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Interpretation of Agreements and World Public Order Principles of Content and Procedure

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BOOK REVIEWS

The Interpretation of Agreements and World Public Order—Principles of Content and Procedure. MYRES S. MCDOUGAL, HAROLD D. LASSWELL, AND JAMES C. MILLER. New Haven and London: Yale University Press. 1967. Pp. xxi, 410. $9.75.

The basic purpose of this book appears to be to provide a critical appraisal of the traditional methods of interpreting international agreements and to suggest a new approach. In their Introduction the authors advocate utilization of modern developments in "communications analysis"—"one of the most rapidly expanding fields in the modern social, behavioral, and engineering sciences," involving linguistics, symbolic logic, mathematics, and "extensive empirical research on the role of communicative activities in social process."[1] Although the study deals primarily with the interpretation of treaties, the authors believe that "the task of interpretation would appear to be fundamentally the same for all types of prescriptions—international agreements, constitutions, statutes, precedents, and customary prescriptions—and even for private agreements."[2]

Thus stated, the intention of the draftsmen of this treatise is clear; the words chosen to express their intent appear to have "natural" or "ordinary" meanings in their context. Unfortunately, what follows throughout large sections of the book is a linguistic morass in which the authors have chosen to bury their own powers of communication. This has compelled them to provide the book with its own (nonaddictive) lexicon and glossary on "use of terms" (like those treaties that commence: "As the terms are used in this convention . . . .") and has led them to reformulate in their own jargon a modern set of canons of interpretation. Possibly one hundred pages are squandered on this dogmatic scientism.

The table of contents and the rubrics employed as titles and subtitles achieve an elevated level of abstraction. Who could guess that the heading, "Trends in the Management of Principles of Content—The Contextuality Principle—Preliminary Events," would lead to a discussion of the desirability of early resort to *travaux préparatoires* in the interpretation of treaties? Similarly, judicial notice and *iura curia novit* are briefly noted under the rubric "Outcomes—The Principle of Comprehensive Mobilization of Authority Functions."

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1 P. xii.

2 P. xi.

The "sounds comprising the words of language systems," the reader is told, are *signs*. The subjective events called up by signs are *symbols*, often referred to as "interpretations." "*Objectives* sought by participants in a forum" are often "highly explicit subjective events." "Strategic expectations" guide "communicators" seeking to modify the "resource environment."[3] *Base values* are "inventoried" as "wealth, power, rectitude, affection, respect, enlightenment, skill, well-being,"[4] and there are check-lists within check-lists (participants, objectives, situations, base values, strategies, outcomes, post-outcomes)[5] to tell the judge how to think systematically about the interpretative process.

What is the text of a treaty? Apparently only the "outcome phase —that denoting the parties' final commitment upon the projection of a future policy" where the parties are "optimally alert to their total value position."[6] Despite this implicit recognition of the importance of an agreed text, the authors deliberately put the cart before the horse by rejecting both the view of Charles Cheney Hyde that "[i]t is the contract which is the subject of interpretation, rather than the volition of the parties"[7] and the conclusion of the International Law Commission that "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties" as "a subjective element distinct from the text."[8]

Contemning the Commission's view as an "arbitrary presumption,"[9] the authors believe that the beginning and end of treaty interpretation is to discover "the genuine shared expectations of the particular parties." This incantation—repeated by the authors fifty times, and, with variants, over one hundred times—is designed to exorcise traditional methods of interpretation characterized by the authors as "lamentable."[10] Judge Charles De Visscher, in his wise and illuminating book, *Problèmes d'Interprétation Judiciaire en Droit International Public*,[11] points out that the doctrinal position that the interpreter should first seek the intention of the parties is a source of

3 Pp. xi-xiii.

4 P. xiv.

5 *See* Table of Contents & pp. 15-34, 44-65.

6 P. 58.

7 P. 93, *quoting* 2 C. HYDE, INTERNATIONAL LAW 1471 (2d ed. 1945).

8 P. 88. *See* Commentary to Article 27, International Law Comm'n, Report, 21 U.N. GAOR, Supp. 9, at 51, 49, U.N. Doc. A/6309/Rev. 1 (1966).

9 P. 88.

10 P. 360.

11 At 50 (1963).

confusion; discovery of that intention is the goal and the result of the interpretative process, not an independent criterion initially applicable. The interpreter can only commence with the text in which the parties record their agreement.

The distaste exhibited by the authors for what they regard as a narrow textual approach is understandable because of its abuse in the past. They are properly critical of the view that words can have "plain," "natural," or "ordinary" meanings divorced from their context. They scathingly reject the hoary canon of interpretation of Vattel that "it is not permissible to interpret what has no need of interpretation" on the ground that this is in itself an interpretation.[12] They carefully examine other contradictory canons, such as *in dubio mitius* (in case of doubt, adopt the interpretation least onerous on a party) and *ut res magis valeat quam pereat* (that the thing may rather have effect than be destroyed—sometimes called "the principle of effectiveness" or "liberal interpretation"), and skillfully fit them into their overriding criterion of "the genuine shared expectations of the particular parties." International lawyers will find most useful the authors' critical appraisals of the jurisprudence of the International Court of Justice and its predecessor on the interpretation of treaties.

The most valuable contribution of the authors is their insistence on the "contextuality principle": nothing that throws light on *the words*[13] chosen by the parties to express their "shared expectations" should be barred to the interpreter. In this connection, they rightly criticize the 1966 Draft of the International Law Commission, which unfortunately separates recourse to *travaux préparatoires* in Article 28, entitled "Supplementary Means of Interpretation," from Article 27, labelled "General Rule of Interpretation." Although, in its Commentary, the Commission denies that it has set up a hierarchy of norms of interpretation, it is to be hoped that the forthcoming Vienna Conference on The Law of Treaties will combine the two articles.

One arrives, then, at considerable agreement with the authors concerning the goal of interpretation. What is regrettable is that they have dressed up in the guise of modern "communications analysis" a decrepit and often-challenged view that it is the intention of the parties (their "genuine shared expectations," "the subjectivities which are important to shared commitment"[14]) which is subject to interpretation,

12 P. 78 *et seq.*

13 The emphasis is the reviewer's. The extraordinary interest of the authors in words appears to dissipate itself before reaching the text of a treaty.

14 P. 15 & *passim.*

rather than the text of the treaty in which they have objectively expressed their shared intentions, subjectivities, and agreement.

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