a global sovereign capable of imposing obligations on a so-called sovereign could not be factually sustained. Since there was no international sovereign, there could be no international law. International law therefore was simply a species of positive morality.

Austin's theory fused the idea of law, state, and sovereignty and provided a powerful objective view of law. In his view, the sovereign was essentially the state and the state represented law. The logical implications of his view that constitutional law and international law were not law, were never fully embraced by the legal profession or, indeed, as legal theory. However, his view did diminish the centrality of constitutional law and international law. It weakened their impact on the concept of global governance and reduced the restraints on national sovereignty required in the practical scheme of human relations.

8. Evolution of Sovereignty: Positivism vs. Natural Law

The evolution of sovereignty in the late nineteenth century appeared to confirm its strength and importance in understanding the internal governance of the state and the role of the sovereign in international affairs. From the point of view of international law, the stress on restraints on the exercise of sovereign power focused on agreements that sovereigns could voluntarily enter into. The Austinian view has often been referred to as the conventional view of law. This may be because, whatever the flaws in the theory, it had certain objective characteristics that could be easily comprehended and, therefore, given operational effect in practice. The Austinian model is a reminder that an elegant and relatively simple idea expressed in a coherent and consistent manner can have traction and important effects in the real world in which it is invoked, irrespective of its inherent validity.

The durability or should we say the survivability of both constitutional law and international law drew strength from fundamental ideas set forth by Grotius. In contrast to the Positivists, Grotius underlined the importance of natural law ideas, whereby law was founded on rationally discernible principles of natural right and justice. These rationality principles imposed certain limits on sovereignty and on the relationship between sovereigns. The evolution of the concept of sovereignty reflected a continuing debate between mutations of Austin's positivism and the role of reason, fundamental morality, and values as reflected in the Grotian tradition. The logic of Austin was that values and morality had nothing to do with law or sovereignty. Grotius repudiated this view.

In the practice of states, the concept of sovereign absolutism continued to exert a powerful influence on state craft during the 19th century. Since there were few restraints on sovereigns other than morality or values, at the close of the century the global community sought to more aggressively pursue sovereign agreements between states. Early in the twentieth century efforts were made to strengthen the use of arbitration by sovereign contestants. Additionally, a bold move was made to subject one essential attribute of sovereignty (the making and means for war) to rules mandated by international law. These were reflected in the agreements that emerged as the Hague Conventions dealing with the rules of war. However, by 1914, notwithstanding increased levels of codification of sovereign agreement, sovereigns

still held the power of war with limited restraint. The assassination of Arch Duke Ferdinand of the Austrian-Hungarian Empire by a Serbian terrorist in Sarajevo in 1914 soon developed into a world war, and sovereigns fell like lemmings into the cauldron. It became evident that whatever limits there were on the power of sovereigns to make war on each other, none of these limits could trump their implicit claim to sovereign absolutism.

9. Modest Retreat from International Sovereign Absolutism

During WWI, two statesmen emerged with ideas about how sovereign absolutism could be limited and thereby prevent a repetition of global war: President Woodrow Wilson and Field Marshall Smuts of South Africa. Wilson remained in Europe for a considerable time after the war negotiating the formation of an organization of global import charged with maintaining peace and security, which eventually led to the founding of the League of Nations. In the fine print of the League Covenant, we see the resilience of Austin's ideas of sovereign absolutism, international law and the state. The Covenant codified a rule upon which all decisions were to be made unanimously. No binding decision could be made if a single sovereign objected. This meant that if a member of the League engaged in acts of aggression, it could effectively veto any action by the League. During this period, Europe witnessed the emergence of totalitarian style states in Stalin's Russia, Hitler's Germany and Mussolini's Italy, as well as a form of totalitarian rule in the Empire of Japan. These states made aggressive claims to freedom of action in the international sphere, implicitly asserting their sovereign right to aggression for the purpose of world conquest. One expression of this form of absolutism was the notion that war could be an exercise in total destruction.

During WWII, serious thought was given to the development of an international law that would provide a stronger institutional framework for limiting sovereign absolutism. This led to the drafting of the Atlantic Charter in 1941 as a policy statement, which formed the basis for the UN Charter ratified in 1945. Parallel to these developments, international tribunals were created to try leaders of the aggressor states for international war crimes. These tribunals (Nuremburg and Tokyo) provided a significant legal restraint on sovereignty. The tribunals maintained that the notion of sovereignty was merely an abstraction from reality. Those making decisions leading to international aggression could be held responsible for war crimes and crimes against humanity.

The United Nations Charter was the first serious global compact reflective in documentary form of the emergent expectations of a global constitutional process. In this sense, the Charter represents an important symbol of the idea of Global Rule of Law. The text of the Charter is, however, an instrument of some ambiguity. It affirmed natural principles of justice as its foundation. But it also allocated effective power according to traditional notions of sovereignty. The Preamble of the Charter states that it represents "we the people" of the global community. Article I largely affirms individual human rights in some form or other. However, membership in the UN is limited to sovereign states. Additionally, the United Nations created a special institution, the Security Council, with an important responsibility for global security. Within the Security Council each of the five permanent sovereign members has the right to veto and can block UN action in areas of peace and security which they deem incompatible with their national interests. Thus, the five permanent members are endowed with the status of super sovereigns over and above other nations and unaccountable to humanity as a whole.

The current structure reflects a modified view of the League's unanimity principle with all its dysfunctions, only a smaller number of states are now empowered to exercise the veto power. Thus, the UN affirms in the practice exercise of near-absolute sovereignty, but restricts it to a small group of states, while subordinating the sovereignty of other states to the will of the Security Council, even in circumstances where the action of the Council may violate even a much weaker interpretation of sovereignty.

Furthermore, while in theory the Charter appears to recognize the existence and rights of humanity as a whole – we the people – in practice, the authority foundations of decision-making in the UN do not accord any status or provide any direct mechanism by which humanity as a whole can express or exercise its sovereign rights, other than through the intermediation of national governments whose values and objectives may differ widely from those of their own citizens. The notion of sovereignty as conventionally understood still enjoys inordinate influence over decision-making under the UN Charter. The lingering underpinnings of sovereign absolutism are in stark contrast to the authority foundations of global governance rooted in people's expectations in accordance with fundamental principles of democratic representation and human rights.

Our position is that the concept of sovereignty must inevitably be extended to encompass the rights of humanity as a whole and that the Charter's own stipulation of "we the people" should be recognized as an essential foundation of the authority of the UN and its institutions. The critical question is how this principle can evolve into an essential practice of political and legal accountability, responsibility and transparency on issues affecting the rights, aspirations and survival of humanity as a whole. The further transmutation of the role of sovereignty in the global constitutional process must, like the evolution of constitutional process at the national level, depend on essential prior developments at the levels of social process and power process.

10. Global Sovereignty and Global Constitutionalism during WWII

In an earlier essay, we borrowed from Harold Lasswell ideas that provide clarity for the context of the global rule of law and its constitutional underpinnings.³ As at the national level, international legal and constitutive processes depend on and are determined by underlying social and power processes. The evolution of global rule of law and the development of global constitutional law are a function of global social development, evolution and precipitous change at all levels from local to global. One important outcome of these social processes is the conversion of social dynamism into effective power and decision-making, which in turn has a determinative influence on the constitution and application of law.

This can be clearly seen by the course of events in 1945. World War II was a global scenario where global differences were to be resolved by armed conflict. The victory of the allied powers reflected an important shift in the world power process. The war essentially pitted the democracies against the totalitarian states. By implication, the war against the democracies was a war waged against "we, the people" and it was vigorously defended and eventually defeated under the democratic Allied banner of 'by the people', so dramatically illustrated by the patriotic appeals of Winston Churchill to the English during the darkest period of the war. Additionally, in occupied nations, peoples' resistance emerged, adding to the sense that the war was a peoples' war. The eventual entry of the USA into the war was

based on tacit agreement that its European allies would dissolve their empires after peace was restored.

After the war, the peoples' perspectives, interests and values, as well as their "authority" found expression in a new world order under the U.N. Charter. By the end of the war there was already intense pressure and a strong expectation that colonialism would soon end and all former colonies attain their freedom. However, the drafters of the Charter could not ignore other components of the global power process. Sovereigns had not exactly abdicated. States, including the democracies that had fought and won the war, were unprepared to relinquish the power they had acquired through war or to accord equal status among the community of nations to all other countries. Thus, the global constitution embodied in the Charter came to reflect the realities of global power as it pertained at the time. The UN Charter, the global constitution, did not resolve the problem of sovereignty or satisfactorily address the problems of global power contestation.

11. Social Origins of Constitutional Change at the National Level

The social and power underpinnings of the constitutive processes may be more easily observed and traced at the local level where the process of social awakening, the release of social energy and its expression in specific actions and events are more transparent, as recorded in the Boston Tea Party, the Salt March in India, Rosa Parks' civil disobedience marking the beginning of the American Civil Rights Movement, and the protests in Cairo during the Arab Spring. Initially the movement is sporadic and unorganized. Later the social energy released becomes directed and expressed in a more organized manner through well-coordinated actions guided by the strategic decisions of social leaders contesting for power. The rise to prominence of social organizations such as the Continental Congress of 13 American colonies, the Indian National Congress, the African National Congress and the Muslim Brotherhood in Egypt became channels for directing and converting social energy into effective power. The power generated and managed is real, but it has not yet consolidated its authority foundations. Later as political events unfold, the perspectives generated by this activism become contenders for progressive constitutional expectations. In this manner the USA, India and South Africa acquired new constitutions and Egypt is in the midst of the highly contentious process of negotiating one. Eventually some of these entities become integrated with formal institutions of governance.

The various aspects of this process are dramatically illustrated by the challenges President Lincoln confronted in waging war against the Confederacy. A lawyer by self-education and profession, he had an instinctive grasp of the fundamental truth that sovereignty ultimately resides in the people. Lincoln was a man of humble origins, a man of the people who knew both their aspirations and limitations. In contrast to most of his military advisers, Lincoln understood that in a democracy war is waged by the whole society, not merely by the army. It is the people who must willingly supply the manpower, bear the tax burden, submit to rationing and endure threats of attack and personal losses. Therefore, he spent his first year in office and the first year of the war preoccupied with building bridges between interest groups, mending fences and offenses, securing allies at all levels, distributing patronage to his political opponents and sounding the will of the people. He consistently resisted the advice of his counselors whenever he felt that it was not supported by the consent of the people. At

the same time, he was very clear that successfully waging a war required a firm authoritative exercise of power. At a time when the President of the United States was provided with only one paid government staff member and the chief of the army did not feel compelled to either consult, inform or obey direct instructions of his Commander-in-Chief, Lincoln gradually gathered himself and exercised more power than any US president who came before him.

But Lincoln also understood that power alone was not sufficient to ensure or preserve legitimacy, unless it was enshrined in the constitution and institutionalized as legal process. He deferred from taking steps he deeply believed in because he knew they transgressed his power under the constitution. But where he deemed it necessary, he stretched that power to the limits. Starting with a Union army consisting of a mere 16,000 men headed by inexperienced leaders, he channelled those prodigious national energies into a massive industrial machine for production of the materials of war and assembled an army of 700,000 to wage war over an enormous territory. At a time when the South was finally ready to negotiate surrender and the North wanted peace at almost any cost, Lincoln forestalled peace negotiations until he could push through a constitutional amendment abolishing slavery throughout the USA. Had he not done so before signing the armistice, the southern states would have exercised their states' rights to perpetuate the institution of slavery for decades or even longer.

It is remarkable to look back now and see by what a slim margin and against what intense resistance the fragile coalition Lincoln assembled successfully passed legislation to abolish a practice we now consider so abominable that it is almost inconceivable to us that it was once tolerated and considered just. Lincoln did all this while defeating separatist forces under the banner of national sovereignty, reuniting a disparate people and healing a nation that had split asunder. Yet immediately following the end of the war, he counseled measures to avoid revenge against the defeated South and quickly restore its prosperity. In doing so he consciously steered the social, power and legal processes of the nation, releasing and directing the energies of the people according to his own vision and values.

12. Signals of the Global Social Process

In retrospect we can identify many elements of the social, political and constitutive processes in the transformation of America during the Civil War, India's Freedom Movement, the American Civil Rights Movement, the Anti-Apartheid Movement, the democratization of Eastern Europe and elsewhere. But still, the driving force compelling these transformative political and legal changes remains elusive. At the time these events were taking place, their inevitable outcomes were far from apparent. Before the Civil War, the nascent American nation was regarded with derision by most Europeans. Few had the insight to believe that the Civil War would not only re-unite the states and abolish slavery, but also establish the foundations for America's emergence as the most prosperous, powerful nation on earth. Even just a year or two before India gained independence in 1947, the vast majority of Indians and their leaders had difficulty imagining it as an independent republic, and many of those doubted its capacity to govern the multiplicity of linguistic, religious and ethnic groups of which it is composed. Today many seem bewildered by the second class status of women in Islamic countries, forgetting that women voters and women political leaders were unthinkable concepts in 19th century Europe, forgetting that women did not acquire equal voting rights with men until 1920 in USA, 1928 in UK, 1944 in France and 1971 in Switzerland. What now

appears logical or inevitable earlier appeared unrealistic or unattainable to all but a few.

So too, when we try to envision the future evolution of international polity and law, we find it difficult to imagine either the conditions or the forces that might compel the entrenched self-interests of the present system to relinquish their privileged status in support of a global constitutive process truly founded on the principles of representative democracy and human rights. Our rational minds tell us it must be the natural, inevitable outcome founded on principles of natural justice. Perhaps, many of those who signed America's Declaration of Independence, which included many slave owners, had difficulty in imagining by what power or process the self-evident truth that all men are created equal would ever be realized in law. So today we may wonder by what circumstances or process international law and governance can and will be transformed.

History not only tells us it is possible, but confirms it is inevitable. It also warns us against the error of mistaking the status quo for the permanent – for even the most powerful forces and institutions of the past – the Church in 15th century Europe, the British Empire in 1900, the Soviet Union and Communist Bloc in 1980 – which seemed impregnable at that time, declined rapidly and inexorably when conditions were compellingly ripe for a new dispensation.

One of the most remarkable of these transformations in recent centuries was the dissolution of aristocratic monarchy as the predominant form of government in Europe. At the time of the French Revolution, the aristocracy of Europe controlled most of the property and occupied virtually all positions of influence in government, the church, the universities and the military. In England just 500 families controlled nearly 50% of all arable land and barely 2 percent of its population was eligible to vote for one house of Parliament.^{4, 5} Yet in the following century, the tide of democracy swept aside hereditary rule in one nation after another, until democracy eventually emerged as the dominant form of government and social culture. In 1780 it was unthinkable to the aristocracy of France that their privileged birthright might so soon become a mark of Cain. It was unthinkable to many Englishmen in 1920 to imagine that within a mere thirty years the greatest empire ever established would no longer exist. It was unthinkable to almost everyone in 1985 or even 1988 that within a few years the Berlin Wall and Iron Curtain would fall, authoritarian communist regimes would be replaced by democratic, market economies throughout the Eastern Bloc, the USSR would cease to exist, Germany would be reunited, and the fledgling European Union would be expanding to eventually encompass 28 nations. These events did not happen by chance. Nor in retrospect is it difficult to perceive the conditions and forces that made them inevitable.

“Indeed the capacity to imagine what was hitherto unthinkable is the significant sign of what is coming.”

So too in looking to the future, we should not be blinded by the illusion of permanence and impregnability which makes even the conception of radical change seem unrealistic or inconceivable. Indeed the capacity to imagine what was hitherto unthinkable is the significant sign of what is coming. What then might be the conditions that serve as the driving force for momentous evolutionary changes in global governance?

The emergence of a truly global constitutive process founded on principles of democracy and human rights must necessarily arise from more fundamental changes in social and power processes. Therefore, we should search for an answer by first examining the factors that are altering the global social process today. There we observe a wide range of very powerful forces gaining momentum. Among them, demographic changes that are rapidly reducing the relative proportion of people living in the countries of Europe and North America which dominate global power structures today; the spread of the flame of democracy from 22 nations in 1950 to 117 and its continued contagion to other regions and to long suppressed minorities within countries; the rapid emergence of the BRICS countries as dominant economic powers; the revolution of rising expectations that has awakened the energies of Asia and is now stirring change in the Muslim world; a four-fold growth of the global Middle Class from 400 million in 2000 to 1.8 billion in 2010 and its further projected rise to 3.6 billion by 2030; two-thirds living in Asia; the emergence of the Internet as the first truly global social organization and empowering transformative force whose influence is yet in its infancy; the rapid rise in levels of education in developing countries – India expects college enrollment to more than double by 2020; the globalization of finance and commerce which undermines the power of national governments; the rise of global civil society represented by more than 40,000 non-governmental organizations; the changing status and role of women in global society, which could prove to be the most momentous of all these forces; and the increasing demand by individuals everywhere that both their inherent rights be fully respected and their creative capacities find free and full scope for expression.⁶

Some of these forces are already fully unleashed, yet the consequences of their continued action is as unforeseeable as the explosive growth of the Internet and cellular telephony was 20 years ago when both were still in their infancy. Others still appear as weak signals of future trends that veil immense hidden power and inevitable consequences. But however we may regard them individually, there can be no doubt that their combined impact will dwarf in magnitude the social forces that swept through Europe at the time of the Renaissance and Reformation; the American, French and Russian Revolutions; the First and Second Industrial Revolution; the New Deal and the End of the Cold War.

The momentous consequences of this tidal wave of social change are difficult to conceive, impossible to predict, but the magnitude of their power and capacity to bend or sweep away the seemingly immovable obstacles posed by entrenched interests and power should not be doubted. A revolutionary social process will undoubtedly effect revolutionary changes in the processes governing political, economic and social power at the national and international level. These will in turn inevitably alter in ways that seem hardly conceivable today the constitutional and legal processes for the governance of humanity.

13. Bringing Law & Order to the Global Wild West

There are also other forces at work that are as great in magnitude and compelling in power as those already mentioned. One such is the rapid accumulation of surplus global financial assets, which have grown from \$12 trillion in 1980 to about \$225 trillion today, equivalent to almost four times global GDP. Rising levels of prosperity globally combined with rapid development of international financial systems has enabled global financial markets to acquire an enormous power that far exceeds the capacity of national governments and central banks to regulate. Although technically the control and regulation of finance is under the sovereign

authority of the nation state, the unbridled growth of the financial sector internationally lies beyond the capacity of individual nations to contain or control. Non-state actors managing greater financial resources than those controlled by all but a few central banks act freely in the sparsely regulated international arena, where a legal and regulatory vacuum leaves ample room for excessive concentration and blatant abuse of power. These developments point to the urgency of enhancing global regulatory accountability to ensure that the global economy is not again brought to the brink of collapse.

This Wild West frontier of international finance is the result of social and economic power processes that have outgrown the existing international political and legal framework. In response there have been piecemeal efforts to extend authority from the national to the international level by the G20, Bank of International Settlements, the Third Basel Accord imposing voluntary standards on international banking, and other regulatory mechanisms. But in the absence of a global centralized legal authority and constitutive process, these piecemeal measures are far from adequate to control the forces they seek to contain. Viewed from an evolutionary perspective, it is evident that the requisite power can only be fully harnessed and positively directed by emergence of a global constitutive financial authority. Current efforts to derive the necessary authority from the consent of national governments based on the values of the prevailing market economy – even when their actions threaten the stability of the entire global economy – are doomed to fail and repetition of crises is inevitable until the necessary power is ceded by sovereign states.

The current international situation is analogous to what prevailed in India in 1905 when Sri Aurobindo first proclaimed the goal of complete independence from British Rule. The Indian people accepted the authority of their colonial masters as legitimate and submitted to it, until leaders came forward to challenge its authority on the principle of freedom and self-determination. The Indian Freedom Movement awakened the Indian masses, released their energy and channeled it into a political organization with the power to drive out the British, leading to establishment of a new constitutive process. Today a similar movement of awakening and organization can bring about parallel progress at the international level. The idea of a global referendum may be one step in that process. The organization of an umbrella group of civil society institutions as envisioned in the WAAS Strategic Plan may be an effective instrument for that movement.

“Social revolution is a distinct possibility unless the pace of evolutionary change is radically accelerated.”

Like the Internet, the prevailing international political and economic system is still a work in progress and has obviously not reached its full potential. It has released enormous human energy and productivity, which have been organized into powerful political and economic structures. But these structures function largely based on narrow principles of nationalistic self-interest and international competition, rather than on cooperative equity and welfare for all.

14. The Emerging Global Constitutive Process

What might be the basis for the fundamental constitutive changes that will unfold at the global level in future? Must it be a gradual evolutionary development from past precedent

or could it come as a revolutionary assertion of a new and higher principle which acquires legitimacy by the will and organized power of those who assert it, backed by the aspirations of billions of human beings seeking higher levels of security, welfare and well-being? Social revolution is a distinct possibility unless the pace of evolutionary change is radically accelerated. There is a compelling social necessity for this to happen.

That was the case two centuries ago when the vast social potential of human initiative and productivity in Europe was severely circumscribed by social and political conditions that subordinated the aspirations and initiative of citizens to the will of a small ruling elite. Democracy came to destroy and replace the old monarchical organizational structure with political parties and an electoral process. The ultimate authority for that revolutionary transformation was not past precedent or the consent of the monarch, but the claim to power by the citizenry and assertion of a new and higher principle of authority - "we hold these truths to be self-evident...men are endowed with certain inalienable rights..."

Regardless of the form it takes, whether as in the sudden revolutions or the gradual evolutions of the past, there will be a marked shift from the prevailing values governing global society to a new set of values, as the hereditary rights of aristocracy were earlier displaced by democratic freedom for the people. The coming shift will bring a redistribution of power in society from military might and economic wealth to more equitable principles of human rights founded on greater recognition of the central value of the individual human being. Global society will inevitably make this shift not only because it appeals to our higher sense of universal justice, but also because it is the only way to sustain the onward progress of humanity. Society is moving inexorably from the domination of the individual by the collective to the full development of the capacities and creative potential of each of its individual members, so that the progress of the collective may be continuously revitalized and invigorated with fresh ideas, creativity, innovation and overflowing energy for renewal, growth and evolution. Already we see that regions with aging demographic profiles begin to anticipate a decline in the vitality of their social processes, which are the underpinnings of human security, welfare and well-being. Whether by opening their borders to more immigrants, reaching out to forge mutually beneficial exchanges with younger nations, re-educating their elderly or liberating the capacities of underprivileged minorities, especially of women, these societies will be compelled to alter their institutions and policies or risk declining rapidly into relative oblivion as so many highly accomplished societies have in the past.

Whether or not those that maintain a near monopoly on global political power today choose to willingly share it, the social forces identified above will not be prevented by any dependence on that willingness. Whether by sudden violent revolution or peaceful gradual evolution, global power and legal processes will be compelled to change as radically in the future as they have been altered within states in the past. At the heart of these changes will be changes in our concept of sovereignty as it applies to nation states and to individual human beings as a single global community.

15. The Global Power Process and the U.N.

The founding of the UN represented an effort to establish a higher level of authority beyond the nation state to ensure world peace and human development. The power of the victorious allied nations was used to give authority to the new structure which they dominated.

It is very significant that the UN charter affirmed universal values and principles that extend beyond the principles of sovereignty on which the nation states are founded. A partial affirmation of higher authority gave rise to a legal system still dominated by the authority of national power of the victors in WWII.

"A significant reform of the United Nations is overdue and inevitable."

Global power has evolved significantly since 1945 but it is still constrained by an outmoded constitutive process. Since then the world has changed. The emergence of Germany and Japan, China, India, Korea, Brazil, the rise of the developing world in general, the progressive integration and expansion of the European Union, and the relative decline of Russia have radically altered the distribution of economic, social and political power. Yet the international legal structure framed 70 years ago remains essentially intact. The challenge now is to evolve a constitutive process that more accurately reflects the prevailing distribution of power in the world. A significant reform of the United Nations is overdue and inevitable.

An analysis of global processes testifies to the need for revolutionary changes based on the authority of higher values and rights, including the sovereign rights of both the individual and humanity as a whole. Among the many steps that will need to be taken to facilitate the transition, the establishment of effective mechanisms for self-expression by the human community is one of the most essential and potentially powerful. Today the voice of humanity is poorly represented and often suppressed by the very national governments that are intended to represent them. In the best of cases, governments primarily represent the interests of a social or economic elite as well as their own entrenched interest in remaining in power. Nation states do not adequately represent the views or the will of the human community. Establishment of a direct mechanism for self-expression by the human community on issues central to our common future would be an important advancement. It could commence as a series of increasingly formal referendums conducted under the supervision of globally respected individuals and institutions.

16. Tools for Analyzing Complexity

The science of complexity first emerged from the study of physical phenomenon involving many variables and exhibiting non-linear patterns of behavior, but even the complexity of the global weather system appears relatively simple in comparison with the global social, political, economic, cultural and ecological system. Therefore, if our understanding is to go beyond broad generalizations or guesswork, we will require appropriate tools with which to approach this complexity. Contextual mapping of social and power processes is a useful tool for this purpose. A study of the causes and consequences of critical decisions contributing to evolutionary or revolutionary change is another. A third useful approach is to conceive of the evolving global society as an organism undergoing a fundamental change of paradigm, akin to the metamorphosis of a caterpillar into a butterfly. This involves a full recognition of both the existing forces and structures that strive tenaciously to maintain the status quo and the emerging forces that are gradually undermining the present foundations, altering power equations, and preparing for tectonic events of great magnitude. Here the perception of weak signals that can be expected to grow with time can provide valuable insights. History too

plays an important role, not as a source of data from which to project into the future, but as an insight into the radical nature of change processes that periodically overtakes incremental changes in existing structures or sweeps them aside in order to establish entirely new structures.

The World Academy's initiative to frame a new paradigm for global development is spurred by the recognition that a fragmented, sector-wise approach commonly adopted to address the multiple challenges confronting humanity today cannot succeed precisely because global society with all its peoples, nations, activities, and institutions represents a complex, living, indivisible, integrated social organism, not a disparate patchwork of independent or intersecting organizations and activities. Moreover, unlike physical systems which are subject to physical observation and measurement, social systems consist largely of subtle and subjective elements that are difficult to perceive and beyond the present capacities of social science to measure. A sudden change in public sentiment can unleash a domino effect rocking and uprooting seemingly invulnerable structures, as they did in the aftermath of the international financial crisis of 2008. Long suppressed social aspirations and frustrations can erupt suddenly and violently as in the Arab Spring. Social attitudes and values may remain dormant until a single event, such as Gandhi's Salt March or Rosa Parks' refusal to move to the back of the bus, unleashes latent energies of great magnitude. In seeking to conceive the possible outlines of an emerging new paradigm, we must not only take into account the apparent complexity of measurable events tracked by statistics relating to demography, economy, education and health. We must also attempt to identify and take into account these intangible social, cultural and psychological forces.

17. Human Capital & Individuality

But however great our measuring instruments and our intuitive perception of subtle forces, attempts to frame the future will still fail unless we recognize that the principal driving forces are not those propelling it from the past but the intangible attractors that are drawing it to the future. The most fundamental of these is the emerging value of the human being both as the ultimate source of all social accomplishment – the human capital that creates and imparts value to all other forms of capital – and as the ultimate recipient whose security, welfare and well-being – individually and collectively – are the only legitimate and lasting goal of the human endeavor. Some limited groups of beneficiaries may gain temporary advantage, as they always have in the past. But as in the past, none can stand in the way of an inexorable march toward greater freedom, equality, and harmonious development of the full capacities and potentials of the individual and the social groupings of which he is the living core.

At the most basic level, human rights and humanitarian rights represent the higher level principle of authority needed to regulate and redirect political and economic power to serve the interests of all. At a higher level, the capacity to fully mobilize social energy through effective organizations for human welfare depends on the development of each individual citizen. The quality of democracy depends on the quality of the electorate. The productivity of an economy depends on the creativity and dynamism of its workforce. Fundamental rights and education provide the basis, but the result will depend on the maturity of the citizenry. The more informed, rational and capable of independent judgment they are, the greater will be the authority and effectiveness of the social collective. This is the significance of the

Academy's focus on the psychological organization of Individuality and not merely on the political organization of individual rights.

The full establishment of individual rights and the full development of individual capacities cannot be fully realized unless there is a corresponding recognition of the rights of the community – local, national and global – for this social collective is the reservoir of knowledge, skills, values and cultural endowments with which human beings nurture their young so that future generations can inherit all the accumulated knowledge, experience and wisdom of their forefathers. Family and Education are the unique social institutions fashioned for this purpose. And they are complemented by a wide range of other social, political, economic and cultural institutions responsible for creating a secure, fertile ground for human development and creative self-expression. Any conceptual framework for the future – especially a framework concerned primarily with the evolution of international law – needs to be founded on a full appreciation of the fundamental symbiotic relationship between the individual and the collective, which is the catalyst and source for all human progress.

“Global conditions now mandate that we take the next steps in the promotion and defense of human-centered global governance.”

18. Conclusion

This paper examines the emerging global society from the perspective of evolving social, power and constitutive processes. We argue that it is myopic and unrealistic to confine the participators in these processes exclusively to sovereign territorial states. Global conditions now mandate that we take the next steps in the promotion and defense of human-centered global governance. Social forces with the power to bend steel-like resistance will ensure it happens. This is one of the most important conclusions generated by a new paradigm perspective on the global Rule of Law. As this process gathers momentum, a great many things will change – most of all the values, ideas and principles upon which we base the constitutive processes governing humankind.

We conclude this article with the list of questions formulated at the outset of the Global Rule of Law project in the hope that it will stimulate readers to further thought and insights.

1. What is the role of sovereignty in governance?
2. What precisely is the relevance of the Rule of Law in seeking to limit unlimited sovereign competence?
3. What is the role of authority in the exercise of sovereign competence or any form of governing competence at any level?
4. Is the concept of sovereignty evolving? If so, what are the implications of these changes for the future of global governance?
5. Does the UN Charter and practices under it empower the people of the earth/space community and restrain the monopolistic power of national sovereignty?

6. How does the problem of rational limits impact on the exercise of unlimited sovereignty by governing powers?
7. What needs to be done to strengthen the authority foundation of the global constitutive process and its practical efficacy in securing the basic values of a humane global public order?
8. What is the relationship of sovereignty to the processes of effective power at all levels of governance?
9. How does the emergence of non-state actors challenge the exercise of authority in global decision making?
10. How is the emergence of global civil society shifting authority rooted in the state to authority rooted and exercised in organizational activity that parallels the state?

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Notes

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