



1969

# Interpretation of Agreements and World Public Order by Myres S. McDougal, Harold D. Lasswell, and James C. Miller

William E. Holder  
*Australian National University*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Holder, William E. (1969) "Interpretation of Agreements and World Public Order by Myres S. McDougal, Harold D. Lasswell, and James C. Miller," *Kentucky Law Journal*: Vol. 57 : Iss. 4 , Article 12.  
Available at: <https://uknowledge.uky.edu/klj/vol57/iss4/12>

This Book Review is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@sv.uky.edu](mailto:UKnowledge@sv.uky.edu).

# Book Reviews

INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER. By Myres S. McDougal, Harold D. Lasswell, and James C. Miller. New Haven and London: Yale University Press, 1967. Pp. xxi, 410. \$9.75.

In a divisive world community, where technological progress has brought intensive inter-nation contact, where conditions beyond the control of any one nation pervade, and where special interests and now perspectives shatter the old common ground of customary international law, it needs no emphasis that international agreements have taken on new significance. Treaties<sup>1</sup> have become the normal form of international legislation—creating the minimum expectations of stability of the world public order system, establishing the world constitutive process,<sup>2</sup> and allowing participants in the international system, ranging from the nation to the individual, to pursue their value objectives: welfare, wealth, respect, rectitude, intelligence, skill, power, and affection.<sup>3</sup>

The premise of *Interpretation of Agreements and World Public Order* is that, conceding the significance of treaties to minimum world public order (peace) and the shaping and sharing of all values, the contemporary confusion about the decision-maker's role in interpretation is extremely hazardous. This is especially so because the growth of public order demands confidence in the competence and integrity of the decision-process (a confidence which may not now be justified). Thus the book has two tasks. It is to demonstrate that past decision-makers have spawned confusion and oversimplification, and it is to postulate a framework of intelligent inquiry for the tasks of interpretation. Eminently, the book succeeds.

The policy-oriented approach of Professors McDougal and Lasswell is today well-known and variously received, but is little under-

---

<sup>1</sup> This writer, like the authors of INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, sees no reason to confine this or synonymous terms to agreements between nation-states or governments, but would include all agreements by all participants in the world processes.

<sup>2</sup> This is a public order system wherein authoritative decision institutions have come into effect and which in turn are protected and extended while promoting the shaping and sharing of values. A full exploration is presented in McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967).

<sup>3</sup> This breaking down of the objectives of participants is based on convenience and the appreciation of these qualities as values. For a brief summary of the content and practicality of these values see *Id.* at 268-75.

stood. Building on their previous suggestions for useful inquiry,<sup>4</sup> they, with Miller, now explore another area of the international control system.<sup>5</sup> First, the relevant processes are isolated: the process of agreement,<sup>6</sup> the process of claims,<sup>7</sup> and the process of authoritative decision.<sup>8</sup> Then, sequentially, these processes are empirically examined by "phases,"<sup>9</sup> resulting in ordered identification of the surrounding context. Finally, to overcome the usual ambiguity of what is meant by the particular law in question, the authors confront the reader with the four intellectual tasks of problem solving: postulation of preferred policies; analysis of the trend of decision; a search for explanatory factors; and recommendations for future manipulation.

Contextuality becomes the key to interpretation. The basic demand of the authors is that, in fulfilling the expectations of the parties to an agreement, a decision-maker must refer to all the surrounding circumstances—those before the agreement (pre-outcome), the agreement (outcome) and those after the agreement (post-outcome). This is demanded since interpretation of treaties is a problem of communication just as it is for constitutions, statutes, precedents, custom and private agreements. All agreements contain ambiguities; all are abstract and contradictory; all provide decision-makers "opportunities for relating the decisions they make to the basic goal values of preferred public order."<sup>10</sup>

The goals of interpretation are detailed in three stages: 1. Primary interpretation demands that "decision-makers undertake a disciplined, responsible effort to ascertain the genuine shared expectations of the particular parties to an agreement."<sup>11</sup> Respect for individual choice is deduced directly from the abstract goal of human dignity.

---

<sup>4</sup> See, e.g., McDougal & Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, YALE L.J. (1943). For two recent additions see McDougal, *Jurisprudence for a Free Society*, 1 GEORGIA L. REV. I (1966); Lasswell & McDougal, *Jurisprudence in Policy Oriented Perspective*, 19 U. FLA. L. REV. 486 (1967).

<sup>5</sup> Among the previously explored areas are: M. McDOUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. McDOUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); and M. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER; THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961).

<sup>6</sup> M. McDOUGAL, H. LASSWELL & J. MILLER, *INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 13-20* (1967) [Hereinafter cited as *AGREEMENTS*].

<sup>7</sup> *Id.* at 21-26.

<sup>8</sup> *Id.* at 27-34.

<sup>9</sup> Phase analysis is a conceptual technique for delineating the relevant aspects of any interaction. To summarize: Who (participants), with what objectives (perspectives) and under what conditions (situations), using what means (base values) in what ways (strategies) achieve what immediate results (outcomes) and what long-term impacts (effects)?

<sup>10</sup> *AGREEMENTS* at XI.

<sup>11</sup> *Id.* at 40.

2. Supplementary interpretation demands that "gaps, contradictions or ambiguities in the parties' communication" should be filled "by making reference to the basic constitutive policies of the larger community which embraces both parties and decision-makers."<sup>12</sup>

3. Policing demands that "when grave contradictions are found between the explicit expectations of the parties to an agreement and requirements of fundamental community policy, decision-makers should refuse to give effect to the expectations of the parties."<sup>13</sup>

The question is, have these goals of interpretation found acceptance in practice? The primary interpretation goal, the authors find, has been variously recognized and spasmodically applied, usually in terms of the "original intent" of the parties, from *Vattel* to the *South-West Africa Case*.<sup>14</sup> Yet the goal is constantly threatened in a number of ways: First, by the reiteration of the "plain meaning rule" to exclude contextual inquiry; secondly, by those who would posit a fixed hierarchy of coexisting "rules" of interpretation (the normal textbook approach); and, lastly, the more contemporaneously and most significantly by Article 27 of the International Law Commission's Draft Law of Treaties, where textuality rather than contextuality rules supreme.<sup>15</sup> The other goals, similarly, while verbally respected, are torn by cliché, ambiguity and infidelity, with little or no effort to identify basic community policy.

To navigate the breadth of a full contextual analysis, a detailed guide is provided. The proposed strategy is to distinguish "principles of content" (*i.e.*, What should decision-makers think about?) and "principles of procedure" (*i.e.*, What is the best way to bring relevant content to view?) "Principles of content are addressed to the choice of subject matter that is relevant to the alternatives of policy open to a decision-maker,"<sup>16</sup> while principles of procedure guide decision-makers in arranging the sequence of events.<sup>17</sup> Consequently, it is possible to isolate relevant details of the context by phase analysis of each analytical unit.

With the proposed policies indicated, the bulk of *Interpretation of Agreements and World Public Order* turns to past practice. The

---

<sup>12</sup> *Id.* at 41.

<sup>13</sup> *Id.*

<sup>14</sup> (1966) I.C.J. 4.

<sup>15</sup> While Article 27 of the Draft, which states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," seems to be broader than its predecessor, the emphasis remains on the "clear meaning" type of approach. Especially is this the case because of later definitions such as to the meaning of "context". See 61 AM. J. INT'L L. 263, 271 (1967).

<sup>16</sup> AGREEMENTS at 466.

<sup>17</sup> *Id.* at 65.

authors easily demonstrate that, despite occasional references to a wider context, there has been a lack of disciplined analysis. Before adequate reference to pre-outcome events there is the tautologous hurdle of the "plain meaning rule," and there are those who would hinder focus on post-outcome events. Indeed, there is little understanding of a decision-maker's tasks, a considerable rejection of expanding scientific techniques, and a near-total evading of the creative opportunities of a decision-maker. The principles of procedure, especially, remain unappreciated and unused in any coherent fashion. Practice, in other words, falls short of the acceptable.

This 230 page analysis of the trend incorporates previous insights of McDougal and Lasswell. The rationale of the complementarity of principles in legal decision-making is elaborated upon. Using the apparently contradictory principles of "effective interpretation" and "restrictive interpretation," the authors show that there is no cause for alarm, because such opposites (if fully appreciated) can guide one to the factors of total context and assist one in articulation of public order policies.<sup>18</sup> Meanwhile, decision-makers should take stock of their own strengths (base values) and adjust decisions within the bounds of effectiveness. They "should be modestly hesitant to impose new policies," especially those contrary to current community expectations.<sup>19</sup> (One wonders if the authors would justify the majority opinion in the recent *South-West Africa Case*<sup>20</sup> under such reasoning. And if not, then when?) Further, decision-makers are called upon to be "explicitly rational" both as to policies and implementation.<sup>21</sup> A broad attack is made upon the common resort to so-called logic by decision-makers. Using the work of Layman Allen, it is easy to fault the *ejusdem generis* rule, for example, or to discover ambiguity of syntax where none was appreciated.<sup>22</sup> In addition, to encourage those who might dismay at the comprehensive nature of the contextual inquiry there is the common-sense principle of adjusting effort to importance.<sup>23</sup>

The final chapter assesses the trend, finding a "remarkable, and in many respects, lamentable state of affairs,"<sup>24</sup> particularly if we limit the inquiry to what decision-makers say. An appraisal reveals inconsistency and false claims of consistency, naivety and the facile use of maxims, and a fundamental misconception of the task of decision-

---

<sup>18</sup> *Id.* at 156-85.

<sup>19</sup> *Id.* at 265.

<sup>20</sup> (1966) I.C.J. 4.

<sup>21</sup> AGREEMENTS at 266-67.

<sup>22</sup> See especially *id.* at 330-43.

<sup>23</sup> *Id.* at 303.

<sup>24</sup> *Id.* at 360.

makers who deny themselves a degree of access to pertinent reality.<sup>25</sup> Intellectual advances are ignored. The crucial factor of the chaos is "the failure by decision-maker and publicists to conceive of the agreement making process . . . as a process of *communication*, and to view this process in its widest extent through the lens of modern communication studies."<sup>26</sup> Quickly dismissed is the possibility that all this confusion is a profound strategy by decision-makers to retain choice of decision and support for implementation, for the authors cannot stomach "the image of a galaxy of canny jurists engaged in out-smarting the rest of the world in the interest of judicial integrity."<sup>27</sup>

At first reading *Interpretation of International Agreements and World Public Order* is rather confusing, with specialized vocabulary and many general premises harbouring their own ambiguity. Yet the work is undoubtedly an outstanding contribution going far beyond the standard works. By focusing only on interpretation and ignoring other problems relating to treaties, the bulk of the authors' previous multifactoral efforts is avoided. The writers amply refute charges of unnecessary prolixity and incomprehensible language by their demand for constructive, policy-oriented inquiry and by the ease with which they display the inadequacy of past and present practice. For he who would move on to contemporary challenges, here is a valuable manifesto.

William E. Holder  
Senior Lecturer in Law  
Australian National University

---

<sup>25</sup> *Id.* at 364.

<sup>26</sup> *Id.* at 371-72.

<sup>27</sup> *Id.* at 370.