

1980

## Book Review

Ved P. Nanda

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Ved P. Nanda, Book Review, 13 *Vanderbilt Law Review* 503 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol13/iss2/14>

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

## BOOK REVIEW

HUMAN RIGHTS AND WORLD PUBLIC ORDER. Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen. New Haven: Yale University Press, 1980. Pp. 116. *Reviewed by Ved P. Nanda.\**

A decade ago when Professors McDougal, Lasswell, and Chen published an outline of their present study<sup>1</sup> in the *American Journal of International Law*,<sup>2</sup> this reviewer considered the article to be a "single outstanding exception" to the then existing literature which was noted for "a lack of general clarity [concerning] the concept of human rights. . . ." <sup>3</sup> It was a "pioneering attempt . . . [designed] to provide a comprehensive theoretical framework for a better understanding of the concept [of human rights] and for its application in specific situations."<sup>4</sup>

Notwithstanding further proliferation of literature concerning human rights in the 1970's,<sup>5</sup> the need for such a theoretical framework has remained acute until the long-awaited publication of this volume, parts of which have already appeared separately in various law reviews.

Since the proclamation of the Universal Declaration of Human Rights in 1948,<sup>6</sup> there has steadily grown an impressive catalogue

---

\* Mr. Nanda is Professor of Law and Director of the International Legal Studies Program at the University of Denver College of Law.

1. M. McDougal, H. Lasswell, & L. Chen, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980), [hereinafter cited as *HUMAN RIGHTS AND WORLD PUBLIC ORDER*].

2. McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 *AM. J. INT'L. L.* 236 (1969).

3. Nanda, *Implementation of Human Rights by the United Nations and Regional Organizations*, 21 *DEPAUL L. REV.* 307, 308 (1971).

4. *Id.* at 308.

5. The name index in *HUMAN RIGHTS AND WORLD PUBLIC ORDER* runs 33 pages, *id.* at 962-94. A few recent notable additions are *THE INTERNATIONAL LAW AND POLICY OF WELFARE* (R. MacDonald, D. Johnston and G. Morris, eds. 1978); L. Henkin, *THE RIGHTS OF MAN TODAY* (1978); R. Lillich and F. Newman, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979). For several periodicals exclusively concerning the study of human rights, see e.g., *COLUM. HUMAN RTS. L. REV.*; *HARV. CIVIL RTS. — CIVIL LIB. L. REV.*; *HUMAN RIGHTS; HUMAN RTS. REV.*; *REVUE DES DROITS DE L'HOMME*; *ISRAEL YB HUMAN RTS.*

6. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G. A. Res. 217, U.N. Doc. A/810 at 71 (1948).

of multilateral and regional treaties, conventions, and covenants concerning human rights.<sup>7</sup> An important addition in 1975 was the Final Act of the Conference on Security and Cooperation in Europe, popularly known as the Helsinki Accord, which is the focus of the present symposium.<sup>8</sup> These agreements, which together constitute an international bill of rights, have undoubtedly contributed to clarification of the concept of human rights and have succeeded in sensitizing people everywhere to the need to afford a high priority to the securing of certain basic rights in every society. The promotion and protection of global human rights is further supported by an ongoing process of refining and strengthening the available institutional and procedural arrangements.

The net result is a growing worldwide concern not only for deprivations and violations of basic human rights of individuals and groups but also for the need to provide adequate means and opportunities for each person to realize his or her full potential as a human being. Thus, we are witnessing a new era, characterized by increasing demands for fundamental human rights, and rising expectations that adequate and effective national, regional, and international mechanisms will be available to positively respond to these demands.

To illustrate this trend, in his address to the thirty-fourth session of the U.N. General Assembly, the President of Uganda stated that:

[t]he Uganda situation is merely one example of a very serious global problem involving extensive violations of human rights. The increasing number of refugees and displaced persons is sufficient testimony to the gravity of the situation. . . . It would be unfortunate if this Organization were reduced to a club of Governments

---

7. See e.g., J. JOYCE, 1-3 HUMAN RIGHTS: INTERNATIONAL DOCUMENTS (1978); HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973); BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (L. SOHN & T. BUERGENTHAL eds. 1973).

8. Voluminous literature exists on the Conference on Security and Cooperation in Europe. See, e.g., Nimetz, *CSCE and East-West Relations*, 80 DEP'T STATE BULL. 44 (April 1980) (statement before the U.S. Commission on Security and Cooperation in Europe on Jan. 24, 1980); HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD (T. BUERGENTHAL ed. 1977); Note, *The Conference on Security and Cooperation in Europe: Implications for Soviet-American Detente*, 6 DEN. J. INT'L L. & POL'Y 122 (1976).

afraid to speak out boldly for the rights of the citizens of the world. . . .<sup>9</sup>

Similarly, the Special Rapporteur of a fact-finding mission conducted recently in Equatorial Guinea at the request of the U.N. Commission on Human Rights, was asked during the course of the mission: "What is the effect of this Commission on Human Rights? What concrete part did the Commission play during the years of tyranny? We would like the Commission to adopt effective measures which could give the subjugated and suffering people moral support and strength."<sup>10</sup>

At the thirty-sixth session of the Commission on Human Rights held in February-March 1980, the Commission took actions with regard to the human rights situations in the occupied Arab territories, Southern Africa, Chile, Afghanistan, Democratic Kampuchea, Equatorial Guinea, Guatemala, and Western Sahara, while it considered the human rights situations in Argentina, Bolivia, Central African Republic, Ethiopia, Indonesia, Paraguay, the Republic of Korea, Uganda, and Uruguay during closed meetings under the confidential 1503 procedure.<sup>11</sup> On November 23, 1979, the General Assembly adopted four resolutions dealing with "[a]lternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms."<sup>12</sup> The Assembly reaffirmed "the absolute necessity under all circumstances to eliminate massive and flagrant violations of human rights" and emphasized "the need to create conditions at national and international levels for the full promotion and protection of the human rights of individuals and peoples."<sup>13</sup> It also recognized that "to gain a full guarantee of human rights and complete personal dignity, it [is] necessary to guarantee the right to work and the participation of workers in management, as well as the right to education, health and proper nourishment, through the adoption of measures at na-

---

9. Cited in address by van Boven at the opening of the Thirty-sixth Session of the Commission on Human Rights, *The Role of the Commission on Human Rights in the International Community* (Feb. 4, 1980), reproduced in 5 HUMAN RIGHTS INTERNET NEWSLETTER, Nos. 6 & 7 at 12, 13 (Mar.-Apr. 1980).

10. *Id.* at 13.

11. *Id.* at 15.

12. See 17 UN CHRONICLE, No. 1, Jan. 1980, at 74.

13. *Id.*

tional and international levels. . . ."<sup>14</sup> The Assembly also emphasized that "the right to development [is] a human right and that equality of opportunity for development [is] as much a prerogative of nations as of individuals."<sup>15</sup>

Thus, while it is undeniable that significant advances have been made during the past three decades toward enhancing the understanding and appreciation of the content of human rights and of the procedures necessary for the effective realization of the basic rights of the individual, massive violations of human rights are "still a painful reality," as acknowledged by Secretary-General Kurt Waldheim in a message he sent to mark the observation of Human Rights Day on December 10, 1979.<sup>16</sup> He warned that the dignity and worth of the human being cannot be considered to have obtained their due recognition in a world in which racial, ethnic or religious discrimination still persists, due process of law is ignored, and torture practiced.<sup>17</sup> He further observed that freedom from want and disease cannot be enforced unless the world community succeeds in bringing about an international economic order which will help insure food, shelter, clothing, and medical care for all people.<sup>18</sup>

The prevalent discrepancy between word and deed in state practices on human rights and the lack of adequate international guarantees and protection of human rights reflect the horizontal structure of the world community in which nation states exhibit ideological, political, and economic inconsistencies and represent a wide range of priorities in their hierarchy of values of human dignity. The situation is exacerbated, at least in part, by the lack of a solid, theoretical foundation for human rights. Several serious questions still remain unanswered, for example, the nature, scope, and magnitude of the rights assumed under the title "human rights" and the nature of the relationships between and among the various rights, such as civil and political rights on the one hand, and economic, social, and cultural rights on the other. These issues, among others, suffer from confusion and obfuscation at the hands of publicists and nation states alike.<sup>19</sup> Similarly,

---

14. *Id.*

15. *Id.*

16. *Id.* at 76.

17. *Id.*

18. *Id.*

19. *See, e.g.*, references in HUMAN RIGHTS AND WORLD PUBLIC ORDER at 63-

in the bulk of literature which is primarily concerned with measures of implementation, the much needed conceptual focus is usually missing and the widest range of alternatives is therefore not explored.<sup>20</sup>

The authors of this book, the most comprehensive study yet published on the subject of human rights, address these questions at the outset. They describe "simple intellectual confusion" as a major contributing factor "affecting the transnational community's failures in securing the protection of human rights."<sup>21</sup> They enumerate and explain these inadequacies in the following manner. First, there is a failure of inquiry regarding the substantive definition of human rights because "[l]ittle effort has been made to create a comprehensive map of the totality of human rights."<sup>22</sup> There has been little discussion of the detailed content of particular rights, the very conception of human rights is often left obscure,<sup>23</sup> and "the particular rights regarded as human rights are not explicitly related to the value features and institutional features of social process."<sup>24</sup> Further, human rights are "often discussed as operative within a national or subnational context, without appropriate reference being made to any relevant larger community context, global or regional."<sup>25</sup> In addition, "it is not always recognized that the honoring of certain rights may require limitation of other rights, [and no] intellectual procedures are devised, much less employed, for calculating the costs and benefits in terms of value consequences of a particular option in decision."<sup>26</sup> Second, there exists the problem of implementation:

[T]he range of alternatives considered has been highly partial and fragmented. The major emphasis in most recommendations for improvement in implementation has been upon isolated features of rule and procedure, without appropriate relation to the larger processes of effective and authoritative power which condition the impact of all changes, rules and procedures. The literature affords little recognition of the comprehensive interpenetrating constitutive processes (global, regional, national, local) which identify au-

---

66, n. 160-68.

20. See references in *id.* at 66-67, n. 169-71.

21. *Id.* at 63.

22. *Id.* at 64.

23. *Id.* at 65.

24. *Id.* at 66.

25. *Id.*

26. *Id.*

thoritative decision makers, specify basic community policies, establish necessary structures of authority, allocate bases of power, authorize appropriate procedures . . . <sup>27</sup>

and provide for many different types of decisions.

What is needed therefore is a "configurative, problem-solving approach, employing all relevant intellectual skills."<sup>28</sup> Under this approach, particular rights have to be explicitly related to "specific value processes and [to] a comprehensive conception of global constitutive processes;"<sup>29</sup> problems must be appropriately formulated so as to allow the performance of the various intellectual tasks of relevant inquiry; basic general community policies have to be postulated and clarified at all the necessary levels of abstraction; the description of past trends in decision should be made "in terms of approximation to clarified policies;" performance of the scientific task of identifying the factors affecting decisions must be built upon "systematic inquiry about both environmental and predispositional variables;" and anticipation of the future should be based upon "disciplined developmental constructs, designed to promote creativity in the choice of decision options."<sup>30</sup> Thus, the framework of inquiry will:

(1) offer a comprehensive map of what is meant by human rights in terms of the shaping and sharing of all values; (2) relate such rights to all community contexts which affect their achievement; (3) specify in detail the past and potential role of processes of authoritative decision at all community levels in clarifying and securing such rights; and (4) mobilize and integrate all appropriate intellectual skills for the better clarification and protection of all rights.<sup>31</sup>

The broad outlines of such a "deliberately policy-oriented, contextual, and multi-method approach" is presented in terms of four major features: the establishment of the observational standpoint; the delimitation of the focus of inquiry; the explicit postulation of basic public order goals; and the performance of intellectual tasks.<sup>32</sup>

The observational standpoint the authors assume is that of "a citizen of the largest earth-space community who identifies with

---

27. *Id.*

28. *Id.* at 67.

29. *Id.*

30. *Id.*

31. *Id.* at 83.

32. *Id.*

the whole of humankind.”<sup>33</sup> The appropriate focus for the authors’ “policy-relevant inquiry about human rights” is both comprehensive and selective. All human rights of all individuals must “seek a comprehensive map of social process that will permit the precise location of particular rights in their larger context.”<sup>34</sup> The conceptualization of social process they recommend is in terms of specific value and institutional categories. Pertinent values include: *respect* (freedom of choice, equality, and recognition); *power* (making and influencing community decisions); *enlightenment* (gathering, processing, and disseminating information and knowledge); *well-being* (safety, health, and comfort); *wealth* (production, distribution, and consumption of goods and services, and control of resources); *skill* (acquisition and exercise of capabilities in vocations, professions, and the arts); *affection* (intimacy, friendship, loyalty — positive sentiments); and *rectitude* (participation in forming and applying norms of responsible conduct).<sup>35</sup> The institutional practices they recommend to achieve these values include: *participation* (individual and group, governmental and nongovernmental); *perspectives* (demands, identifications, and expectations); *situations* (geographic, temporal, institutional, and crisis); *bases of power* (authoritative, controlling); *strategies* (diplomatic, ideological, economic, military); and *outcomes* (shaping and sharing values).<sup>36</sup> Outcomes are categorized as: (1) a basic share of participation and enjoyment; (2) a positive opportunity for further participation and enjoyment; (3) further recognition or reward for actual meritorious contribution; and (4) the largest possible aggregate shaping and sharing.<sup>37</sup>

The authors’ approach is concerned both with effective and authoritative decision. Authoritative decision is a “decision in which elements of authority and control are appropriately balanced.”<sup>38</sup> By authority the authors refer to “the expectations of community members about who is to make what decision, in what structures, by what procedures, and in accordance with what criteria.”<sup>39</sup> By control, they refer to “effective participation in the choices that

---

33. *Id.*

34. *Id.* at 84.

35. *Id.* at 85.

36. *Id.*

37. *Id.* at 86.

38. *Id.*

39. *Id.*



are in fact put into community practice."<sup>40</sup>

The transnational process of authoritative decision includes constitutive as well as public order decision. By constitutive process, the authors refer to "those features of authoritative decision which provide an institutional framework for decision and allocate indispensable functions in the making and application of law." The particular decisions "which emerge from constitutive process in regulating the shaping and sharing of values other than power may be described as 'public order' decisions."<sup>41</sup> As a basic outline of the constitutive process, the authors recommend:

in terms of established authoritative decision makers, the basic perspectives (demands, identifications, and expectations) for which the process is maintained, the structures of authority provided, the bases of power (in authority and control) placed at the disposal of different decision makers, the procedures authorized for the making of different kinds of decisions, and the various kinds of decision functions regarded as necessary to the making and administering of general community policy.<sup>42</sup>

They categorize decision functions to encompass intelligence, promotion, prescription, invocation, application, termination, and appraisal.<sup>43</sup> The comprehensive set of goal values they recommend "for postulation, clarification, and implementation are those which today are commonly characterized as the basic values of human dignity or of a free society."<sup>44</sup> The necessary intellectual tasks "include the detailed clarification of goals, the description of past trends in decision, the analysis of conditions affecting decision, the projection of future trends in decision, and the invention and evaluation of policy alternatives."<sup>45</sup>

This, then, is an outline of the theoretical framework the authors offer. The framework of inquiry presented in Chapter 1 is further elaborated in Chapters 2 through 5 of this volume. Chapter 4, *The Global Constitutive Process of Authoritative Decision*, presents a wealth of material on the major features of contemporary process and persuasively demonstrates first, that "protection of the fundamental policies embodied in all the different human

---

40. *Id.*

41. McDougal, Lasswell & Chen, *supra* note 2, at 239.

42. HUMAN RIGHTS AND WORLD PUBLIC ORDER at 87.

43. *Id.* at 87-88.

44. *Id.* at 90.

45. *Id.* at 91.

rights prescriptions has become an integral part" of that process,<sup>46</sup> and second, that "this new protection of human rights on a global scale is beginning to take on the substance, as well as the form, of the basic bills of rights long established and maintained"<sup>47</sup> in many mature territorial communities. Chapters 6 through 16 illustrate the application of the authors' framework of inquiry to the important outcomes of the respect value. Chapter 16 suggests directions for future development "toward a world civic order in which the individual enjoys the utmost possible freedom of choice in the shaping and sharing of values compatible with common interest."<sup>48</sup> As an appendix there is a chapter entitled, *Nationality and Human Rights: The Protection of the Individual in External Arenas*. The authors have included this chapter "partly because of the importance of the problems of nationality and partly to suggest a model for the study of other claims in relation to power."<sup>49</sup>

The authors have dealt with only one of the eight major values — that of respect. A detailed study of the outcome features of the other values has been left for a future date. This reviewer looks forward to an early completion of the study of those other values as well.

It would be desirable that those uninitiated in the New Haven school of policy science jurisprudence acquaint themselves with at least some of the prior works of Professors McDougal, Lasswell and their associates<sup>50</sup> and appreciate how the authors have suc-

---

46. *Id.* at 313.

47. *Id.*

48. *Id.* at xxii.

49. *Id.*

50. These studies include: M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); M. McDUGAL AND W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); M. McDUGAL, H. LASSWELL, AND I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. McDUGAL, H. LASSWELL, AND J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* (1967); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF INTERNATIONAL LEGAL ORDER* 73-154 (R. Falk & C. Black eds. 1969); Lasswell & McDougal, *Criteria for a Theory About Law*, 44 *S. CAL. L. REV.* 362 (1971); Lasswell & McDougal, *Trends in Theories about Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 *GEO. WASH. L. REV.* 1 (1972); and McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a*

ceeded in avoiding the normative ambiguities characteristic of so much writing in international law.

Moskowitz issued a challenge in 1968: "[I]nternational human rights is still waiting for its theoreticians to systematize the thoughts and speculations on the subject and to define desirable goals. Intelligent truisms do not necessarily add up to a theory."<sup>51</sup> This formidable challenge has finally been met.

---

*Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

51. M. MOSCOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 98 (1968).