THE TEACHING OF INTERNATIONAL LAW

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I have no particular thesis on the teaching of international law. I think that the type of syllabus varies enormously. If one is dealing with post-graduate work, then one's decision is based on whether one wants a tightly knit, one-year examination-based LL.M. for postgraduates with little time to spare, or whether one wants some high-grade, ambitious, D.Phil. thesis-based structure. So many conceptions of what one wants exist; so many different types of customer exist; and this is true of both the United Kingdom and the United States and Canada. So I do not like models and caricatures as substitutes for the complications of life. On the other hand, we have to discuss matters in terms of some sort of generalization if only to save time. So I am going to perpetrate a few generalizations.

I do not overall like the dichotomy between English and American style which has been referred to today. I do not say that it does not exist. I think it is a question of emphasis and degree. One thinks of the United States in terms of international law that it is a large place; it has many institutions, and one thinks of a diversity of people. One thinks of McDougal, Bishop, Baxter, Falk. Falk is in some ways both technical- and policy-oriented. There is, if you like, a spectrum of ways of handling law and policy, and whilst one hears of the Yale School a great deal, and perhaps one overreacts to the Yale School, there are, as I say, a number of other American authors and also a judge (Jessup) who are just as orthodox as the English. Just as on this side of the Atlantic there are a number of people who, with or without an apparatus of concepts, are nevertheless conscious of policy issues. I do not like the notion of a sharp contrast.

I warmed to the general spirit of Richard Falk's contribution this morning, to this extent: that if one looks to see what is characteristic of the United States, then one learns about oneself. There is some value in making comparisons, certainly, but I think we have certain shared problems, and these problems all stem from a tendency towards parochialism. I do not want to explain the possible reasons, particularly in the United Kingdom, for increasing parochialism in all sorts of spheres, nor am I content to be told that there is considerable Anglo-American cooperation, that there is great talk about the Common Market, and so on. I am not sure that that is good enough. I think that a "club" atmosphere

amongst five or six states can be just as parochial vis-à-vis the great wide world as single-state parochialism; there is no nice sharp line between internationalism and parochialism. There are at least two major recent works in the English literature which are perfectly content—and this is their very object—to present the rules in terms of the judicial decisions and to a lesser extent the practice. The emphasis is on municipal courts of about five states doing things. This is a more parochial approach than Oppenheim; it is a more parochial approach than Hall (whose final edition by Pearce Higgins appeared in 1924); it is a more parochial approach than Wheaton. It really concerns me that one can have this situation: that brand-new books can appear in the last ten years with this sort of general standpoint.

So whether we are British or American, and whichever general approach we have to the teaching of international law, my simple message is: Avoid parochialism. This is the duty of the teacher. He does not have to agree with what the Ruritanians do; he does not have to agree with what the General Assembly does; he does not even have to agree with unanimous resolutions of the General Assembly. But he should have the decency to report them to his students. There is a great tendency at the moment for some people to avoid reporting what they do not like. We all have our particular standpoints and our preferences, and it may be very difficult to eliminate these from our teaching, but there are certain "mechanical" safeguards that one can take, and one of them is reporting: just reporting what goes on in the world at large, and not simply what a particular group of states does. It does not make it any better if your parochialism is that of Douglas-Home or George Brown or Brezhnev or Rogers or whomever.

I have already dealt with my view that the dichotomy or divergence point can be overstressed. But I would like to pursue that a little further. We have been talking about international law and attitudes towards it. It is quite common among American lawyers, it seems to me, to misreport what English courts do. English judges, we know, are easy targets for accusations of gross conservatism. But it is the case that English courts do pay great attention to policy. In Oxford one has to teach a variety of subjects, and one of the subjects I teach is administrative law. Well, one cannot spend very long with that subject without being aware of the enormous freedom which the courts have in approaching various large issues, affecting Ministers' powers, and so on. In *Sweet v. Parsley*,[1]

[1] [1970] A.C. 132 (1969).

which is the House of Lords' authority on the defintion of crimes of strict liability, the leader for the appellant was on her feet for 2 ½ days dealing with an issue on which there were no binding authorities (the House of Lords can do as they please); their Lordships were fed with the relevant authorities or useful cases, but what they were interested in, in argument, was policy—the whole position of managers of flats whose tenants smoked cannabis. They were not interested in a particular Oxfordshire farmhouse; they were interested in the extrapolation from that to the Greater London Council, to the managers of hundreds of thousands of flats. The whole matter was based on policy—what would happen if . . . ? — and a lot of cross-questioning, on practical points.

I would agree that there is a difference of emphasis between British and American approaches. This is enhanced by the Englishman's conception of the Supreme Court in the United States, of course, which has a special role. However, if you ignore the Supreme Court position, which is a special one, the behavior of the two sets of courts is not perhaps so radically different.

I think also that, so far as there are objective differences between English and American teaching, some of these stem from, as it were, genuine differences, not differences of approach, but of underlying differences, differences of geography. International law in the United States is mainly taught in graduate law schools to large classes, where it would be strange if the teaching methods were not rather different to those of the typical, relatively small undergraduate law course in the United Kingdom. The differences are, I think, traceable simply to the rather different conditions in which people are taught in English institutions and American (apparently, though superficially parallel) institutions.

One can make other points about the contrast between the case-method approach and the textbook approach to teaching.

Now, a lot has been said about the relevancy of policy, and it seems to me clearly that the teacher should bring policy in. The question is: How does one do this?

If one's students are at all mature and well informed, then one can to some extent surely assume that they have the sort of framework vis-à-vis the higher levels of policy about the interests of underdeveloped countries, the ideological clash between East and West, and so on, that they have their own choices, and at least one should not have to put that sort of policy background to them.

Secondly, I think that a lower level policy is a very useful, practical

part of instruction simply in explaining the motivations of states. In fact, closer reference to policy motivation might lead simply to better factual information.

A good illustration is the persistent misreporting in the Anglo-Saxon literature of the Latin-American claims, by Peru and the others, to 200-mile limits. This is persistently referred to in *Colombos* and many other contexts as claims to a territorial sea. Now, it does not follow that they are lawful on this account. They were in fact claims to fishery conservation zones, though the position may well have changed in view of the Montevideo Declaration of 1970.[2] At any rate my example refers to the period from 1952 until quite recently, and the point I wish to make is as follows: If close attention had been paid to the motivation of the Latin Americans, then there would have been a straightforward report of what in fact they were doing: they were not claiming a territorial sea; they were claiming a fishery conservation zone of 200 miles. The policy point which it is important to make is that, just as the United States had on a unilateral basis originally started to protect particular interests by continental shelf claims in 1945, the Latin Americans, having a different sort of interest in the fish of the epicontinental waters, thought (as it happened, they were wrong) that they could make a similar "special interest" claim. We know that the difference was that the continental shelf development got taken up generally, and it was, I think, a very successful accommodation of the interest of the user of the sea and the exploitation of mineral resources.

I am not, as it happens, from a policy basis personally in favor of the Latin-American claim. But I am simply emphasizing this point, that it would be as well if teachers did bring policy considerations in, in order to explain the motivations of governments. Some particular developments have to be evaluated, and to evaluate them correctly one at least wants to know what the governments thought they were doing. It makes a great difference if they thought they were creating a fishery conservation zone as opposed to creating a territorial sea of 200 miles.

I think, in general, that one ought to be cautious in bringing policy considerations in, particularly the larger sort. By the larger sort I mean reference to polarization, between North, South, East, and West, the underdeveloped countries and the others. When I say that—this is not directed towards Professor McDougal particularly—it is directed to all

[2]Declaration of Montevideo on Law of the Sea, May 8, 1970, *reprinted in* 9 INT'L LEGAL MAT'LS 1081 (1970).

of us who at some time or other indulge in these generalizations, and that includes me. But the point is this: If you look at the *Barcelona Traction Case*,[3] that is a very useful reminder that a large number of states occupy both roles; they are both exporters of capital and importers of capital—Spain, Italy, West Germany, the United Kingdom, Canada, and a large number of states are of both kinds. Therefore in looking at the *Barcelona Traction Case*, although there is some evidence, if you like, of certain well-known conflicts of interest that do follow the simpler generalization, the position cannot really be explained in simple terms. So if you are bringing the student to look at policy issues, I think one wants to be careful not to sow his mind with a form of theology which is too general, as it were, to be of much value.

Another illustration would be the situation where an Afro-Asian state makes a 12-mile claim or a claim to a continental shelf, which is in some way a novelty, the common point being that such states tend to emphasize the coastal states' rights. If one happens to know the inner history of such claims, they are, in some cases at least, prompted by the interests of the local company which is the concessionaire, and which actually prompts the coastal state to do this for the better health, economically, both of itself and the concession-holding company.

So what I am saying is: Policy—fine; but be careful how it is done. It can in fact become a sort of theology too general to be of much use.

Another reservation I would like to make about the use of policy in reference to teaching is this: The kind of policy reference I do not like is the one that too readily brings in special circumstances. This is where I am in some danger of misreading Professor McDougal. What is called a contextual approach to my way of thinking encourages unilateralism. It encourages the view that by reason of special policy considerations one breaks away from the rule. Now, the rule may be a pretty poor thing; it may be poorly formulated; it may even be based on some rather outdated conception of policy, but it may at least be a rule for the time being maintaining some sort of stability. When one gets the Canadians or whoever happens to provide the latest example of, if you like, a form of practical contextual analysis, where they say, "We have special policy reasons including the uncertainty of the law," and so on, in declaring a 100-mile, antipollution-jurisdiction zone in the Arctic, then this sort of development is more easily rationalized by a certain type of policy interpretation which emphasizes the special circumstances, talks about base

[3]Barcelona Traction, Light and Power Co. Case, [1970] I.C.J. 3.

values, which are a sophisticated way of referring to the necessities of a particular state, and as a consequence encourages unilateralism. It is in considering Professor McDougal's applications of his theory to particular cases that I find reservations. On all other scores, although I would not share his apparatus of concepts, I would usually accept his results. I would think, for example, that in an area in which I am interested, the law of the sea, McDougal and Burke give a better picture of what is happening and what it is all about and are infinitely more intelligent than Colombos, who is a good example of what is an authority on the law of the sea, and has been translated into many languages. Yet McDougal and Burke really tell one what it is all about and lead one to expect further developments.

It is, however, this point of contextual analysis as applied in certain situations which I think is a sophisticated invitation to a certain type of unilateralism.