



Global Governance: A New Paradigm for the Rule of Law*

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Abstract

This article seeks to appraise the Rule of Law in the context of international sovereignty and the growth of international non-governmental organizations. The article explores the meaning of the Rule of Law and suggests that it is better understood as a symbol representing the most basic values that underline our global constitutional system. When we relate the global Rule of Law to the values and the global constitutional framework, we recognize that the Rule of Law and the global constitution are better secured if their authority base can be strengthened. The obvious way this can be done is by strengthening the role of non-governmental organizations within the framework of global governance. If we see the Rule of Law as a defense and promotion of basic values, we may then pose the question about the Rule of Law as an agent of change in a novel developmental construct. Here the author notes that the dynamism of technological change will only increase in the future. But technological change will result in more use of technology and less employment. The question then is, should the benefits of technology not be shared with the workers as well? If that is true, one of the obvious benefits of technology in relation to labor is to reduce the number of hours or days that the worker has to work. Leisure time could result in an aggregate distribution of human happiness. It could evolve into an incentive to generate enhanced human co-creative activity. We could possibly even imagine a second renaissance in the impact of human imagination on society. A modern renaissance. In short, such a development could stimulate the evolution of a human rights based aesthetic.

1. The Global Rule of Law: Paradigm Shift

‘The Rule of Law’ is a disarming phrase. It suggests ostensible simplicity. Any person of average intelligence will be able to determine that a rule which governs his behavior and for which there may be consequences if he violates the rule, has the quality of the Rule of Law. However, the phrase actually implicates greater complexity. Unpacking its complexity is of course important to us. At the risk of extreme reduction we could suggest that the Rule of Law idea was largely an idea generated by legal culture and juris consults to limit the arbitrary capacity of sovereign decision making. Leonard Shapiro, a great student of

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totalitarian political culture, suggested that the most fundamental difference between totalitarianism and democracy was a working Rule of Law: an operational restraint on arbitrary and expedient sovereign action.

To a large extent this version of the Rule of Law was reflected in the evolution of modern constitutional democracy. It was therefore the Constitution of law which limited sovereign absolutism. After WWII, we the people of the earth/space community promulgated a global constitution. This constitution and the processes that preceded it and proceed from it, form the United Nations Charter. What is distinctive about the Charter is that it did not seek to establish itself as a neutral umpire between the competing stakeholders. The Charter was not value-free. It was rooted in the most fundamental values that humanity has identified for its survival and future prosperity. This has implicated a Rule of Law of global dimensions. A Rule of Law rooted in the fundamental values of human coexistence and aspiration, and rooted as well in the promise of a constitutional culture which seeks to give specific prescription and application in concrete instances of decision-making responsibility.

In a recent article, Garry Jacobs and I provided an outline and guidance on the need for a new paradigm for a global Rule of Law.¹ Implicit in our article was an understanding that a new paradigm for the global Rule of Law, which implicates a global constitutional law and a global interest in good governance at every level of society, must present some kind of developmental vision of a realizable and more promising future. In these brief remarks, I plan to explore these issues further.

It may be useful to commence by asking the question “What is meant by the Rule of Law?”

The UN General Assembly recently adopted a Resolution giving a wide ranging and important clarification as to what it means by the global Rule of Law. According to the declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, United Nations A/RES/67/1, General Assembly, 30 November 2012, Sixty-seventh session,

2. *We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.*
7. *We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth,*

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sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.

We may provide a shorter and possibly, a more suggestive answer. The term ‘Rule of Law’ symbolizes an inspiration about basic values and seeks to guide authoritative and controlling decision making (for which we reserve the term law) to secure the most ancient objective of all law: to defend and to promote the common interest of all the people. The common interest today is broadly seen in terms of universal well-being and a celebration of human dignity. Additionally, the symbol ‘Rule of Law’ implies an aspirational future of realizable global justice and dignity. In short, it implicates the vision of a desired developmental future for humankind. That in short is the challenge symbolized by the global Rule of Law idea. It was precisely this challenge that Garry Jacobs and I addressed in our article that a new paradigm of the Rule of Law is urgently needed to give the Rule of Law idea an optimum meaning. The central institutional mechanism, which gives the Rule of Law idea operational relevance, is the constitutional form that it inspires. Constitutions are generally seen as instruments reflecting Rule of Law values.

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At the global level, it is therefore quite appropriate to identify a global constitutional process. That process includes the text and practice of international society under the UN Nations Charter. However, it is by no means clear that the UN Charter, which clearly is our global constitution, has universal traction among all stakeholders that it is a constitution with fully enforceable international obligations as law. The weakness of the Charter as a global constitution is that it has to contend with the concentration of effective power among key sovereign state participators. It has sometimes been admitted that a directorate of super sovereign states drives key decisions of the UN. We believe that this retards the full promise of the global constitution and its capacity to respond to the major issues and problems that we confront in the global environment. In short, the practice has gravitated to a high level of sovereign state influence as well as the leverage of control that such entities generate. This suggests that the control factor, a residue of sovereign abolitionism, seriously weakens the authority foundations of the global constitution. It will be recalled that unrestrained sovereign claims to absolutism led to the demise of the League of Nations. It was for this reason that the drafters of the Charter confronted the problem of authority behind it. The very first terms, which introduce the UN Charter, locate its authority in a statement, which says, “We the people...determine.”

The Preamble in Chapter 1 identifies peoples and individual rights in terms of the need for security, human rights and dignity, humanitarianism, economic and social justice, and respect for law. Most of the rest of the document deals with the membership of states and the powers allocated to them.

Garry Jacobs and I have followed a tradition of scholarship established by leading figures in the World Academy of Art and Science, seeking to address the question of how to broaden the authority foundations of the global Rule of Law. In our paper, we stress the notion that at any level of society, problems emerge from the human participators and it is those problems that require law to respond in the form of responsible authoritative and controlling decision making. The first task that we thought would provide some insight into the nature of global authority and global problems was to understand that there is such a thing as a global or planetary community. This planetary community is made up of many and diverse participant stakeholders. Realism requires that we acknowledge their existence, roles, and potentials for improving or diminishing the human prospect. What we see, as a critical normative salience is that, humanity is organized institutionally, at the back of every institution are human agents who claim identity, who assert claims for basic values and who also claim recognition of settled expectations. We believe that important elements that recognize the individual as a fundamental unit of legal and political analysis in the global environment are reflected in the text of the UN Charter, especially the human rights references and subsequent developments in the area of human rights, humanitarianism and development. We can connect this to the notion of an evolving or emerging paradigm of inclusive global governance. We can for convenience identify the prior paradigm as the largely territorially organized sovereign state paradigm. This paradigm is increasingly challenged by the creation of other participatory stakeholders in the global social, power and constitutional processes. These other stakeholders include not only intergovernmental organizations or cosmo corps, but include humanity as a whole which is increasingly expressing itself through globally identifiable institutions of civil society. This is a fact increasingly recognized by the UN itself. ^{* 2, 3}

My colleagues in the World Academy have drawn attention to the failures in global economic development and see as a missing component of a solution to our current economic crisis the importance of human capital as a driving force of social capital. The central insight here is that individual human beings represent capital resources, which if properly developed, generate social capital, at all levels of economic organization. The fundamental idea may also be seen as a cornerstone of human rights. Individuals who claim human rights, and who are the activists for the realization of human rights, are in effect recognizing that human rights are an aspect of political capital and an important component of an improved human prospect.

The critical question for the UN and enlightened decision makers is how to create more space, politically, culturally and economically for the individual subjects of the global community process. I suggest as well that this is a matter of importance because this universe of participators would deeply strengthen the authority aspect of the global constitution and

* UN Civil Society, see <http://esango.un.org/civilsociety/login.do>. See also, <http://www.civilsoc.org/whatisCS.htm>, http://www.un.org/partners/civil_society/home.htm and <http://gcsknowledgebase.org/>

involvement as stakeholders may well change the global expectations of limiting powers to a small group of states.

At present, we live in a world in which we have already seen the emergence of many sectors of global civil society. Recently, we saw the emergence of the Earth Summit in Rio, the Cairo World Population Conference and the World Conference on Women in Beijing. The Global Campaign for Climate Action (GCCA) is an *alliance* of 300 non-profit organizations around the world whose objective is to mobilize civil society and galvanize public support for a safe climate future. The GCCA led a campaign against the XL pipeline. They also led the push for European leaders to support a financial transaction tax for the purpose of grappling with poverty and climate change. We should also note that the World Association of Non-Governmental Organizations website lists some 22,885 NGOs in North America alone. In addition, global society is permeated with professional organizations in law and medicine, the sciences, and the arts. Indeed, we are here today representing the World Academy of Art and Science, an organization we think can contribute to the future of global Rule of Law. Our central problem is to modify the UN Charter or creatively interpret it to provide non-state actors access to this important forum on international decision making. This will require complex strategic thinking but at the back of this approach there must be the realization that expanding civil society participation and influence also broadens the authority foundations of the UN itself. A mobilization of the professions, the civil society organizations, the humanitarian and human rights NGOs, could provide a form of leverage where the UN can confront the crunch issues looming on the horizon. It could influence decision making in constructive ways and possibly permit important discussions on a variety of issues such as the impact of technology on working hours. In short, is there a human prospect in which individuals will have more free time to focus on aesthetic rights and possibilities that may improve the happiness factor in a future scenario?

It has been my contention that a realistic understanding of the Rule of Law and its potentials for improving the human prospect must be rooted in the social reality of a global social process. It will be apparent that what emerges from the global social process are demands and problems that are crucial to human well-being. These demands are also changing and greatly implicate the idea of global governance. Sovereignty holds a crucial position in the global, social, political, and juridical context. It should be noted that there have always been pressures in the evolution of sovereignty to modify or change it. In the current global social process, we witness a very wide range of non-state, non-sovereign actors. The emergence and salience of these actors have served to limit in some degree the centrality of sovereignty in the global stream of governance. The emergence of these other stakeholders has been greatly facilitated by the global communications revolution. This revolution has permitted the emergence of newer forums outside of the boundaries of sovereignty and which for want of a better term are conceptualized as global civil society.

A new paradigm for the Rule of Law has witnessed an evolutionary trend in the development of sovereignty and its placement within the context of the fluid notion of globalization. This development presses us to explore more critically the conceptual and normative bases of sovereignty in our time and to appraise it in terms of the notion of authority in the idea

of governance itself. In general, authority is rooted in the people's expectations and therefore the idea of authority itself resists the notion that it should be collapsed into a form of sovereignty, which implies the monopolization of power and at the same time diminishes the popular expectation of authority rooted in the people. Contemporary international relations have their legal foundation in the Charter of the United Nations.

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The Charter limits membership to sovereign nation-states. However, the Charter proclaims that it communicates with the authority of the people of the earth/space community. Indeed, the normative foundations of the Charter are rooted in the people's expectations of peace, security, human rights, and social progress. This represents an important challenge to the Rule of Law, that this idea finds its authority in the people of the world community. The recognition of the importance of people as a source of authority for a new paradigm for the Rule of Law is a critical shift in focus. It might challenge the idea that the values relating to the very existence of humanity are to be monopolized by a small directorate of powerful states whose foundations in the authority of people's expectations are vastly limited. This challenge requires the powerful to restrain themselves from the temptations of the exercise of power and to seek and act with the authority, as well as the objectives of universal well-being and dignity.

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2. A New Paradigm for the Rule of Law: A Glimpse of Future Developmental Constructs

I had earlier mentioned that the global Rule of Law idea could partake in a generation of a desirable sequence of global developmental constructs for the improvement of the human prospect. Therefore, apart from the subject on our agenda today, there are theorists such as James Martin who stress some other dimensions of problems of global importance. Reference is made to the crisis of climate change, demographics and overpopulation, the shift of global economic power to the corporate form of economic organization; the possibility of future pandemics of global destructive capacity. With these thoughts and their connection to the Rule of Law, it is worth a reminder that a Rule of Law that gives full recognition to the individual in the global environment may have a positive influence on how future challenges are confronted. An unadulterated recognition of the individual is recognition of the human capital inherent in all human beings. This would seem to tie in with the idea of human capital and its importance for a global developmental construct. One aspect of this should be

whether human capital and global development may be used as indicators of human happiness. Indeed, if we consider the inevitability of technological innovation and its impact on economic productivity, we may well have to confront the challenge that a newer paradigm of development may require a sharing of the benefits of technological innovation. Sharing may implicate the prospect of more leisure time for humanity. This in turn may suggest an important challenge for a developmental construct. This may be a point when conditions favor an opportunity for a renaissance in human affairs in which human capital is highly valued for its imaginative, co-creative capacity.

This human potential may be facilitated in an unleashing of innovation and creativity as a form of aesthetic development. It is worthy of consideration within the new Rule of Law paradigm that aesthetics may constitute one of the most fundamental of human rights. There is no aesthetic experience without the subjectivity of the individual and the protection of the individual needs as well, the protection and promotion of individual creativity, which encompass aesthetic values. As a component of human rights values, it would seem to be important at every level of society that individual freedom be secured and encouraged. In short, a very reasonable developmental construct for a new Rule of Law paradigm provides the normative guidance at an inclusive global level that functions as a liberating force for human creative possibility. This could be directed at individual creative capacity, hopefully as a humane and socially liberating force that gives voice to and is rooted in the expression in global civil society in which individuals are both the controllers and the controlled.

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This perspective, idealistic as it sounds, is rooted in important contemporary social fact. It is fit for the common understanding of the Rule of Law, as we now understand it. A central value objective of the UN Charter focuses on the well-being and dignity of the individual. Inherent in the constitutional foundations of the Charter is an appreciation of the close link with its fundamental base of authority: we the people. This base of authority is global in its potential reach. Current practices encourage engagement in civil society. The constitutional system needs to find the means and the methods to dramatically open up its processes to civil society.

Global communications processes are a critical technique for the engagement of civil society. A closer alliance with communications networks, associations of journalists and academies of the sciences and the arts, could facilitate the creation of a newer paradigm of global expectation. Additionally, there are efforts to facilitate people-to-people diplomacy, such as sister city alliances; cultural diplomacy could also be a vehicle pointing the way to a new order of the global renaissance.

We can of course generate other developmental constructs such as a world completely free of nuclear weapons, a world in which war is abolished universally, a world in which need is globally secured for all; a world in which educational values are universally defended and promoted, a world that would seek to maximize universal respect, a world that would make the giving and receiving of affection a major expectation of interpersonal as well as cultural aspiration. If affection is given its due, humanity will have a profound basis for global solidarity because affection and empathy are the essential ingredients of solidarity on a global scale.

It seems clear to me that the domination of global governance by territorially organized sovereign states cannot solve the great global problems of our time, which threaten the survival of all. New initiatives based on new thinking are urgently needed and organizations like the World Academy of Art and Science, the Club of Rome, the Pugwash Society and such academic innovations as the Oxford Martin School, are an indicator that there is an incipient move to develop a new Rule of Law for a new age.

I conclude this paper with a warning about the dire consequences for humanity of a weakening of the global Rule of Law. This warning I discovered in the papers of my late wife, Judith Mattox Nagan who passed away on April 5th this year. She saw in the demise of the global Rule of Law a real threat to humanity; these are her last words:

“I fear for mankind’s survival. I believe we will most likely destroy life on this planet in the not too distant future. With so much suffering that man creates, it seems almost inevitable. Nuclear destruction is how we will end. Quickly. But life will begin again of course – and it will all start all over again – and we will have learned nothing. Perhaps it makes no difference. Perhaps life is random. Only man creates meaning for himself, nature does not care who lives or dies – everyone dies.”

– From the papers of **Judith Mattox Nagan** (1944-2013)

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Notes

1. Winston Nagan and Garry Jacobs, “New Paradigm for Global Rule of Law,” *Cadmus* 1, no. 4 (2012): 130-146 <http://www.cadmusjournal.org/article/issue-4/new-paradigm-global-rule-law>
2. John A. Hall, *Civil society: Theory, History, Comparison* (Cambridge, UK : Polity Press, 1995)
3. John Keane, “Global Civil Society?,” *Foreign Affairs* 26 September 2003 <http://www.foreignaffairs.com/articles/59214/g-john-ikenberry/global-civil-society>