



Anticipation in Law and Social Science*

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Abstract

This article explores a particular aspect of the role of anticipation in social and legal processes. The program begins by recognizing that social interaction happens within a time-space manifold of events. This means that society functions in terms of events located on the plane of time and the situation of space. This means that social process is a dynamic. As an ancient philosopher put it, change is so ubiquitous that you cannot jump into the same river twice. Since we tend to look at social dynamics in a more static way, one major theorist reminds us that the stable in social process is a special case of the unstable. The article underscores a point that the anticipatory perspective is a ubiquitous part of social dynamics and change. Indeed, it is a critical component of social coexistence. To briefly illustrate, if the members of a governing group come into power, they will immediately have to anticipate the security needs, the economic needs, the educational needs, the health and well-being needs, the skill and labor needs, the food needs of the body politic, the requirements of effective family relationships, the requirements of morality and ethics and the needs of aesthetics. The paper provides a framework in which anticipation is used to predict the problems that emerge from the social process. The value of a social science that facilitates anticipation before problems occur provides opportunities on the time-space manifold of society to develop problem-solving strategies with a better chance of those strategies being successful. To utilize this approach, the authors provide the sophisticated model of social process developed by WAAS Fellows Lasswell and McDougal: Human beings pursue values through institutions based on resources. Using this model the authors provide a provisional map of the social process with key markers at points likely to generate important problems. The markers in the maps are as follows: participators, perspectives of participators, base values accessible to participators, situations in which events occur, strategies to be deployed, outcomes and consequences. The authors use this map to provide a provisional simplified model of a process of mapping the problems contextually.

1. Introduction

Anticipation is an important resource in the development and social relevance of the

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practice of law. It is also an important goal or objective in the contribution that the social and political sciences make to the stability and endurance of the system of public order. Anticipation involves the capability of some systems to modify their behaviour on the basis of a model of the future evolution of the context in which they are rooted.¹ The study of the social and political sciences is, in general, to provide a scientific enlightenment about the foundations of the systems of public order that govern human societies.

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An important focus of the social and political sciences invariably is influenced by the role of power and the emergence of law as important components of the architecture of the system of public order. In this sense, the study of social and political sciences and the study of law and power are matters of intimate association. An important gloss on the notion of the science of society and law is the need to understand the nature of the public order as it is.*

In this sense, the social sciences share with law the need to understand the state of law in society as it is. Both society and law work in the context of a time-space manifold of events of importance to both law and social sciences. The essential challenge of law and society, in this context, is the trajectory of these events in the time-space manifold of events which include conceptions that implicate the anticipation of future of bodies politic for both law and society. This means that social process is inevitably a consequence of the dynamism of the legal and social events that project their consequences into the future time-space manifold. However, no particular future is assured unless legal and social theorists build into their description and analysis of legal and social phenomena—at least a partial understanding of what those futures might entail. It is impossible to avoid the consequences of understanding the state of law and society without generating a concern for the anticipated future or futures of those legal and social phenomena. Indeed, in order to anticipate a projected public and legal order, we already encounter the prospect that description and analysis without a concern for contingent futures miss the point of understanding law and society; and what their anticipated future holds for the relevant universe of stakeholders.

2. Anticipation: Problems and Social Process

The above introduction suggests that we need to graft onto our conceptions and methods of legal and social process, a vital space for the role of anticipation in the evolution and development of these phenomena. This perspective is made more important when we consider that the study of any form of social organisation and law will generate certain outcomes which we designate as problems emerging from the legal and social processes. The importance of a problem-oriented gloss is that it gives social relevance and policy importance

* For a detailed examination on public order in the context of international law, see McDougal, Myres S., Harold D. Lasswell, and Lung-chu Chen. *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*. New Haven, CT: Yale UP, 1980. Print.

to the capacity to anticipate problems before they actually occur. Additionally, problems themselves sharpen the guidelines that permit the anticipation of problems generated by problems on the plane of space and time.

Rather than being overcome by the specifics of a new scenario, agents look to substitute alternatives with activities they are accustomed to and act in certain ways that demonstrate a high level of predictability to putatively take in order to have a greater chance of anticipating the end result.*

The anticipation of economic security is another of the most important aspects of the health of the public order. Wealth is a critical base of power that may be used to secure all other values and institutions of importance. As a consequence, the anticipation of the prospects of economic security or insecurity is a critical factor that is implicit in studies of social and political science and law. The central issues are how to sustain a responsible process, to enhance the productive capacity of society including the full utilisation of its human capital. Optimising productive capacity generates the important anticipation of the fairest and just method of allocating the benefits that inhere in the system of productive relations. A critical anticipation of the optimal production and distribution of wealth is the anticipation that the stakeholders in the system will have maximal opportunity and capability freedoms.

Anticipation is progressively becoming the centre of modern discourse relating to a wide range of social and political issues.² Briefly, the importance of anticipating problems is a central and critical feature of good, responsible, and accountable governance. Virtually all bodies politic work on a notion that has to anticipate the emergence of certain problems. For example, all bodies politic have an actual or prospective anticipation of security problems. Anticipation permits them to examine problems in the light of realistic anticipated projections into the future and then plan for the contingencies of securities. These include size of the military, institutionalisation of intelligence services, coordination of law enforcement, investment in technologies of national defence, directing economies into situations where invention, production and distribution hold a proper place for defence interests.

Tavory and Eliasoph (2013) develop a guideline that analyses how actors engage each other toward their futures. They then classify forms of future-coordination into three distinct types—(a) **protentions**, or moment-by-moment anticipations that humans regularly fail to properly appreciate, (b) **actors' trajectories over time**, which progress in ways that are more or less culturally foreseeable; and finally, (c) **plans and temporal landscapes**, all-encompassing temporal orientations that humans experience as unavoidable and even normal.[†] By handling future-coordination in this manner, it is clear that the subtle choreography preserves agents' cooperative orientation toward the future while accepting motion, uncertainties, and missteps. Agents have to share a vision of a future with each other, even if done so indirectly—to be able to coordinate plans and/or action.

* For a comprehensive analysis on anticipation, see Riegler, A. (2003). "Whose Anticipations?" In M. V. Butz, O. Sigaud & P. Gerard (Eds.), *Anticipatory Behavior in Adaptive Learning Systems* (p. 12). Berlin: Springer.

† For a detailed classification of future-coordination, see Tavory, Iddo. & Eliasoph, Nina. Coordinating Futures: Toward a Theory of Anticipation. *American Journal of Sociology*, Vol. 118, No. 4 (January 2013), pp. 908-942 Published by: The University of Chicago Press Stable URL: <http://www.jstor.org/stable/10.1086/668646>

The propensity towards greater levels of uncertainty seen in modern societies is reinforced by the interaction between non-concrete outlooks and the role of technology for communication purposes. Communication is now immediate and is also networked through the globe. Thus, the outcome of the unclear future prospects and the rise in the speed of communication are uncertain.³

All bodies politic have an interest in food security; they must plan for contingencies that require sustained food production, storage facilities, for long-term food needs and interests, and thus anticipation will ensure adequate markets and state support to sustain food production. Bodies politic also have an important interest in health security. Bodies politic must anticipate the necessities for adequate health service and accessibility, problems of preventative strategies to improve health, and the anticipation of responses to health crises such as pandemics. Bodies politic therefore must anticipate the needs of the body politic in access to health and well-being.*

One of the most important instruments for the development of human capital in society is the production and distribution of educational/enlightenment values. Depending upon the combined role of public and private education, the state must anticipate the effect of demographic growth, appropriate access to schools, technical training and universities to ensure the adequacy and preparedness of each generation of social participators.

Society must also anticipate the nature and distribution of economic skills in terms of its labour potential. Both the state and private sector must therefore be concerned about the adequacy of labour opportunities and values to sustain capital in a society; this requires an anticipation of labour needs and values and their distribution in the future. Because societies are not static in terms of their own legal and social structure, the state must be alert to the anticipated futures and the expansion and contraction of class stratification, gender stratification, ethnic stratification to ensure that opportunity freedoms are maximised and catastrophic disabilities which result in accelerated poverty are reduced. In short, the state must keep an eye out on an anticipated future of approximate equality and avoid aggressive inequality. Radical inequality and unemployment may be anticipated as net losses to the aggregate value of the body politic.

Bodies politic at least implicitly maintain an anticipated perspective that their continued future must enhance the loyalty, solidarity and patriotism of the participators in the social process. Since these values are rooted in the principles of affection and compassion, bodies politic generally have an interest in reproducing family forms that maximise affection and positive sentiment as the emotional bases of bodies politic which bring greater social and political cohesion to the body politic. The politics of affection[†] although understudied is nonetheless an important anticipation for the continued success of any rational social order.[‡]

All societies have some forms of religious, spiritual, ethical and moral experience to ensure longer term solidarity and patriotism. The state in general has an interest in the

* For more information regarding bodies politic, see Grosz, E. A. (1995). *Space, Time, and Perversion: Essays on the Politics of Bodies*. Routledge.

† For an extended discussion of the politics of affect, see, Nagan, et al, *Human Rights and Dynamic Humanism*, Brill/Nijhoff, pp. 564-654 (2017).

‡ A detailed review of the politics of affection can be found in Velásquez, Eduardo A. *Love and friendship: Rethinking politics and affection in modern times*. Lexington Books, 2003.

reproduction of those moral sentiments that make ethics and morality a common experience of an anticipated future. Rectitude therefore is a widely embraced expectation that elites consider a necessary element of social solidarity.

Finally, the state and society exist in cultural forms and traditions with elements of creativity that embody the fundamental aesthetics of the society. It is difficult to imagine an anticipated future society with an absence of aesthetics. Therefore, society has an anticipated interest in the future aesthetic of the body politic as a mechanism of approaching an enduring commitment to the solidarity of the body politic. The relevance of aesthetics may be anticipated from the dynamics of social communication and collaboration over time. This will give us a clearer sense of the salience of aesthetics to the public order of the community. Aesthetics in the form of propaganda may be crucial in time of crisis or war and may also be a political tool of propaganda to mobilise particular interests in the body politic.

3. Social Dynamism and Anticipation

In all social relations, you may universally determine that human beings have needs, wants and desires. All humans come to social relations as an instrument of energy which, with varying degrees of success, they use to acquire values they need, want or desire. In seeking access to these values, they will cooperate with each other or they will engage in some form of conflict with each other. When they are forced to resort to conflict, the conflict is invariably about a valued thing that one participator wants and another participator denies. We can therefore anticipate that the state of any social organisation will generate outcomes of collaboration and outcomes of conflict. Outcomes of conflict may be resolved by forms of lethal conflict or forms of conflict resolution. In general, if there is anticipation of conflict, resolution is meant to be lethal, then it is important to anticipate the scope, scale and strategies of lethality that may be employed. Here the anticipation may simply be that the anticipation of conflict is a zero-sum game. One side wins. Those losers may have anticipated the loss and devised strategies for elite or group survival. The winners may have to consider an anticipated future where lethal conflict is diminished and where nation building solutions are needed.

The outcomes of conflict may represent a stalemate in which each side experiences losses and does not anticipate advantages from continued conflict. The key protagonists may have to anticipate a negotiated solution to end the conflict on terms that are mutually beneficial and then anticipate how power should be managed to represent an effort to identify the common interests of the parties. Here the parties may consider methods which anticipate the stabilisation of power relations, a fair distribution of power competencies.

The understandings may anticipate the evolution of a behavioural constitution in which the parties respect the agreed upon allocation of decision making powers in the body politic. The behavioural constitution may in turn anticipate the representation of constitutional expectations in a document. The parties may be realistic enough to note that the constitution may not necessarily abolish conflict.

The conflict may have to change in terms that are not destructive but produce results that strengthen the coherence and solidarity of the group as a whole. Such arrangements may

anticipate institutions of dispute settlement which may include components of administrative justice, juridical forms of dispute settlement. They may anticipate non-judicial methods of settlement such as arbitration, mediation, conciliation, good offices, negotiation, as well as ad hoc methods to secure the pacific settlements of disputes. In terms of legal culture, the dynamics of legal culture are triggered by the value contestations between participants. When a participant seeks to invoke the law to secure his or her interests it comes with an anticipation of winning or the cost of losing. When a client seeks legal representation, the client is generally moved by self-interest and therefore wants a cleaner sense of anticipation of winning or the price of losing. Anticipation will deeply influence judicial decision making since a great deal of what judges and decision makers do rests on their sense of anticipation. Judges use many tools to provide themselves with the guidance that their trained anticipation will produce stability in expectation and an approximate sense of justice from the point of view of society, an articulate sense of the problems and conflicts that may be seen from a given context involving goals, trends, conditions, and anticipated futures. This underlines the importance of anticipating conflicts and anticipating solutions to conflict as a consequence of the anticipation of social and political science. In the case of both law and social science therefore the anticipated state of the public order as a consequence of scientific insight permits via a focus on problems the capacity to anticipate problems and build on that by anticipating solutions that the problems create.

Thus far, we have seen the centrality of anticipation in the evolution of public orders influenced by social sciences and law. We now must engage in a technical shift of focus. If we accept the fact that the problems generated by social interaction are problems that require authoritative responses, we are still left with the challenge of how to identify and predict problems with the help of scientific specificity. This requires a provisional map of social dynamics in which we can locate the specific problem outcomes with a specificity that comes from mapping the social process and mapping the problems onto the different phases of that social process.

The most elegant method of mapping the social process emerges from the work of Harold Lasswell, Myres McDougal and their associates. This tool of mapping they describe as a phase analysis for the purpose of the identification of problems with specificity in a specific contextual location.* We summarise the phase analysis with a brief definition and a broader description. The conceptual basis of the phase analysis of mapping is as follows: Human beings pursue values through institutions based on resources. To develop this conceptual framework into a map, the following markers are used.

4. Mapping the Social Process and its Relevant Anticipated Problems

- I. Identification of the **participants**
- II. The relevant **perspectives** of the participants

* See McDougal, Myres S. and Lasswell, Harold D., *Criteria for a Theory About Law* (1971). *Faculty Scholarship Series*. Paper 2573. http://digitalcommons.law.yale.edu/fss_papers/2573. Also see Nagan, *Contextual Configurative Jurisprudence: The Law, Science and Policies of Human Dignity*, Vandeleplas Publishing (2013).

- a. perspective of identity
 - b. perspective of demand
 - c. perspective of expectation
- III. **Bases of power** (all demanded values sought, power, wealth, respect, health and well-being, skill, affection, rectitude, aesthetics).
- IV. **Situations** (spatial, temporal, institutional crisis)
- V. **Strategies** (coercive and persuasive-economic, diplomatic military, pacific methods)
- VI. **Outcomes** (problems relating to 1 to 5 above)
- VII. **Effects** (where the problems are resolved, who resolves, how they are resolved and the consequences for the production and distribution of values for the body politic). Every one of the categories above will generate problems.

5. Mapping the Problems of Participation

The problems of the universe of participators are as follows: who is included and who is excluded. The problems of inclusion and exclusion are the central problems of any political culture. In this situation, we can specifically and contextually locate the problem in a context of actual and potential stakeholders. The role of anticipation here is the expectation that exclusion will be entrenched, diminished or extinguished.

6. Problems of Perspectives

Item II identifies the perspectives or psychological states of the participators. The specific breakdown deals with conflicts, deprivations or indulgences based on the essential identity or the ascribed identity to the participators. For example, refugees have diminished rights, citizens have maximised rights. Hence the problem of whether refugees may acquire more rights to alleviate their condition. Indicators of identity can serve as markers for value indulgences or deprivations.

The perspective of demand represents insights of ego-psychology. It is ego that demands access to values that ego needs, wants or desires. These can be identified as follows: power, wealth, respect, health and well-being, skill, enlightenment, rectitude, affection and aesthetics. When these demands are not met or there is deprivation, problems result.

7. The Anticipation of Problems as Value Contestations in Law & Society

Above we set out a map that permits a contextual breakdown of the social dynamics in which each marker provides us with a key to the anticipation of the contestations about values, which contestations permit us to anticipate the specific value problems and their precise location in the map of legal and social process. What follows is a brief summary of the major value contestations that we might anticipate in any social process at any level of analysis.

8. The Problems of Conflicts about the Value of Power

Here, we ask the reader to analyse the specific problems of power by placing them in the context of the markers that we have identified in the map.

8.1. Problems of power: claims to power and claims to depreciate power

- The power claim to be acknowledged as a human being
- The claim to appropriate status of group affiliation (Nationality, domicile, citizenship)
- The power claim of minority groups to equality and dignity
- The problem of the freedom of access to participate in the system of power relations
- The freedom of choice for reasonable access to power and other value institutions
- Freedom of access to representations via global governance and diplomatic institutions
- Freedom from capricious incarceration, seizures and confinement
- Problems of maximising the access of rule of law protections for individuals
- The maintenance of a strong independent judiciary and independent bar and wide access to legal services

8.2. Problems relating to the autonomy of the individual and basic respect

The value of respect is often viewed as the most fundamental value incorporated in the principle of human dignity. The problems therefore of the reduction of respect have a fundamental quality to them. The following are the anticipated problems of the production distribution of respect. The central problem concerning the issue of respect is whether the freedom of choice to fully participate in all the value institutions of society is respected or diminished.

- Freedom of choice to take part in all value processes
- Equal opportunities, freedom and the replacement of invidious discrimination
- A central value of respect is the recognition of a person as a contributor to the public interest
- Liberty of choice about the following:
 - » Optimal involvement in shaping and sharing respect
 - » Opportunity freedom to achieve realism in expectations
 - » Opportunity freedom of access to institutions
 - » Ensuring all are respected during crises
 - » Opportunity freedom from forced labour, violence and terrorist activities

8.3. Problems relating to enlightenment

- Optimal achievement in the aggregate sharing and shaping of enlightenment
- Provision of access to enlightenment for all
- Non-discrimination in procurement, usage and communication of knowledge and information

- Immunisation from biased communication
- Immunisation from deprivations of enlightenment inconsistent to crisis
- Opportunity freedom of assembly of appropriate resources for enlightenment
- Freedom from censorship, indoctrination and distortions

8.4. Anticipated problems relating to well-being

- For ideal influence and sharing of well-being
- For essential and core levels of safety, health and comfort
- For compassionate euthanasia
- For general contribution in realisation of bodily and mental health and growth
- For continued existence and development
- For an atmosphere favourable to survival and development
- For freedom to acceptable well-being and other value institutions
- For availability of state support adequate to defend and fulfil demands for well-being
- For freedom to receive or decline medical service
- For the use of genetic engineering

8.5. Problems relating to wealth

- For preservation of high levels of efficiency
- For essential levels of benefits from the wealth process
- For experiencing benefits on the basis of input and compassion
- For liberty to take part in the wealth process
- Liberty to accrue resources for productive purposes of the public interest
- Freedom from profligate use of resources (sustainability of values)

8.6. Problems of labour and skill

- For ideal aggregate in attainment and employment of skills
- For additional acquisition in terms of talent and emotional energy
- For acquisition of a basic minimum of skills pertinent to actual sharing in all value processes
- For prospects of having talent recognized
- For opportunity to procure skills and utilise them without discrimination
- Freedom for right to use institutions specialised in skills

8.7. Problems relating to affection

- For an ideal aggregate in moulding and sharing of affection universally
- For basic recognition necessary for individuals to obtain the motivations and capabilities of functioning effectively in shaping and sharing values

- Freedom to provide and experience loyalties
- Freedom to initiate and establish intimate and amiable personal relationships

8.8. Problems relating to rectitude, morality and ethics

- Preservation of public and civic mandate in which individuals' demand of themselves and others that they act responsibly for the shared interest
- Minimum prospects to obtain positive evaluation of rectitude
- Movement toward a fuller involvement of all in responsible conduct
- Freedom of association for promoting universal dignity on the basis of rectitude
- Abolition of religious intolerance
- Freedom of religious and rectitude association

9. Conclusion

We can follow this model by posing the question of the deprivations of these values and the distinctive problems they represent. We can anticipate that the full reach of deprivations will reflect the fullest measure of human rights losses. We can anticipate that the general problems we have outlined give us a clue for the anticipation of what further problems may be encountered in different aspects of the map of social and legal process. What is clear is that the intellectual task of identifying problems is the first step in the specification of problems in detail that we might anticipate. To anticipate these problems accurately permits us to deploy the intellectual tools of problem solving. These include the task of goal clarification and specification, the intellectual tools of trade analysis, the intellectual tools of scientific conditions, the deployment of the tools of developmental anticipation, the deployment of the tools of creativity as a response to an anticipated projection of problems that require legal and political intervention.

“To anticipate problems accurately permits us to deploy the intellectual tools of problem solving.”

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Notes

1. Roberto Poli, “Anticipation: A New Thread for the Human and Social Sciences?,” *Cadmus* 2, no. 3 (2014): 23-36 <http://cadmusjournal.org/files/pdfreprints/vol2issue3/reprint-cj-v2-i3-anticipation-rpoli.pdf>.
2. Poli, “Anticipation: A New Thread for the Human and Social Sciences?”
3. Barbara Adam and Chris Groves, *Future Matters* (Leiden: Brill, 2007).