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Volume 1 | Number 1

Article 5

1-1-1978

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Recommended Citation

Lung-chu Chen, *Human Rights and World Public Order*, 1 Loy. L.A. Int'l & Comp. L. Rev. 109 (1978).
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Human Rights and World Public Order

*Lung-chu Chen**

Through the adoption of the Universal Declaration of Human Rights in 1948,¹ the entry into force of the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights,² and the workings of customary law, a comprehensive global Bill of Human Rights is emerging. This global Bill of Rights,³ which originated with the United Nations Charter and has been sustained by a multiplying host of specific human rights conventions and expressions, represents a tremendous collective effort and symbolizes the common aspirations of humankind for fostering and enhancing the protection of all basic human values.

The contemporary global human rights movement is heir to all the great historic movements for human dignity, freedom and equality. It expresses the enduring elements in most of the world's great religions and philosophies. It builds upon the findings of modern science concerning the close link between respect for human dignity and all other values, between human rights and peace.

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1. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

2. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 21) 49, U.N. Doc. A/6316 (1966).

3. The "International Bill of Human Rights," as contemplated at the founding of the United Nations, has been projected in the form of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its Optional Protocol. Close observation reveals that this emerging global Bill of Rights has all the features of the bills of rights in mature national communities, to wit: deliberate and customary prescription, application to all parties (official and non-official), invocation by injured parties, and subjection to termination only by the same modalities as by which created. From a dynamic perspective, this developing International Bill of Human Rights has been greatly fortified by various ancillary instruments dealing with particular categories of participants (women, refugees, stateless persons, youths, children, mentally retarded persons), particular value categories or subject matters (genocide, apartheid, discrimination, racial discrimination, sex-based discrimination, slavery, forced labor, nationality, employment, education, marriage), by the decisions and recommendations of international governmental organizations (especially the various organs and entities of the United Nations), and by customary developments in the transnational arena. For a convenient collection of these human rights instruments, see UNITED NATIONS, HUMAN RIGHTS, U.N. Doc. ST/HR/1 (rev. ed. 1978). Other useful collections include BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971) and BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (L. Sohn & T. Buergenthal ed. 1973).

For a detailed elaboration on the emerging global Bill of Rights, see M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (ch. 4) (forthcoming, Yale University Press).

I

The peoples of the world, whatever their differences in cultural traditions and institutional practices, are today increasingly demanding the greater production and wider distribution of all basic values.⁴ They demand effective participation in shaping and sharing of the values of:

respect;
power;
enlightenment;
well-being;
wealth;
skill;
affection;
rectitude.

They demand a fundamental freedom of choice for participation in different value processes, for equality that minimizes discrimination on grounds irrelevant to personal capabilities and maximizes effective opportunity, and for a large domain of personal autonomy. They demand full participation as persons in the processes of both authoritative decision-making and effective power sharing. They seek freedom to acquire, to use, and to communicate information and knowledge. They seek health, safety and comfort. They seek access to goods and services. They demand the freedom to discover, to mature and to exercise latent talents. They seek the establishment and enjoyment of congenial personal relationships. They demand freedom to form, to maintain, and to express norms of responsible conduct.

A cursory look at daily events around the world shows that deprivations and non-fulfillments continue to characterize the value-institutional processes of vast segments of the world's population. Though the nature, scope and magnitude of the values at stake may differ from one community to another, the deprivations and non-fulfillments extend to every value sector.

Examples are dramatic. The demand for freedom of choice, for equality and for personal autonomy meets with persistent discrimination on such invidious grounds as race, sex, religion and political opinion, massive invasion of the civic domain of personal autonomy,

4. For a detailed itemization of these values, see McDougal, Lasswell & Chen, *Human Rights and World Public Order: Human Rights in Comprehensive Context*, 72 Nw. U.L. Rev. 227, 231-35 (1977).

and the practice of apartheid in South Africa. The demand for power sharing meets with the increase of totalitarian regimes, one-party rule and military dictatorships, arbitrary arrest, detention, imprisonment and torture in many police states; restrictions on emigration for Soviet Jews; mass expulsion of Asians in Uganda; and the abuse of power exemplified by the Watergate syndrome. The search for enlightenment encounters suppression of political dissents; widespread practice of censorship; systematic indoctrination as an instrument of social policy. The search for physical well-being is blunted by hunger in many parts of the world, deprivations of life because of war and terrorist activities, ecocide, and genocide. A striving for wealth faces poverty in the developing areas and the widening gap between the rich and the poor. The risk of nationalization without adequate compensation discourages the investment of private resources in societal development. The demand for skill development must cope with consequences of skill obsolescence due to technological advances, the brain drain, unemployment and underemployment. Pursuit of congenial personal relationships meets with prohibition of interracial and interreligious marriages, homelessness for millions of refugees, mutual suspicion and fear generated by networks of secret police and informers. Longings for a moral integrity meet with denial of freedom to worship, intolerance and persecution of religious minorities, and warfare involving religious conflicts, as in the Near East and Northern Ireland.

The conditions which have resulted in these great disparities between the rising common demands of people for human dignity values and the degree of their achievement are both environmental and predispositional. These factors are in constant interplay.

Among the most important environmental factors are population, natural resources, and institutional arrangements and practices. The implications of the population explosion affect the quality of life in every value sector. The natural resources of the world appear to be diminishing in quantity and deteriorating in quality, as dramatized by the energy and ecological crises. The world's resources are unevenly distributed, with glaring discrepancies in the pattern of resource consumption. Confronted with the unprecedented challenges of our planetary ecosystem, the institutions and practices of humankind appear to be inadequate. Geographically, these value institutions and practices are too state-centered. Functionally, they are too tradition-bound.

The predispositional factors include the more fundamental demands, identifications and expectations of the peoples of the world. Too often they continue to demand special interests at the

expense of common interests. Their identifications are fragmented. While identifications with the inclusive community of humankind expand, the syndrome of national parochialism remains vigorous. In an insecure world, the expectations of violence remain high. The effective elites of the world tend to be preoccupied with calculations of short-term payoffs, rather than with concern for long-term aggregate gain.

The interdependencies of the world social processes as they affect human rights are not well understood and are not taken seriously. The quality of life of every individual now depends upon many factors operating beyond his local community and national boundaries. The interdependencies of peoples transnationally within a particular value process inexorably matrix with the interdependencies of peoples everywhere as between different value processes. In an earth-space arena in which the means of mass destruction threaten all civilization, no people can be secure in their rights unless all peoples are secure.

II

One important factor contributing to the transnational community's failures to protect human rights is simple intellectual confusion.

Little effort has been made to develop a comprehensive map of the totality of human rights. The particular rights regarded as human rights are not explicitly related to the value and institutional features of social process. Human rights are often discussed as operating within a national or sub-national context, without reference to any relevant, larger community context, regional or global. The very concept of human rights often is left obscure or warped. In some conceptions, human rights are defined only as those rights which the state protects; in others, they are grounded in the empyrean of nature, wholly outside the protection of any one state.

In a vast literature, the principal focus of attention has been on what is called the problem of implementation.⁵ Even on this problem, however, the scope of concern has been highly partial and

5. See, e.g., J. CAREY, *UN PROTECTION OF CIVIL AND POLITICAL RIGHTS* (1970); M. GANJI, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1962); E. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION* (1970); M. MOSKOWITZ, *INTERNATIONAL CONCERN WITH HUMAN RIGHTS* (1974); A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972); *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (L. Sohn & T. Buergenthal eds. 1973); *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* (J. Tuttle ed. 1978); UNITED NATIONS, *UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS*, U.N. Doc. ST/HR/2 (1974).

fragmented in terms of isolated sanctions and technical procedures. Little effort has been made to explore systematically the interpenetrating constitutive processes (global, regional and national) which project basic community policies, establish necessary structures of authority, identify authoritative decision makers, allocate bases of power, authorize appropriate procedures, and provide for essential decision making functions.

Furthermore, an appropriate problem-solving approach is lacking. Problems are not formulated precisely. Some relevant intellectual skills are ignored. No adequate intellectual procedures are devised to assess the value consequences of a particular option and to guide the application of prescriptions to particular instances.

The major jurisprudential approaches have made many contributions to an inquiry into human rights, but they have also contributed in various ways to the existing inadequacies. The natural-law approach talks about human rights in terms of transempirical absolutes and relies upon syntactic derivation.⁶ The historical approach confines human rights to the demands which particular peoples actually make at a certain time in their unique communities;⁷ it is highly deterministic and nationalistic in perspective. Under the positivist approach; human rights are conceived of merely as the rights which a system of law in a particular state in fact projects;⁸ but the rights legally protected may be highly inimical to human dignity values. The Marxist (Communist) approach talks about human rights in terms of dogma and inevitability;⁹ a persistent theme of this approach "is that human rights appertain not to the individual person, but to the collectivity"¹⁰ known as the nation-state. The social science approach is interested primarily in the scientific inquiry, but has been slow in developing a comprehensive map of human rights in the social process.¹¹

III

The framework of inquiry which appears necessary both to escape the traditional confusions and to meet the contemporary challenge to scholarship is a policy-oriented approach which is contextual, problem-solving and multi-method. Such an approach would

6. See McDougal, Lasswell & Chen, *supra* note 4, at 284-87.

7. See *id.* at 287-89.

8. See *id.* at 289-91.

9. See *id.* at 291-95.

10. *Id.* at 292.

11. See *id.* at 295-97.

offer a comprehensive map of what is meant by human rights in terms of the shaping and sharing of all values and would relate these rights to all community contexts which affect their achievement. It would specify in detail the role of authoritative decisional processes at all community levels in clarifying and securing these rights. It would mobilize and integrate all appropriate intellectual skills for the better clarification and protection of all rights.

The broad outlines of this policy-oriented approach, as developed and employed by Professors Myres S. McDougal, Harold D. Lasswell and this writer¹² may be indicated in terms of four major features: (A) the establishment of an observational standpoint; (B) the delimitation of the focus of inquiry; (C) the explicit postulation of public-order goals; and (D) the performance of intellectual tasks.¹³

A. Our observational standpoint is that of a citizen of the world community who identifies with the whole of humankind. As scholarly observers, we seek to clarify the common interest in the defense and fulfillment of human rights on a global scale.

B. In delimiting our focus of inquiry, we seek to be both comprehensive and selective. We seek to relate human rights to the whole of the social and community processes in which they are demanded and in which authoritative decision is invoked for their protection.

Human rights can best be understood by reference to the empirical interactions in social process by which values are shaped and shared. There is a human rights dimension in every social interaction. Social process can be described in terms of human beings pursuing certain objectives, through institutions, by employing re-

12. For a more detailed analysis, see *id.* at 297-307. See also the following articles co-authored by McDougal, Lasswell & Chen: *The Aggregate Interest in Shared Respect and Human Rights: The Harmonization of Public Order and Civic Order*, 23 N.Y.L.S.L. REV. 183 (1977); *Freedom from Discrimination in Choice of Language and International Human Rights*, 1976 S. ILL. U.L.J. 151; *The Human Rights of the Aged: An Application of the General Norm of Non-Discrimination*, 28 U. FLA. L. REV. 639 (1976); *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976); *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination*, 74 MICH. L. REV. 865 (1976); *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975); *Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination*, 2 YALE STUDIES IN WORLD PUBLIC ORDER 1 (1975); *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975); *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900 (1974); *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969).

13. See McDougal, Lasswell & Chen, *supra* note 4, at 297-98.

sources and strategies in achieving value outcomes.

The value-institutional categories we find convenient for our inquiry are eight. As mentioned above, these eight values are respect, power, enlightenment, well-being, wealth, skill, affection and rectitude. There is no magic in these terms, of course. Any equivalent terms would suffice, so long as their empirical content is specified.

In regard to each particular value process, we find it useful to categorize the outcomes in the following terms:

1. A basic share of participation and enjoyment;
2. Positive opportunity for further participation and enjoyment, free from discrimination for reasons irrelevant to capabilities;
3. Further recognition or reward for actual contributions to the common interest; and
4. The largest possible aggregate shaping and sharing.

A policy-oriented approach will characterize law not merely as rules, but as decisions, which embody both perspectives and operations. It will be especially concerned with authoritative decision, that is, decision in which elements of authority and control are properly balanced. In the absence of decision characterized by authority, human rights are at the mercy of naked power. When control does not accompany decision, the protection of human rights may become mere illusion and mockery, as in some modern constitutions.

As in every social interaction, there is a human rights dimension in every authoritative decision. Our concern for authoritative decision regarding human rights extends to the ongoing constitutive process of authoritative decisions that are established and maintained by the effective elites of the community. This provides the necessary institutional framework and procedure to perform the essential decision functions: the intelligence, promoting, prescribing, invoking, applying, terminating and appraising functions. Our concern also extends to a continuing flow of public order decisions that emanate from the constitutive process and that shape and maintain the protected features of the community's various value processes (e.g., respect, enlightenment, wealth).

In an interdependent world, the degree of protection of human rights a particular individual can enjoy does not depend merely upon the operation of social and decision processes within any single territorial community. It is also a function of the operation of such processes within a whole hierarchy of interpenetrating communities: from local or national to regional and global. It is important to

grasp the dynamic interplay between transnational and national processes of decision and their reciprocal impacts.

C. The comprehensive set of public order goals we 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. This is not an idiosyncratic or arbitrary choice but a product of many heritages. As projected in the United Nations Charter, the International Bill of Human Rights, and their host of ancillary expressions, these values are formulated at many different levels of abstraction and in many different cultural and institutional modalities. The basic thrust of all such formulations is toward the greatest production and widest possible distribution of all important values.

D. The intellectual tasks essential to a policy-oriented framework of inquiry about human rights include the detailed clarification of goals, the description of past trends in decision, the analysis of conditions affecting decision, the projection of probable future developments, and the invention and evaluation of policy alternatives. Goals, trends, conditions, projections and alternatives are distinct, yet interrelated. Each task affects, and is affected by, the others. It is important that all these tasks be performed systematically and contextually in relation to specific problems. Work on these tasks has only begun.

It would be premature to suggest that the emerging global Bill of Human Rights has already been applied in a minimal, acceptable way. Application of the different prescriptions of this Bill of Rights requires much more effective management of the global processes of authoritative decision and of effective power. It is essential that the perspectives of the effective elites of the world be changed in favor of greater concern with the protection of human rights. These elites must be shown that there is more to gain by encouraging, rather than stifling, human rights. Only then can there be substantial hope that protection of human rights will occur on a world-wide basis, and in an adequate fashion.