

1981

## Human Rights and World Public Order. By Myres S. McDougal, Harold D. Lasswell, & Lung-Chu Chen

Fred L. Morrison

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

---

### Recommended Citation

Morrison, Fred L. (1981) "Human Rights and World Public Order. By Myres S. McDougal, Harold D. Lasswell, & Lung-Chu Chen," *Hofstra Law Review*: Vol. 9: Iss. 2, Article 15.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss2/15>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## BOOK REVIEW

HUMAN RIGHTS AND WORLD PUBLIC ORDER. By MYRES S. MCDUGAL,\* HAROLD D. LASSWELL,\*\* & LUNG-CHU CHEN.\*\*\*  
New Haven: Yale University Press, 1980. Pp. xxiv, 1016. \$45.00.

*Fred L. Morrison*†

McDougal, Lasswell, and Chen's *Human Rights and World Public Order* is the latest application of the well-known World Public Order approach to a specific segment of international law.<sup>1</sup> The choice of subject matter makes this one of the most successful of these endeavors. Human rights law is one of the most rapidly developing and changing fields in international legal studies. Many of the developments and changes are clearly "law" by any definition and are enforceable in domestic and international tribunals. These include such norms as the provisions of the European Convention on Human Rights and the Inter-American Convention. The various human rights covenants are likewise law, *in esse* or *in posse*, even by traditional standards of norm recognition. Beyond these, however, is the vast authoritative legal structure for specialized deliberation on human rights issues. This structure is international constitutive law, even if the institutions involved have few, if any, authoritative substantive rules to apply and sanctions to invoke.

Because of the rapid development of international human rights norms in the past decade, their description and elaboration

---

\* Sterling Professor of Law, Emeritus, Yale Law School; Distinguished Visiting Professor of Law, New York Law School.

\*\* Ford Foundation Professor of Law and the Social Sciences, Emeritus, Yale Law School (deceased).

\*\*\* Professor of Law, New York Law School.

† Professor of Law, University of Minnesota. A.B., 1961, Kansas; B.A. (Juris.), 1963, Oxford University; Ph.D., 1966, Princeton University; J.D., 1967, University of Chicago.

1. Major works include M. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960); M. MCDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962); M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); and M. MCDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

as a dynamic, not static, legal process is necessary for a comprehensive understanding of the subject matter. The more traditional legal approaches have failed to provide an adequate description of the current legal order as it pertains to human rights, let alone a prescription or guidance for its juridical development. Indeed, the McDougal, Lasswell, and Chen volume includes a comprehensive survey of the failures of the major efforts in this direction, aptly entitled "Inadequacies in Inquiry: The Intellectual Confusion about Human Rights."<sup>2</sup> The problem with most of the traditional forms of analysis is that they provide a static picture of the state of human rights law, a "snapshot" of currently applicable norms and practices. McDougal, Lasswell, and Chen offer a "motion picture," which emphasizes the evolving, ever-changing demands and expectations within this highly volatile field. A motion picture is a much more accurate and useful perspective from which to view the state of the law—both for the government practitioner attempting to gauge the legality of proposed action and the human rights activist attempting to advance the frontiers of human dignity.

That a picture is moving, however, is not a guarantee that it reflects current reality. The dynamics of the system described by the authors are such that any depiction of it is immediately obsolete, for the system changes faster than the printing press can produce the volume. Automatic obsolescence, however, does not detract from this volume's usefulness as a treatise on the process of legal development. Armed with the insight proffered by the authors, one can look at later manifestations of existing legal questions, and use their methodology to predict trends and patterns.

The volume applies the well-developed apparatus of the McDougal/Lasswell-public order analysis to human rights issues. It opens with an extensive section on the delimitation of the human rights question in the contemporary international legal system.<sup>3</sup> It continues with an effort to clarify and identify the general policies involved,<sup>4</sup> and proceeds to point out trends,<sup>5</sup> and predict future developments.<sup>6</sup> The volume also contains a brief appendix on the law of nationality and the protection of human rights.<sup>7</sup>

---

2. M. MCDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 63-82 (1980).

3. *Id.* part I.

4. *Id.* part II.

5. *Id.* part III.

6. *Id.* part IV.

7. *Id.* appendix.

The structure of the analysis requires systematic consideration of various factors: Participants, perspectives, situations or arenas, base values, strategies, outcomes, and effects.<sup>8</sup> Regarding nearly all of these factors, the human rights movement has shaken many of the traditional foundations of international law by expanding the forum and the rules of play. With the emergence of nongovernmental organizations as participants in international decisionmaking, old doctrines that limited the "subjects" of international law to nation-states are clearly obsolete. The perspectives include a rising concern within nations for the protection of minimal human rights in other nations—a phenomenon little known only a few decades ago. The situations or arenas include the rapidly expanding list of international organizations concerned with human rights. Here the authors include not only the new treaty organizations, but also, perhaps more significantly, other international organizations that have taken up human rights issues ancillary to their primary substantive concerns. The panoply of human rights organizations ancillary to the United Nations is one example. While some have nominal decisional capacity, even those that do not still influence international decisionmaking. The changes in base values, the growing importance of the global—as opposed to the national—community, at least from the Western perspective, is a significant change for decisionmakers. New strategies have also arisen. In addition to traditional diplomatic representations and national action, the activities of official and unofficial international organizations can shape outcomes and effects. Of course, the end product of the McDougal, Lasswell, and Chen analysis is an examination of potential outcomes (regarding the concrete situation under consideration) and the effects of possible outcomes upon the climate of future decisionmaking.

In their effort to be comprehensive, the authors may have detracted from the usefulness of this book as a teaching and research tool. The volume is at once both too detailed and too general. In many instances, its analytic structure is filled out by long lists of items to be considered by the reader in reaching conclusions about the factor then under examination.<sup>9</sup> These items, however, are

---

8. *Id.* ch. 2.

9. For example, a section on "rising common demands" includes a 7-page list of human rights demands, *id.* at 7-13, and is followed by a 24-page list of deprivations. *Id.* at 15-37. The list of deprivations is extensively footnoted to source material—mostly from the early and mid 1970's—relating to the particular issues.

listed with only minimal narrative connection or analysis. This format may be jarring to the casual reader; the factors surge on without discussion of their weight or salience, or the impact of each on decisionmaking. Of course, this can be instructive, for it emphasizes the lack of authoritative finality in the international legal process.

The analyses of particular trends and conditioning factors may be disappointing to specialized international scholars in the field. The authors have selected nine human rights issues for analysis—all relating to what they classify as a single kind of claim: the claim to respect.<sup>10</sup> It is impossible to develop a complete analysis of any one of them in the available space. While the material presented is useful to illustrate the World Order-process method, it is too brief to provide a comprehensive guide to the particular subject matter.

Like its predecessors, the volume may rekindle the controversy about the nature of international law. Is international law a series of statements about a static set of acknowledged norms or is it a description of a process, that is, the evolution of enforceable expectations about governmental conduct?

Traditional legal scholarship of the nineteenth and twentieth centuries adhered to the first of these two approaches. It sought stability in widely accepted norms, and eschewed the existence of law when there were no firmly established legal expectations. The epitome of this approach can be found in the provisions of the statutes of the two international courts, which narrowly define international law sources to be applied in controversies before them.<sup>11</sup> A narrow view of international law was reinforced by the positivism which shaped much of this century's English jurisprudence, and which is inherent in much of continental legal thought. Where a putative norm had not been validated by the cumbersome processes of the *Grundnorm* of the system, it was mere political rhetoric and was beneath legal cognizance.

---

10. The chapters in this part of the volume relate to freedom of choice, basic equality of opportunity, racial discrimination, sex discrimination, freedom of religion, freedom of political opinion, language rights, aliens' rights, and rights of the aged. *Id.* part III. In an average span of 35 pages, it is impossible to provide a comprehensive look at any of these subjects. The volume provides an introduction, not a conclusion, to these studies.

11. Statute of the International Court of Justice art. 38(1) (1945), *reprinted in* [1977] U.N.Y.B. app. 2 at 1190, 1193; Statute of the Permanent Court of International Justice art. 38 (1920), *reprinted in* [1920-1927] LEAGUE OF NATIONS Y.B. 261, 271.

Positivism was essential in freeing domestic law from the political whims of the sovereign in nineteenth century monarchies—especially on the Continent—but it played havoc with any system of international obligation. The difficulty of the positivist approach is illustrated by Hans Kelsen's tortuous efforts to find a basis for calling "international law" "law" within his narrow concept of legal norms and obligations.<sup>12</sup>

In contrast, process-oriented legal scholarship, of which McDougal and Lasswell were the progenitors, has focused on the constantly evolving nature of international law. The late Harold Lasswell's sociological approach to domestic legal questions was applied and sharpened in the international field in a long association with Myres McDougal;<sup>13</sup> it has been applied in collaboration with a series of scholars. It is no accident that this approach blossomed in the United States both because of the emergence of "legal realism" and "sociological jurisprudence" and because of the nature of American legal interpretation. The American lawyer was better prepared than his Commonwealth or Continental compatriots to accommodate the dynamics of change in law through progressive interpretation and evolution, rather than through formal amendment.

Unburdened with the *stare decisis* of the House of Lords<sup>14</sup> and the limitations of code interpretation, and blessed with a multiplicity of domestic jurisdictions, American law has been a more creative exercise. In private obligations, the American common law system permitted a gradual evolution of legal norms. In public law, the broad strokes of the United States Constitution accustomed the American lawyer to radical changes in legal norms, even to complete reversals, without so much as the change of a single comma in the governing document. Since this approach to the law is alien to many foreign lawyers, it has not been accepted in all areas with open arms.

Indeed, in some fields of international law, the more traditional view has gained ascendancy. Where a high degree of legal certainty is required to guide decisionmakers in their present decisions about the future consequences of their conduct and promises,

---

12. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 328-90 (A. Wedberg trans. 1961). Despite the strictures of his general jurisprudential approach, Professor Kelsen was a major exponent of international law.

13. See McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

14. Even after the formal abandonment of *stare decisis*, much of the English approach is remarkably oriented toward formal precedent.

the relative stability of traditional analysis has proven attractive. Thus, the Vienna Convention of the Law of Treaties appears to have rejected much of the contextual analysis promoted by Professor McDougal in favor of a more rigid textual analysis.<sup>15</sup> Perhaps this is parallel to the ascendancy of textualism in some fields of domestic law, such as taxation, in which a high degree of certainty about future consequences is required.

In other areas, traditional scholarship has failed to provide an accurate account of legal prescriptions. Human rights is clearly an area in which process-oriented scholars are entitled to claim the day. Here there is broad acknowledgment of the rapid change in normative standards. This is occurring both within traditional channels of international-norm recognition (*e.g.*, by new treaty law) and outside those channels by the development of new expectations regarding state conduct. Yesterday's clear legal precedent is today's questionable authority and tomorrow's antiquarian curiosity.

Nothing makes the preeminence of process-oriented scholarship in human rights law clearer than an examination of traditional analyses in this field. Only a decade ago, major traditional international law treatises and texts appeared with only the merest mention of human rights.<sup>16</sup> There was little or no indication of the ferment in the international legal system which would push human rights to the fore as a topic for juridical examination. During the last decade, there has been a blossoming of scholarship concerned with the application of existing and newly emergent international legal rules in human rights situations: Decisions of domestic courts, international regional adjudication, the deliberations of universal agencies under United Nations auspices, and the emergence of human rights issues in the broader security picture.

In this context, traditional analysis can tell the scholar or reader only what yesterday's rules were. It is here that the World Order-process analysis permits the scholar to recognize not only presently applicable rules, but trends and developments that predict the norms that will apply in the future. These are the elements that an expert lawyer needs: An ability to focus on develop-

---

15. For a discussion of the progress of those negotiations and the rejection of Professor McDougal's suggestions, see Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 519-21 (1970).

16. *E.g.*, W. FRIEDMANN, O. LISSITZYN & E. PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* (1969) devoted only 11 of its 1,205 pages to human rights issues.

ment and a prescription to guide conduct both for today and for the future when the dynamics of the system may make a different set of technical rules apply. For example, today's international lawyer would be unwise to rely upon the domestic-jurisdiction rule to justify or excuse a state's mistreatment of its own citizens, even though that was a widely held doctrine a decade ago. Lawyers must come to recognize that evolution controls legal decisionmaking internationally as well as internally.

This is the McDougal, Lasswell, and Chen volume's prime contribution. It does not and cannot provide a complete description of international human rights law. Its contribution on the substance of any particular issue (*e.g.*, age discrimination) is too limited to provide the ultimate research tool or the definitive statement. The volume is already dated in this regard, as the dynamics of the system it describes overtake it. But rather than providing answers to specific questions, the volume provides a more important service: A comprehensive overview of the process within which and the influences under which human rights law is rapidly emerging. While the book will be of continuing value as a source for discussion of legal process, its particular window in time on the state of international legal norms and surrounding factual considerations will become rapidly obsolete. However, the ultimate purpose of legal scholarship is not merely to describe, but to guide the progressive development of law.

