
Law's Frontier – Walther Schücking and the Quest for the Lex Ferenda

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Abstract

Based on a short recapitulation of Schücking's family background and his formative years as a law student and young scholar, the article then focuses on Schücking as a left-liberal politician and – strongly influenced by Kant's tract on Perpetual Peace – as an adherent to a progressive international legal order based on the Organization of the World and the rule of law. Schücking participated in the Versailles Peace Conference and in this capacity supported the League of Nations project. However, he became increasingly critical with regard to the Versailles Peace Treaty which he held to be shortsighted and prone to lead to another World War. He withdrew from his political activities and concentrated on developing his concept of an international law as a dynamic tool to induce the necessary process of peaceful change.

1 Introduction

Walther Schücking's life and work were deeply influenced by the political and social environment of the outgoing 19th and beginning 20th centuries that were marked by far-reaching changes in the political and social landscape. There were the growing tensions among the European Great Powers and the corresponding decline of the European Security System, set up by the Vienna Congress in 1815, but now losing its peace-keeping capabilities, due to the wave of nationalism and the social unrest caused by the growing power of the working class. Schücking was born in 1875, that is amidst the increasing struggles between the conservative, liberal, and socialist forces in Germany and beyond. He grew up in a harmonic family in which the strict, but increasingly liberally minded father, Lothar Schücking, and the warm-hearted, but also temperate and pragmatic mother, Luise Schücking, had a lasting impact on

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his personality, that is self-discipline and a keen interest in public affairs, on the one hand, and a strong compassion and sense of justice together with a good deal of strong-mindedness, on the other hand. These became lasting traits of his personality and were clearly reflected in his scholarly work as well as in his political activities.¹ In section 2 we shall recall Schücking's formative years as a law student and young scholar. In section 3 we shall then try to trace Schücking's philosophical and jurisprudential positions as the basis of his understanding of the interaction of law and politics, particularly of international law. In the concluding section we will examine Schücking's lasting contribution to a better understanding of law's frontier on the one hand, and the necessary interaction between the *lex lata* and the *lex ferenda* on the other hand.

2 Formative Years

Following a family tradition Schücking decided to study law. He enrolled at the University of Munich where he was very impressed by the lectures of the left-liberal, social-reformist Lujo von Brentano. He then spent a short time at the Universities of Bonn and Berlin. Schücking began seriously to pursue his legal education at the University of Göttingen where he soon passed his first state examination with distinction and decided to pursue an academic career. He did his post-graduate studies with Professor Ludwig von Bar, who was not only a renowned scholar in the field of international conflict of law and a member of the Permanent Court of Arbitration at the Hague, but also had served as a member of the Imperial Parliament on the ticket of the left-liberal party.² He strongly supported Schücking's post-doctoral work. Given Schücking's strong political interest as well as scholarly aspirations, it is not surprising that von Bar became a role model for him.³ As early as in 1899 Schücking received the *venia legendi* in constitutional and international as well as administrative law, and got his first appointment to an extra-ordinary professorship at the University of Breslau/Wrocław at the age of 25. Only three years later he was appointed to a full professorship at the University of Marburg/Lahn. It was now that Schücking began to reflect in depth on what were his jurisprudential and philosophical points of view as the basis for his research work and political activities.

3 Philosophical and Jurisprudential Positions

To outline Schücking's jurisprudential and philosophical positions is no easy task since he never wrote elaborately on this subject. Thus, one has to rely on the various

¹ For further details see F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung – Dogmatische Strukturen und ideengeschichtliche Bedeutung* (2001), at 43 ff; as well as Wehberg 'Das Leben Walther Schückings', 35 *Die Friedens-Warte* (1935) 162.

² See Wehberg, 'Ein grosser deutscher Völkerrechtler. Zum 100. Geburtstag Ludwig von Bars', 36 *Die Friedens-Warte* (1936)_173, for helpful information on von Bar.

³ See Bodendiek, *supra* note 1, at 48, and D. Acker, *Walther Schücking (1875–1935)* (1970), at 7–9, with further references.

explicit self-descriptions and, of course, implicitly on Schücking's scholarly and political activities that are based on his jurisprudential and philosophical convictions.⁴ Schücking described himself as an adherent to a critical idealism as he found it in Immanuel Kant's works. Marburg was, at that time, a stronghold of the Neo-Kantian philosophy that aimed at a renewal of Kant's philosophy.⁵ Schücking called upon the leading intellectual elite to bring about a new age of idealism. It is not by chance that Schücking did not find his closest colleagues and friends in his law faculty, which was dominated by strongly conservative members who were also adherents to the positivist jurisprudence that Schücking rejected. Rather it was Paul Natorp and Hermann Cohen, both renowned adherents to Neo-Kantianism, with whom he developed his philosophical positions. The interdisciplinary exchange with Natorp and Cohen led Schücking to believe strongly that scholars should not remain in the seclusion of their studies. Rather they should open up to their social and political environment and contribute to social and political progress, law being an important instrument to bring about such progress. Schücking himself lived up to his credo by joining several social-liberal associations or groups, and at one time ran – unsuccessfully – for a seat in the Prussian Diet.⁶ The Prussian so-called three-class system of voting favoured the conservative candidates over the left liberals. Indeed, Schücking's moderately pacifist writings and his open commitment to the liberal left earned him the fierce criticism of his colleagues not only in Marburg but also of the community of the German international and constitutional law professors, and, of course, of the Prussian authorities. He was repeatedly subject to disciplinary measures, particularly during World War I, when he publicly opposed the war and the political goals proclaimed by the Imperial Government and the Military High Command. Furthermore, he entertained secret and not so secret contacts with like-minded friends and colleagues in neighbouring 'enemy countries' like the Netherlands, the UK, and France, with the aim of bringing about an early end to the war.⁷

The political environment in Germany changed – at least for a decade – when the war was over. Now Schücking's advice was sought with regard to the peace negotiations in Versailles in general, and with regard to the League of Nations project in particular. He was a member of the German delegation to the Versailles Peace Conference until he withdrew because he became increasingly disappointed with the policies Entente Powers, who rejected the German draft proposal for the League Covenant *in toto*.⁸ It was quite in line with his straightforward character that, as a member of the newly elected German Reichstag, he voted against the ratification of the Versailles Peace Treaty, which he criticized as short-sighted and prone to lead to another major war.

⁴ See Bodendiek, *supra* note 1 at 116 ff.

⁵ On the development of the many schools of Neo-Kantianism and the Marburg school in particular see Holzhey, 'Neukantianismus', in J. Ritterrand and K. Gründer (eds), *Historisches Wörterbuch der Philosophie* (*Historical Dictionary of Philosophy*) (1984), vi, at 747 ff.

⁶ Acker, *supra* note 3, at 21–22.

⁷ *Ibid.*, at 59 ff.

⁸ The German proposal is reproduced in H. Wehberg and A. Manes (eds), *Der Völkerbund-Vorschlag der deutschen Regierung* (1919).

In 1926 Schücking returned to his academic work when he was appointed to the chair for international law at the University of Kiel and to the directorship of the Kiel Institute of International Law which has carried his name since 1995 in memory of the Institute's most outstanding director. In Kiel he worked, *inter alia*, on the comprehensive first and only commentary on the League of Nations Covenant together with his close friend Hans Wehberg,⁹ with whom he also co-edited the journal *Die Friedens-Warte*, which was founded by one of the leading pacifists, H. Fried, and was – and still is – committed to furthering the cooperation of international law and peace research.¹⁰

In 1930 Schücking was elected to the Permanent International Court of Justice in The Hague on which he had served as an *ad hoc* Judge in the *Wimbledon* case a decade earlier. When in 1933 the National-Socialists came to power Schücking was ousted from his position at the Kiel Institute *in absentia*. He could never return to Germany and he died at The Hague in 1935.

Inspired by his pacifist convictions Schücking began to develop a concept aimed at securing a lasting peace among the nation states based on the rule of law. Philosophically, this approach was obviously based on Kant's tract on *Perpetual Peace*.¹¹ Schücking shared Kant's central *dictum* that individual freedom and security can only be achieved within a legally constituted order. Accordingly, Kant argued that people leave the rude state of nature and subject themselves to the rule of law.¹² Consequently, Schücking, following Kant, strongly believed that the concept of a legally constituted order could and must be realized on the international level, as well. Based on this approach, Schücking understood international law as a value oriented law in contrast to the then dominant positivist legal doctrine. In his view international law was an instrument to resolve international conflicts, and thus had to be developed and interpreted according to the supreme paradigm of peace.

As already mentioned, Schücking was not only a scholar living in the lofty sphere of academia, but was a political person, feeling a strong responsibility to translate his visions of an international peace order into the real world, i.e., to develop a legal framework for a lasting peace order, based on a realistic assessment of the existing political environment. In other words, he was convinced that a realistic concept of an international peace order had to be based on a careful sociological analysis of the international system and the traditional political behaviour of the sovereign states as the dominant actors in this system.¹³ In modern terms, Schücking became a pioneer

⁹ W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (1st edn., 1921; 2nd edn., 1924; 3rd edn., i, 1931, with Böhmert).

¹⁰ For comment see Porsch, 'Die Friedens-Warte zwischen Friedensbewegung und Wissenschaft', 74 *Die Friedens-Warte* (1999) 39. Biographical information on Fried is provided by H. Wehberg, *Die Führer der deutschen Friedensbewegung* (1923), at 19–23.

¹¹ See Bodendiek, *supra* note 1, at 179 ff; W. Schücking, *Organisation der Welt* (1908), at 53 ff; Delbrück, "'Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein'" – Kant und die Entwicklung internationaler Organisation', in K. Dicke and K.-M. Kodalle (eds), *Republik und Weltbürgerrecht* (1998), at 181 ff.

¹² I. Kant, *Zum Ewigen Frieden. Ein philosophischer Entwurf* (1795). Kant's approach to international organization is explored in Delbrück, *supra* note 11.

¹³ Cf. notably W. Schücking, *Neue Ziele der staatlichen Entwicklung* (1913); id., 'Allemagne et le progrès du droit international', 1 *La revue politique internationale* (1914) 417. For a thorough analysis see Bodendiek, *supra* note 1, at 119 ff.

of interdisciplinary research, i.e., in his case, of scholarly cooperation between international law and the emerging discipline of peace research. As he entertained close relations with the various pacifist associations and groups he found much support in his new approach to unfolding a realistic concept for a lasting international peace order.¹⁴

For Schücking the key to the creation of an international peace order was to establish, on the international level, an equivalent to the Kantian legally constituted order of the states, i.e., a legally constituted international community of the states. In 1908 he published his ground-breaking tract on the 'Organization of the World'.¹⁵ In 1912, this publication was followed by a comprehensive analysis of the results of the two Hague Peace Conferences of 1899 and 1907,¹⁶ in which, for a considerable time, Schücking saw the beginning of the formation of a legally constituted world order. Thus his scholarly work in the years after the first and the second Hague Peace Conferences concentrated on possible world federation models. However, after the creation of an international Prize Court¹⁷ – a court that should have possessed obligatory jurisdiction – failed, Schücking himself conceded that the institutional steps taken by the Hague Peace Conferences did not amount to the kind of organization of the world that he favoured as the basis of an international rule of law. Thus, he turned to concrete problems that needed to be resolved in order to establish the rule of law on the international level. He focussed on two main issue areas that he considered to be essential for the realization of the rule of law.

First, he addressed the question of the role of sovereignty in the 'peace through law' strategy, and, secondly, the problem of the enforcement of international law. Quite in line with his methodological approach, i.e., to analyse legal concepts and principles on the basis of their historical and sociological origins, he carefully traced the origins of the sovereignty principle – an approach that he shared with Max Huber by whom Schücking was befriended, although curiously they did not mutually refer to their scholarly work.¹⁸ Schücking did not deny the scientific value of the concept of sovereignty, but he rejected the notion of sovereignty as an insurmountable obstacle to the organization of the world, i.e., building of a community of the states under the rule of law.¹⁹ He concluded that the principle of sovereignty originated from the struggles of the territorial princes with the Pope and the Emperor in the early modern times.²⁰ As such it had a progressive cultural effect. But, given the social and political changes brought about by the forces of modernization, such traditionalist understanding of sovereignty could have only negative effects. He freed the concept of sovereignty of

¹⁴ For more on this point see Bodendiek (in this volume), at 741.

¹⁵ Schücking, *supra* note 11.

¹⁶ *Der Staatenverband der Haager Konferenzen* (1912), translated as *The International Union of the Hague Conferences* (trans. Fenwick, 1918).

¹⁷ Cf. Convention (XII) relative to the Creation of an International Prize Court (1907).

¹⁸ On Huber's sociological approach see Delbrück, 'Max Huber's Sociological Approach to International Law Revisited', 18 *EJIL* (2007) 97.

¹⁹ The point is explored by Bodendiek, *supra* note 1, at 163 ff.

²⁰ The following draws on Schücking, *supra* note 11, at 77 ff.

its almost mythical character and reduced the meaning and function of sovereignty to a legal concept that defines the states' capacity to act legally within the community of states as subjects of international law, thereby possessing the legal power to communicate with other subjects of international law and enter into legally binding relations, that is, *inter alia*, by participating in the organization of the world with the consequence that they subject themselves to the rule of law.

Schücking, as much as he was an idealist, was no utopian. Although he devoted much of his work to the development of the peaceful settlement of international disputes, he also firmly believed that international law, like domestic law, needs procedures to enforce it, for instance, decisions by arbitration courts. Schücking certainly was not the first international legal scholar who called for the prohibition of war and emphasized the need for obligatory arbitration. But within Germany he, indeed, was the first – and for quite some time: the only – international scholar who clearly saw that the peaceful settlement of international conflicts procedures needed a strong international 'Executive' to enforce not only the decisions by arbitrators, but international law in general.²¹ He had quite modern ideas of the institutional set-up and the powers of such executive organ that he called the 'International Reconciliation and Mediation Office'.²² Its powers included the right to sanction violations of international law, such as disregarding binding decisions of arbitrators, violating a moratorium imposed upon states, or violating the rules of international humanitarian law. Sanctions were to include diplomatic and economic measures as well as military punitive actions. The latter were to be undertaken by an international force consisting of national military contingents. Schücking knew that his concrete and yet visionary proposals for backing up the rule of law by an 'International Police' – as he called the executive organ – were not yet in tune with the dominant political class – national and international. It took two cruel and disastrous world wars before the international community of states realized much of Schücking's vision, albeit in a much watered down format.

4 Law's Frontier

Given the little immediate effect his scholarly work had on the political conduct of states, it is of special interest to find out what made Schücking hold on to his approach to solving the problems of creating a lasting international peace order. It appears that the key to understanding Schücking's unyielding commitment to his scholarly work on the vision of an international peace order under the rule of law is his understanding of the role of law in an international environment that was dominated by sovereign states.

As already mentioned, Schücking perceived existing international law as a – in a way – technical instrument that could offer a chance for states to solve disputes in

²¹ In addition to his early works, see notably Schücking's 1927 Hague Lectures ('Le développement du Pacte de la Société des Nations', 20 *RdC* (1927-V) 353) and his article on sanctions by the League of Nations ('Die Organisation der Völkerbundexekution gegen den Angreifer', 16 *Zeitschrift für Völkerrecht* (1932) 529 – co-authored with Rühlund and Böhmert).

²² See notably Schücking's detailed study, *Das völkerrechtliche Institut der Vermittlung* (1923).

a peaceful manner according to legally prescribed procedural rules and substantive norms of international law. It was, *inter alia*, for this reason that he welcomed the adoption of the Convention for the Pacific Settlement of Disputes by the Hague Peace Conference of 1899.²³ However, his aspirations went further. As much as the legal instruments of peaceful solution of disputes were of great importance, their effects remained limited in so far as they were based on the existing international law, which by its very nature is static and thus necessarily has a more conservative character, the possibility of an interpretation of the law according to the supreme paradigm of peace notwithstanding.²⁴ Already in the course of Schücking's political activities in the social-liberal groups in Marburg he was convinced that it was imperative to promote political strategies aimed at a peaceful change in the existing socio-economic conditions. As one of the instruments to be used to bring about such socio-economic change he favoured the development of progressive law. Quite in line with this basic approach he postulated that international legal scholarship should not only be concerned with the international law as it exists, but should also engage in its progressive development. In other words, Schücking postulated that legal scholars in general and international legal scholars in particular should concern themselves with legal policy, as well.²⁵ For him this approach meant that besides the existing law – the *lex lata* – the *lex ferenda* was a legitimate object of scholarly research. The method he used to develop blueprints of progressive international law – he himself called it an evolutionist method of legal policy – was based on the careful elucidation of the historical and present nature and causes of international conflict formations. The task of international scholarship was then to cast the results of the political and sociological findings into appropriate international legal rules and principles as the *lex ferenda*. In this approach Schücking followed a methodological movement that – inspired by the theoretical work of Rudolf Stammler²⁶ – distanced itself from the then prevailing legal positivism school. This methodology met with strong criticism on two points. First, as Schücking himself clearly saw, this methodological approach risked leading to an unscientific mixture of *lex lata* and *lex ferenda* – a distinction that he held to be one of the most valuable contributions of legal positivism. Secondly, critics argue that by this method legal rules would be created through the impossible inference from the Is to the Ought. That is to say, that rules with the force of law cannot be derived from mere facts. Furthermore, in developing progressive international legal rules and principles, i.e., the *lex ferenda*, international law scholars – so Schücking warned – should abstain from postulating international legal norms that would be too far removed from reality – again a position that Schücking shared with Max Huber, who warned that international law must always be close to its socio-political substrate.²⁷ He correctly observed that the dissociation of law and facts is inherent in the development of law generally and of

²³ Convention (I) for the Pacific Settlement of International Disputes (1899).

²⁴ On the nature of international law see J. Delbrück and R. Wolfrum, *Völkerrecht* (2nd edn., 1989), i/1, at 46 ff.

²⁵ See notably W. Schücking, *L'Allemagne et les progrès* (1914), at 427; also Bodendiek, *supra* note 1, at 124 ff.

²⁶ See, for instance, R. Stammler, *Die Lehre von dem richtigen Rechte* (1896), in English, *The Theory of Justice* (trans. I. Husik, 1925).

²⁷ Cf. Delbrück, *supra* note 18, especially at 108–110.

international law in particular.²⁸ Despite these *caveats* Schücking held on to work at the frontiers of international law – a legacy that has been held in high esteem in the Walther Schücking Institute to this day, with the exception of the short period between the years 1936 and 1943, when the Institute was under the directorship of Paul Ritterbusch – a staunch National-Socialist who was more interested in international relations and the ‘National-Socialist Theory of the State’ than in international law.²⁹

However, Schücking’s quest for the *lex ferenda* – and that also means for him inevitably to work at the frontiers of international law – is characterized not only by avoiding the ‘unscientific mixture’ of the *lex lata* and the *lex ferenda*, but also by his clear insight that working at the frontiers of international law means recognizing that the very notion of a ‘frontier’ implies the marking of the limits of the effectiveness of law, and particularly of international law. This insight appears to be the reason why Schücking shifted the main focus of his research away from visionary models of an international peace order, i.e., away from the *lex ferenda*, to the post World War I organizations like the League of Nations as the main already existing instruments for the preservation of peace, i.e., the post-war international *lex lata*. The main work in this new approach certainly is the commentary on the League of Nations Covenant, which Schücking co-authored with his friend Hans Wehberg.³⁰ Schücking’s view of the Covenant was critical, but the main object of his sharp criticism was the Versailles Peace Treaty, of which the League of Nations Covenant was an integral part and thus a part of the post-war *lex lata*, as already mentioned. As a member of the League of Nations Codification Committee Schücking strongly pleaded to begin with a comprehensive codification of the international law, but the majority of the members of the Committee found such project too premature.³¹ Besides the seminal work on the League of Nations Covenant Schücking devoted much of his time to public appearances and to the publication of numerous articles on current national and international political events concerning the post-war peace order, which he increasingly found threatened by the rising political radicalism in Germany and the – in his view – intransigent politics of the victorious powers. In most of his public utterances Schücking presents himself as the moderate but at the same time strongly committed pacifist that he had been since his Marburg times.³² In his untiring quest for the international *lex ferenda* he learned much about the frontiers of the law, and he left the legacy that in order to achieve a *lex lata* that satisfies the criteria of justice and humanity it is not only the professional ethos, but also the moral imperative that the international legal scholar engage in the progressive development of international law.

²⁸ See Huber, ‘Die soziologischen Grundlagen des Völkerrechts’, in M. Huber (ed.), *Gesellschaft und Humanität – Vermischte Schriften* (1948), iii, at 49 ff.

²⁹ For more on Ritterbusch and National-Socialist approaches to international law more generally see Stolleis, ‘Against Universalism: German International Law under the Swastika’, 50 *German Yrbk Int’l L* (2007) 91.

³⁰ Schücking and Wehberg, *supra* note 9.

³¹ Bodendiek, *supra* note 1, at 255.

³² For a complete listing of Schücking’s public utterances, newspaper articles, etc., see Bodendiek, *supra* note 1, at 314 ff.