Michigan Law Review

Volume 39 | Issue 8

1941

NIEMEYER ON LAW WITHOUT FORCE

Josef L. Kunz
University of Toledo College of Law

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the International Law Commons, Law and Politics Commons, and the Military, War, and Peace Commons

Recommended Citation
Josef L. Kunz, *NIEMEYER ON LAW WITHOUT FORCE*, 39 MICH. L. REV. 1337 (1941).
Available at: https://repository.law.umich.edu/mlr/vol39/iss8/4

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NIEMEYER ON LAW WITHOUT FORCE*—A REVIEW

Josef L. Kunz †

WHEREAS Lauterpacht[1] tried to determine the function of law in the international community, Niemeyer investigates the function of politics in international law. His book is on politics, but it is theoretical in its treatment and not political. The book not only represents an ambitious work, but is certainly interesting and stimulating. As to his ideas, Niemeyer derives from Herman Heller,[2] to whom the book is dedicated. Heller's theory of the State[3] is not a legal, but a sociological, a functional theory of the modern, occidental State as it developed since the Renaissance, a theory which stands halfway between Kelsen's "pure theory of law" and Carl Schmitt's "pure theory of power." Heller's starting-point is the nonexistence of isolated individuals, independent of social relationships. The social-political world is dialectically formed, a living thing and, therefore, a contradictory reality of human behavior. The task of his theory is to analyze the particular reality of the modern State, to understand it in its present structure and function. His theory, opposed to aprioristic norms of natural law, is not a theory for theory's sake. It is motivated by practical ends. His method is that of a cultural science of reality, his object of investigation the State as *Gestalt*, as a real structure, active in the social-historical world. All social reality is individual and collective effect in indissoluble dialectic unity. Heller conceives the State neither in an atomistic sense as a mechanism, composed of individuals, nor as an organism, but as organization. The State does not consist of men, but of human performances. The *genus proximum* of the State is organization, the *differentia specifica*, as compared with all other organizations, is its independent and supreme organization and activization of territorial social cooperation, and its justification lies in the

* LAW WITHOUT FORCE; The Function of Politics in International Law. By *Gerhart Niemeyer*—Lecturer in Politics, Princeton University. Princeton, N. J.: Princeton University Press. 1941. Pp. xiv, 408. $3.75.

† Professor of International Law, University of Toledo College of Law. Dr. Jur., Dr. Rer. Pol., University of Vienna. Formerly Professor at the Hague Acadamy of International Law.—*Ed.*

[1] H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933).

[2] Although the influence of other thinkers is also clearly seen, particularly of E. FEILCHENFELD, VÖLKERRECHTSPOLITIK ALS WISSENSCHAFT (1922).

[3] H. HELLER, STAATSLEHRE (1934).

fact that it represents the organization necessary for securing the law at a certain stage of evolution. While force is not an essential quality of law, the modern State has a State monopoly of legal physical force. That is why the summit of the organization represents the limit for securing the law by organizational coercion.

Just as Heller,[4] in trying to show that the "political" is not mere blind struggle for power but has an objective meaning, was working under the shadow of the totalitarian development, so Niemeyer in his book reflects the present-day international crisis. According to him, our present-day international law has completely broken down; this cannot merely be the consequence of the "wickedness" of some governments; the fault must lie with international law itself: the unlawfulness of international reality is only a consequence of the unreality of international law. Reconstruction means a new orientation in the direction of a "functional international law," based on a realistic account of the past.

As to the critique of Niemeyer's starting point: This writer agrees that the "new" international law of the "period between two World-Wars" has broken down, but disagrees with the author's thesis of the disappearance of all international law. Such a statement is simply not true, as a look at international reality shows. This writer agrees with the author's distinction between a mere violation of the law and a revolt against the law; but it must be said that such revolt happens also in municipal law, as every revolution or civil war proves, and that, on the other hand, even in the present war many violations of the law are mere violations, not a revolt against the law. This writer agrees with the author as to the present distortion and abuse of international law, but these are, by no means, new phenomena, nor are they restricted to the field of international law: Voltaire said in the eighteenth century that the principle of the sanctity of treaties is mostly honored by breaking them; Talleyrand stated, long before the recent Spanish Civil War, that nonintervention means in international affairs about the same thing as intervention; the Roman jurists had for such "concealed lawlessness" coined the phrase, *agere in fraudem legis*. Nor is the present condition of international law a peculiarity of international law: it is only one form of uncertainty which is to be found in all realms

[4] Heller's work, not entirely finished, and edited, after the author's death, by Niemeyer, deals with international law only accidentally. But his remarks in this direction are very different from Niemeyer's theory. Cf. my book review on Heller, Staatslehre, 29 AM. J. INT. L. 543 (1935).

of human activity, a particular instance of the "*escandalosa provisionalidad,*"[5] which is so characteristic of our epoch of crisis and transformation.

As to Niemeyer's first part, historical in character, this writer questions the correctness of the assertion that international law was "born" in the seventeenth century. Our international law has been developing, within the Catholic universality of the Middle Ages, since the twelfth century. That the "new science of international law" drew from the sources of the scholastic philosophy and of Roman law, that it presupposed an eternal, natural law, although the *lex aeterna* of St. Thomas was replaced by the *lex naturalis*, the *dictamen rectae rationis* of Grotius, is correct. But this writer cannot agree with Niemeyer's thesis that international law during the period of liberalism was characterized by a shift of the center of gravity from politics to economics, from the State to Society, that international law became "non-political," was made only to fit an individualistic, capitalistic, interdependent world-society. It follows, according to the author, that today, with the end of laissez-faire, with the rise of autarchy and authoritarianism, with the predominance of State interests over individual interests, with the disruption of the earlier "international society" of trading individuals through the invasion of the economic sphere by the State, our present-day international law is absolutely obsolete in its concepts, standards and rules. It is obsolete, he affirms, because, under the present international law, States are operated only as means, not as ends, are constituted only instruments, not ultimate values, whereas in reality it is the interest of States which clash in these days marked by the ascendancy of politics over private affairs.

This writer agrees with the analysis of the present period of crisis and transformation as a movement away from superindividualism to a more collectivistic, social form of thinking. But the analysis of the pre-world war international law seems to be based on too one-sided an economic interpretation. It is the same mistake as in the Marxian theory of law: had Marx only pointed out the great importance of economic factors, he would have been on sound ground; but his attempt to explain the whole world, the whole law, exclusively as a "superstructure" over economic interests, is untenable, as is any attempt to reduce this complicated world of ours to only one factor. True, many rules presuppose the distinction between State activities and private activities, e.g., in the law of neutrality. But to say generally that inter-

[5] J. ORTEGA Y GASSET, LA REBELIÓN DE LAS MASAS (1929).

national law only served the interests and exigencies of a world-society of trading individuals, is certainly grossly exaggerated. Read the diplomatic documents to see what enormous role was played by the conception of prestige, i.e., reputation for power. Hegel's philosophy,[6] which has exercised so wide an influence, shows that the adoration of the State was, by no means, unknown to the nineteenth century. The State, according to Hegel, is the realization of the moral idea, the Fate imposing itself in its omnipotence irresistibly; everything is absorbed by the State and it is only in the State that the individual is fully realized.

In the second part, Niemeyer reviews the legal theory since Grotius. He shows that the international law since the Renaissance depended on morality, whereas in the present epoch of the Mass Man the individual's organizational orientation no longer responds to moral appeals but to efficiency and rapidity of organized action. Legal theory, he tells us, has since the seventeenth century been dominated by the "personalistic," atomistic approach; the consequence has been a dualism between subjective reality ("the interests of the States," the *raison d'Etat*) and an objective ideality based on conscience ("natural law"); law has been conceived as a normative restriction "from without" of the liberty of States. The personalistic approach, therefore, presupposes "natural law," universal standards of morality. Even the positivistic doctrine was forced to reintroduce natural law in a concealed form. But the vagueness and formalism of such concepts as "Family of Nations," "*Pacta sunt servanda*" and so on, opened the door wide to arbitrary speculations of international lawyers.

But as there no longer exists a common standard of reference in the ideal of interindividual morality, and as on the other hand, international law is necessary to prevent the cult of mere power at the sacrifice of culture, a fundamental reconstruction imposes itself: abandonment of the ethical basis and replacement by a functional basis. The new "functional international law" must find transnational elements within the very domain of political function.

The "functional approach," the author suggests, is the way out. As the States are, by definition, the topmost agencies of power in human society and as there is no possibility of a compulsion against them, except in the form of war, the "new international law" must be a "law without force," binding by virtue of its own merit, effective because of its inherent appeal. International law must not start with the conflicting "interests" of the States, but with their functional connectedness,

[6] GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (1821).

with the State as "autonomous organization and actualization of social cooperation in a certain territory," with the State which, because of its inherent function, is, at the same time, also a "local agency of international social relationships."

Functional approach: by whom? By international law or by the science of international law? The functions of law and of legal science are, by no means, the same. Apparently, Niemeyer wants a functional approach by the science for laying the ground work of a functional international law.

Such "functional approach" has often been urged upon international lawyers by sociological jurists.[7] But in contradistinction to the "realists,"[8] Niemeyer—thank God—recognizes that it is impossible to solve a single legal problem without resorting to normative standards which transcend the actual given facts. Therefore, he assigns to legal theory the principal task of analyzing the patterns and forms in our social system *and* the rational lines recognized by men as guides of their co-ordinate behavior. But how shall an international lawyer qua international lawyer be competent for such task? It is an old illusion that a lawyer, merely because he is a lawyer, is also an expert in politics, economics, sociology and everything. One might as well make it a principal task of sociology to make biological studies.[9]

The third part, showing the way to reconstruction, proposes a functional approach as a normative one, approaching social phenomena "as they ought to be." The author looks for a basis of non-moral values operating in the actual structure of social relationships, for a principle of immanent evaluation of reality, for the "transpersonal reason" of co-ordination inherent in individual acts. He is, after all, not a sociological, but a normative jurist. But his method is not a teleological one, and the criterion of legal order is for him not purpose,

[7] Pound, "Philosophical Theory and International Law," 1 BIBLIOTHECA VISSERIANA 71 at 89 (1923), sets to international lawyers "a great task of social engineering . . . a functional critique of international law in terms of social ends, not an analytical critique in terms of itself."

[8] Cf., e.g., "A realistic understanding [of the law is] possible only in terms of observable behavior," Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 COL. L. REV. 431 at 464 (1930). As a critique of such an erroneous attitude, it is enough to quote the phrase of COHEN, LAW AND THE SFCIAL ORDER 205 (1933): "if the behaviorists succeeded . . . they would have a descriptive sociology, not a juristic science."

[9] In fact, there are natural scientists who seem to suggest that a workable international law is possible only on a biological basis. E.g., HUXLEY, MAN STANDS ALONE (1941), sees the fulfillment of the task of formulating a social basis for civilization in our critical epoch only on the foundation of a new world picture reflecting the biologist's special knowledge of the human being in all his uniqueness.

but function. He distinguishes between the purposes as set by individual wills and the ends that constitute the meaning of social phenomena; the functional ends are relatively autonomous with regard to individual purposes. Social reality is structured according to an order of its own. A functional law emphasizes the inherent lawfulness of social conduct, not mere passive obedience to prescriptions. Such functional values *do* exist, the author asserts, and they have a strong normative appeal for the modern mind.

In conformity with the postulate that law knows only man-in-connectedness, the functional reorientation must start from the personification of the State, an inheritance from the Roman law, which selected the natural individuals, as isolated and complete biological units, for the cornerstone of the legal system. This attack, which can be found already in Oswald Spengler,[10] is not quite justified. I need hardly mention that in Kelsen's system the person—entirely different from the "man"—is merely a juridical construction, a conceptual point of reference for the imputation of legal duties and rights. But already in Roman law it is not the biological unit "*homo*," but the juridical construction "*persona*" which matters; a slave is a man, but not a person. The cognition that the single individual and his self-perfection is no concern of the law, that the law is interested only in man-in-connectedness, is equally very old, as shown by Aristotle's emphasis on the πρός ἕτερον relation in law or Dante's definition of law as "*hominis ad hominem proportio.*"

The meaning of Niemeyer's replacing of the "substantival" conception of the State by a functional one, made by reference, not to existence, but to performances, can best be expressed in Feilchenfeld's words: "*nicht Menschendienst, sondern Werk am sachlichen Ideal.*"

Institutions follow laws of inherent functional necessity; but that does not prevent a conflict between lawfulness and lawlessness. While taking a strong stand against the imperative theory of law, the author admits that legal rules are not submitted to the judgment of every individual's conscience. In his functional approach he tries to replace the imperative theory by a conception of law as the element of orderliness, inherent in the actual behavior of individuals (he often refers to the parallel of language). If the legal order exists in actual legal conduct, then the problems of revision, of obligatory force, of coercion disappear. Law cannot be made. The validity of legal rules is sustained by the actual behavior of individuals within the framework of social

[10] Who asks how long the modern law will be a law of personae and res, based on the vanished economy of antiquity, and when, finally, the engineer, thinking in terms of functions, will get the law, adequate to his world.

institutions. But law is not a formula for factual regularity of behavior, it is a standard of "required" behavior. And the criterion of "requiredness" is the transpersonal end with a view to which individual acts are coordinated in a relationship. The test of validity of legal rules is the legal conviction of people. The law must be found in social reality, it cannot be deliberately made. While mere "regulations," based on practical expediency, not on "inner necessity" may have their value, statutes will, in a functional law, be of decidedly secondary importance.

Functional international law is not equivalent to the endorsement of every political reality; it can only be realized as the intrinsic lawfulness of the behavior of individuals acting on behalf of States. As to international law, all its present possibilities are exhausted. The cry for "international organization" and the "federal fallacy" lead inescapably to the World State, and the World State is neither possible, nor desirable. What is possible, are international agencies with tasks, specified and concretely agreed upon in advance; possible also are "regulations" as auxiliary means. But the real international law must be a functional one; the legal rules, which cannot be made wilfully, represent the immanently necessary line of conduct pertaining to social relationships. What is needed is not to act, but to wait, not organization, but reorientation.

Niemeyer admits, as he has to admit, that the two spheres of Isness and of Oughtness constitute two different worlds, which cannot be deduced from each other, a Kantian cognition which is at the bottom of Kelsen's pure theory of law; neither does he reduce the law to facts, as many sociological jurists do; he tries rather to solve the conflict between the ideal and the real, between "actual" and "required" conduct, by putting both spheres, *Sein* and *Sollen*, into the social reality and determining the "required" conduct, the legal rules, by immanent values, by the inherent finality of social institutions, a sort of transplantation of Aristotle's ἐντελεχία from the organism to the social organization.

But is this not a new form of natural law? The author defends himself against the implication of an *ordre naturel*, on the ground that his concept of law refers, not to a natural, but to a cultural orderliness. But the historical school of jurisprudence, too, emphasized its stand against natural law and yet in the end simply replaced a philosophical with a historical natural law. Do we not have here sociological natural law? There are, indeed, many parallels between Niemeyer's theory and the historical school, which comes from Hegel and his conception of his-

toric evolution and of the State: the emphasis on the secondary character of legislation; the idea that law is found, not made; the ever-recurrent analogy of the language; the teaching that law is not a product of human will, but a common conviction; the insistence, not upon the organized force of the political society, but upon social pressure behind the rules.

Law without force? Only international law, or also constitutional law? [11] But does not Niemeyer tell us that his functional concepts hold good for all law?

There are laws of inherent functional necessity, which individuals, regardless of their personal purpose, must follow to achieve a transpersonal end, we are told. Certainly, the members of a symphony orchestra must follow a required behavior, if the transpersonal end, a perfect performance of Beethoven's Ninth Symphony, is to be achieved. But are these rules of law? Is the functional "law without force" not a replacement of law by "social-technical" rules in the sense of Paschukanis?

Intrinsic lawfulness of required behavior by individuals acting on behalf of States; what States? States are topmost agencies of power within a certain territory. What territory? Inherent finality for transpersonal ends. What ends? To this fundamental question, Niemeyer, again referring to the analogy of language, admits no concise answer can be given; ultimately, he says, it is the human being who, through his stewardship of social relationships, contributes his share to the constant development of the criterion of lawfulness. Are we here not again left with the "silently-operating forces" of the historical school? How can a behavior be regarded as legally required for transpersonal ends, if we have no measure for those ends? What Lorimer said against the utilitarians, we may ask here, too, replacing "purpose" by "function": "Function for what? Before we can measure by results, the results must be measured."

But such questions are not intended to detract from the value of the book. It is a thesis and does not pretend to constitute an ultimate solution. It is a highly interesting, challenging work; it is born out of a deep desire, which we all share, to see this war followed by a lasting and effective order in international relations. This is not the place for the writer to develop his ideas as to the future of international law; but it is an agreeable duty for the critic to congratulate the author.

[11] Some German writers isolate international and constitutional law from the other fields of law as "Spitzenrecht."