INTERNATIONAL LAW FROM A FUNCTIONAL PERSPECTIVE

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THE analysis of international law in functional terms is an accepted device of acknowledged utility. It amounts, most of the time, to the division of international relations into two quite different segments: the first corresponding to what we usually mean by the domain of "national interest," however that ambiguous phrase is defined; the second encompassing subjects of primarily social, economic, or scientific import, which by definition do not readily engage the survival sense of governments.[1] The principle conclusion drawn from this distinction is that international law operates most easily in the second area. Expressed somewhat differently, states are most amenable to regulation in those segments of their activities which they do not choose to define as central to their survival and which are most easily transposed into the terminology of some technical expertise.

At the outset, it will be helpful to make three brief comments to orient the discussion to the functionalist approach to international law. First, functionalism has the advantage of directing our attention away from the glamorous, but theoretically less important realm of major international crises, to the rather prosaic, but more significant, questions of workable international regulation. Second, despite its utility as a means for asserting research priorities, it is only occasionally a genuine form of explanation.[2] Broadly speaking, functional explanation seeks to account for the persistence of a pattern of behavior by demonstrating the ways in which it in turn contributes to the persistence of other activities in its environment. The application of functionalist views to international law is sometimes

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[1]Falk, *New Approaches to the Study of International Law*, in NEW APPROACHES TO INTERNATIONAL RELATIONS 357, 373-75 (M. Kaplan ed. 1968).

[2]Flanigan & Fogelman, *Functionalism in Political Science*, in FUNCTIONALISM IN THE SOCIAL SCIENCES __, 111-15 (D. Martindale ed. 1965). In its widest range, functionalism means that in analyzing phenomena, a political scientist will be concerned with functions or purposes served by the phenomena among other things. It is treated as one factor among many relevant ones. The more narrow view is that the approach of functionalism is the most promising.

exemplified through a demonstration of the social and economic interdependence of nations and the resulting need for the control of activities across political boundaries. But more often "functionalism" simply means that international law is conceived to perform service in some distinct subject areas but not in others. In other words, functionalism is a means of description, not of explanation. Third, however functionalism is understood, its application to international law usually proceeds in a kind of vacuum, isolated from any systematic concern for other types of legal systems. The frequent failure to deal comparatively with international and non-international legal systems in large part has resulted from traditional forms of naive comparison which see international law either as a gigantic magnification of municipal law or as an area so radically different that the very term "law" cannot legitimately be applied to it.[3]

Any exploration of international legal functions is but another way of posing a familiar question, "What is the relevance of international law?" If the comments below rely on any single assumption, it is that this question cannot be approached without simultaneously asking "What is the relevance of law *qua* law?" At the international level we admittedly deal with a singular manifestation of legal order, yet this manifestation also bears some kinship to law in other, more complex settings. We shall, consequently, begin by considering the functions law can and has performed, and then move to a consideration of the relationships between legal functions and their social and political milieu.

I. FUNCTIONS LAW CAN AND HAS PERFORMED

The "relevance" of law has inevitably to do with the problem of "fit," that is, the degree of congruence between rules of behavior and empirically observed patterns of behavior.[4] An irrelevant legal system will succumb to either of two extreme situations: it will run too far into a utopian future too fast, asking more of mere mortals than they wish to give; or it will lag woefully behind, continuing to deal piously with problems that in a changed society simply no longer exist. In the former situation, the law has been utilized for innovative purposes but it has been unable to wrench social actors from their accustomed modes of

[3]The discussion which follows necessarily reflects these considerations, even if, in the end, the subject remains a no less perplexing one than it did in the beginning.

[4]Deutsch, *The Probability of International Law*, in THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS 57, 71 (K. Deutsch & S. Hoffmann ed. 1968).

behavior. Thus, the result is a problem of social engineering. The latter case, far more common in international law, reduces law to irrelevance because the rules envision one set of problems and the environment produces another. In such a circumstance it may not even be fair to say that law has failed to regulate conduct, for it has not made the attempt. Between these extremes lies a zone of optimal time-lag, where the content of legal rules both incorporates the values and expectations of social actors and subtly diverges from them. Obviously, a set of rules perfectly responsive to observed behavior regulates nothing, for every deviation automatically becomes incorporated into the rule system.

International law has wrestled with all of these problems. The literature reflects an anguished preoccupation with the demands of reform—the desire to free international relations from war and injustice. The anguish results from the perceived urgency of the task, its manifest difficulty, and the conflict between it and another central enterprise—that of partially closing the excessive gap between international rules and international conduct. This complex dilemma lies at the center of functional analyses. For example, emphasis of functional approaches on problems of international economic growth and improved social welfare reflects reformist aims. The selection of these problems, on the other hand, involves a retreat from problems of the control of force and thus leaves untouched the great normative questions of war and peace. The more mundane business of reducing time-lag, essential in a decentralized and heavily customary system, often carries with it the need to bring rules in line with practices that are perceived to be politically undesirable, morally repugnant, or both. Should the scope and depth of international law be expanded for their own sakes or only when the substance of rules meets external moral criteria? If the development of an international law is an automatic process over which no one has very much control, can we identify areas of processes in which desirable marginal adjustments can be made? The horns of the dilemma are made no less sharp by the knowledge that it is easier to adjust law to behavior than the other way around.

The acuteness with which the problem is felt, at least by scholars, frequently derives from the view that law has some specific, determinate function to perform in all human societies. That function has been identified with the attainment of "justice," however defined, or with the realization of some particular distribution of values; in any case, with the attainment of a desired end-state for the society. Alternatively, law has been conceived to be a way of dealing with trouble and troublemakers, or freeing society from disruptive forces.

This is particularly true of the literature of international law, preoccupied as it often is with the problem of controlling or eliminating force in relations between states.

In fact, there is no reason to regard law as unifunctional. Furthermore, there are persuasive reasons, drawn from different types of societies, for believing that law should be regarded as multifunctional. There is also reason to believe that the functions performed vary systematically with the complexity of the society. Law, conceived as broadly as possible, might perform at least four different functions. These functions are listed below in order of the greater amount of resources necessary for their performance.

1. *To achieve order and predictability in the relationships among social actors.* I have viewed this as a product of the ability of legal rules and concepts to structure human perceptions,[5] or, to use Gidon Gottlieb's useful phrase, legal rules operate as a mode for "decision guidance."[6] When interacting individuals share the same set of rules, they can both perceive the world and make decisions in a manner which produces behavior that is patterned over time. As a corollary, this behavior is also mutually predictable. Rules alone suffice for this purpose if they are widely known and shared.

2. *To de-escalate and resolve conflict, by curbing or eliminating its violent expression.* This function gives use to the opportunity to vary the means. This can be exemplified by the use of regularized bargaining and mediation. It may also involve ritualized conflict as a surrogate for uncontrolled forms (*e.g.*, verbal expression of hostility, duels, feuds, ordeals, and "war" itself when detailed laws of war are operative). This function requires the rule system associated with the first function and institutional means for conflict management, particularly institutionalized bargaining and manifest third parties.

3. *To control deviation.* This function is conventionally referred to as the police function and is dealt with through the criminal law. While this appears to overlap substantially on the conflict resolution function, it is in fact rather different. Deviation from norms need not involve conflict behavior; conflict behavior may or may not constitute

[5]M. BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 151 (1968). The author lists 6 formal characteristics of legal theory and also lists the polymorphous qualities of law.

[6]G. GOTTLIEB, THE LOGIC OF CHOICE: AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY 66-77 (1968). The author discusses reason as guided by rules, causing confusion by thinking that the rule is the reason. He also discusses the process of reasoning as creating a link between rule and actions. The rule is an inference-guidance device, with court interpretation enhancing the inference-guidance.

deviance. Moreover, since deviation control depends upon rules and since conflict resolution depends upon procedures and authorized representatives of the community able to act in a coercive manner, function three requires considerable less in the way of institutional resources.

4. *To set policy*. This function utilizes legal rules to move a community towards a desired end-state more specific and/or comprehensive than that suggested by the attainment of predictability, conflict control, or deviation control. Thus function four is characterized by the presence of a rule-making or legislative authority in addition to the apparatus listed for the other functions. Tax laws, which involve a substantial redistribution of resources, fall into this category, although the complete articulation of a tax policy involves other functions as well.

While these functions can be separately performed, none prevents the performance of the others. The four functions cover a wide range of human activities and require substantial resources for their cumulative fulfillment.

This suggests that all social systems may not possess the ability to perform all legal functions, nor should we expect them to. To assume, for example, that international law performs the same functions as does municipal law is to indulge in gross oversimplification. What is far more probable is that the nature of the society in question determines, at least in large measure, the variety of *performable* (as opposed to merely desirable) legal functions. This is strongly suggested by Richard D. Schwartz and James C. Miller through their finding that societal complexity is systematically related to three fundamental legal institutions: mediation, police, and counsel.[7] As complexity increases, institutions are added in sequential fashion. As a result, four types of societies can be distinguished: those with none of the institutions; those with mediation alone; those with mediation + police; and those with mediation + police + counsel. Remarkably few societies appear to deviate from this typology. Mediation and police, respectively, bear strong resemblances to functions two and three listed above.[8]

In any case, the evidence is strong that societal complexity and the complexity of the legal system are related systematically; legal characteristics occur in some combinations but not in others.[9]

[7]Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. SOCIOLOGY 159 (1964).

[8]*Id.* at 163-64.

[9]While it is by no means central to my line of argument, the way is also left open for a theory of legal evolution.

On the basis of the functions listed above, we can distinguish five possible legal systems arranged to form a scale running from the last to the most complex:

1. No legal functions performed, logically possible but empirically most unlikely.
2. Predictability.
3. Predictability + conflict management.
4. Predictability + conflict management + deviation control.
5. Predictability + conflict management + deviation control + policy articulation.

It is also worth speculating that these five possible legal systems are associated with differing levels of societal complexity, such that system five would occur only in the most complex society, characterized by such elements as the largest number of social actors, highest volume of interactions, and most extensive role differentiation. The simplest society would possess a legal system which would approximate system two (since system one is unlikely to exist in any ongoing social group) and the systems in between would occur in environments of ascending complexity.

II. LEGAL FUNCTIONS AND THEIR SOCIAL AND POLITICAL MILIEU

At this point, the analysis of functions and the question of milieu obviously intersect. We are accustomed to speak of both "international law" and "the international system" in the singular, as if there were one legal system and one system of international relations with which we must contend. This imputed singularity certainly makes thought and discourse easier. But there is no good reason to assume that either law or society on the international level possesses the unitary qualities so often attributed to them. While it is beyond the scope of my discussion to analyze the reasons for these traditional usages, they are generally attributable to three factors. First, it is simply easier to impute a unitary character than it is to think in terms of multiple laws and multiple societies. The use of unconscious simplifying assumptions pervades political and legal discourse. We speak of "the United States" and of "the American legal system," in each of which lines of authority are clear, and control from the top is assumed. This may or may not be true; certainly we do not employ these terms on the basis of careful empirical research, but only on the basis of convenience. What empirical research there is suggests that the boundaries of the United States contain multiple legal systems that overlap and frequently conflict. At the international level, where power is widely

diffused and coordinating institutions are absent, the likelihood of a gap between the terms of discourse and observed behavior is correspondingly greater.

Second, a long intellectual tradition stretching back to the spokesmen of natural law pushes us in the direction of a global approach to international law and relations. It has become second nature to view international events in a global perspective, just as international norms are automatically conceived to possess global validity. Third, there has in fact been a long-term tendency towards greater interaction between Western and non-Western nations. Processes, first of colonization, then of de-colonization, have been mistaken for genuine globalization. There is, as a matter of fact, quite as much evidence that receding Western influence in the non-Western world will produce increased regional autonomy and differences. Hence, at the very least, we ought to experiment with a more complex type of analysis which recognizes the existence of multiple political and legal systems.[10] Nonetheless, we are still largely trapped in the thinking of an earlier period when assumptions of singularity went unquestioned.

Once we acknowledge and attempt to delineate multiple international societies, each with its own structure of norms, we must be prepared to find that different combinations of legal functions are actually performed. Sub-global international communities can be expected to differ markedly in their degrees of formal organization, size, cultural homogeneity, value systems, interdependence, and life-span; in a word, in their degrees of integration. Given differences along these dimensions, we can expect differences in the functions which legal rules can effectively perform. Thus three or four major varieties of legal systems might be manifested at the international level in a single time period.

An analysis of the functions of international law of the kind proposed assumes that international *laws* and international *societies* manifest a "primitive" character, at least in comparison to their state components. In other words, the characteristics of most international

[10]Hints of this existence have materialized from time to time, as in Morton Kaplan and Nicholas Katzenbach's historical analysis of international law and politics in the nineteenth and twentieth centuries. Adda Bozeman's explorations of the cultural assumptions of legal thought, and the general interest in the legal consequences of international regional organizations are also noted. Kaplan discusses the "balance of power," how it developed through a treatment of the international system as model and reality, how it fell apart, and how it was replaced by the bipolar system with international institutions. *See* A. BOZEMAN, POLITICS AND CULTURE IN INTERNATIONAL HISTORY (1960); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 30-55 (1961).

systems are closer to those of societies usually studied by social anthropologists than they are to those of their own state components.[11] Stanley Hoffman, among others, has argued that this is a false characterization since it fails to take into account the high degree of legal and societal complexity within individual states.[12] In other words, the complexity of the parts determines the complexity of the whole, and, indeed, if this were true, the analogy of the primitive and the international would be patently misleading. In fact, there does not seem to be any obvious reason why complex components cannot be put together to form a system that overall is simpler than any single part. One explanation for this birth of apparent simplicity from a foundation of complexity is the difficulty that occasionally arises in determining exactly what the components are. More commonly, however, the identity of the parts is known, but if they act corporately, their internal complexity is largely irrelevant to the level of complexity of their external relationships. Thus the differences in interactions among three actors or ten actors may depend more on the numbers, common tasks, and shared environment than on whether the actors are states, corporations, universities, or individuals. We find no difficulty in recognizing that the observable behavior of an individual is far simpler than the sum of his internal physiological processes, yet the extension of the same generalization to larger systems often proves unacceptable to us.

III. CONCLUSION

Let us now return to the questions of relevance discussed above under Part I. In fact, when we ask about relevance, we wish to know whether a given legal system operating in a particular environment at a specified point in time is performing all the functions of which it is capable. If some functions are not being performed, it remains to be determined whether the cause lies in the failure of the legal system to realize its potential or merely in the inability of the environment to support certain kinds of tasks. Similarly, we cannot ask of a legal system more than it can perform in a given milieu. If a legal system is in this sense relevant to its society, and still fails to perform as we

[11]M. BARKUN, *supra* note 5, at 14-35; Masters, *World Politics as a Primitive Political System*, 16 WORLD POL. 595 (1964). These authors give reasons for comparing primitive and international politics. There are similarities such as self help and violence. Analogies, as well as differences between international politics and a primitive, stateless system are explored.

[12]Hoffman, *International Law and the Control of Force*, in THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS 21, 24-25 (K. Deutsch & S. Hoffmann ed. 1968).

desire, our obvious recourse lies in efforts to change the character of the society—a very different matter. The most disturbing failings of international law are attributable to system-level characteristics; that is, we ask of the society legal attributes which it cannot produce, quite as futile as demanding of the Copper Eskimo that they have legal counsel. A related but more subtle problem lies in the area of system boundaries. At the international level, when we speak of "system," we usually have in mind an all-encompassing global network of interactions. The more comprehensive the system, the simpler and less integrated it is likely to be, and, consequently, the lower the level of legal performance of which it is capable. International legal systems might be seen to do more, if they could be seen to operate in more narrowly bounded communities where the levels of complexity and integration are higher.

Is it not possible for a legal system to perform efficiently in the sense of rising to its maximum level of functional performance and yet be subject to considerable modification? To say that a legal system performs certain specified functions tells us relatively little about the content of legal rules. Functional performance necessarily gives rise to considerable substantive leeway. The demands of predictability or deviation control or policy articulation can be met by very different kinds of rules. Hence, we can remain within the limits that a given society sets and still seek changes in the content of the rules, so long as those changes do not push the legal system to perform new functions for which the means are not available. It ought also to be borne in mind that the legal systems discussed earlier differ drastically, not simply in the scope of their operations, but in the means available for their conscious alteration. H.L.A. Hart's secondary rules,[13] through which conscious change is prescribed, are conspicuously absent in all but the most complex systems. Put in another way, simple legal systems not only perform simple tasks, but also lack internal machinery for task expansion. Secondary rules of recognition, change, and adjudication

[13] H. HART, THE CONCEPT OF LAW 79 (1961).

> Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.

Id. The author states that law with its complexity and perplexing features can best be understood by studying interplay between two basic types of rules, the primary being related to what human beings are required to do and the secondary modifying or enlarging the first.

introduce the potential for almost indefinite modifications in the legal system; at the same time they produce the same problems of law-society congruence alluded to earlier. The ability of the legal system to change itself matters little if these changes have no effect upon the society. International legal systems, where secondary rules are either poorly developed or nonexistent, lack the ability to alter substantially their own internal character, ignoring for the moment the greater problem of societal impact. Hence we would do well to rein in our aspirations, however anxious we may be to alter the normative status quo. The consequent choice is between that which is highly desirable but practically impossible, and that which may be marginally desirable but within the realm of possibility.