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THE TEACHING OF INTERNATIONAL LAW

Edward McWhinney

My first and very basic point must be the essential relativism of the dominant legal ideas in any country at a particular time, and that every country ends up, ultimately, in getting the type of international law that it deserves. For there is, inevitably, a fairly close correlation or symbiosis between the high-level international law doctrine of any country—the legal folklore as authoritatively interpreted by its professional legal *honoratiors* or priestly caste in the courts and executive offices and the law schools—and the demands and expectations and needs of that country's foreign policy.

By this I do not mean that the legal *honoratiors* in any crude sense will bend themselves to the dictates of national foreign policy and distort or pervert their legal doctrinal positions accordingly, though Georges Scelle has warned us of the more obvious dangers of a *dédoublement fonctionnel* when the jurist wears, at the same time, the two hats of professor and governmental adviser. I mean simply that, granted the existence of a plurality of substantive and methodological approaches to international law, those legal approaches will tend to survive in Holmes' famed "market-place of ideas" which tend to be relevant to and genuinely helpful in the solution of the major tension-issues of the day of the particular society concerned. On the one hand, one is reminded of Dr. Gregory Tunkin's well-administered rebuke to Soviet legal writers, in language oddly reminiscent of the American legal realists (and of Professor McDougal) for their "[w]eakness and incompleteness in juridical argumentation and a tendency to slip into the easier path of ready-made political argumentation reinforced by quotations . . . [producing] an isolation from actual reality, from the foreign policy of the U.S.S.R. as it is practiced."¹

By the same token, however, while the Austinian, Roman Law-style virtues of clarity and certainty and precision, and also noninvolvement or at least detachedness, which characterize British international law teaching in its golden era from the late nineteenth century until the time of World War Two, seem perfectly attuned to the needs of a great Colonial Empire at the *apogée* of its political-military power, those same qualities may not be so valuable or useful, in community, societal terms, in Britain today. In the aftermath of decolonization and the liquidation

¹[1962] *Sovetskoe Gosudarstvo i Pravo*, No. 5, at 3.

of imperial grandeur, when Britain has to work and trade under competitively rather unfavorable conditions in order to survive, it may be argued whether some more affirmative, avowedly instrumental and problem-oriented approach to international law might not be better attuned to contemporary British needs.

Of course, there is an "American" approach to international law, just as there is, demonstrably, a "Soviet" approach, and a "Latin-American" approach, and a "Continental-European Civil Law" approach, though the differences can, of course, be very much exaggerated. Even in an era of ideological pluralism, the congruence of basic interests, and the resulting mutual give-and-take reciprocity, seem usually to be greater, in concrete problem-situations, than the conflict or opposition—at least in the case of those countries, East and West, at the same essential stage of economic and technological development.

When one examines any one of these distinctive national or regional approaches to international law in depth, however, and in terms not only of substantive legal values but also (perhaps more pervasively) in terms of basic legal method, one begins to appreciate the innate complexity of the legal tradition involved and the polypolarity of the different cultural sources contained in that legal tradition.

I look at Myres McDougal and I see an approach that is hailed by many as being in a distinctively, even uniquely, "American" tradition, but which we know, with its origins in sociological and the pragmatist-realist teachings of America between the two World Wars, has very strong borrowings from and debts to Continental Europe before the First World War, with perhaps a little bit of Dewey added to it for extra measure. But McDougal is also, of course, a product of the Oxford school of real property law training; and I think those of you who notice the seeming curious coexistence, at times, of pragmatism and natural law in the McDougal thinking will find certainly the pragmatism explained, methodologically at least, by German and, more directly, by American social science teachings. But the natural law, it seems to me, in its McDougallian manifestation, is pure Oxford real property training, when you get into what McDougal calls the shaping and sharing of values, in trying to balance the competing interests present in any problem-situation. In pursuing his international law of human dignity in this particular way, McDougal comes back, after all, to cases like Frederick the Great and the Miller Arnold; and this was one of the favorite real property law paradigms, as we know.

To turn back to the British scene, I think we can say that Ken Simmonds, who is a product of the postwar period which has been, at the same time, both a period of ideological division and also a period of ever closer association on a supranational or regional basis, has, with his interests in comparative law, a training that is very much in keeping with the needs of the times in international law.

I remember the present Solicitor General of the United States, Erwin Griswold, when he was Dean of the Harvard Law School, saying that the key to the future in law was in federalism. This was fifteen or twenty years ago when the cold war was still on, but he looked to larger and larger regional associations. I think he was right in this. There may be some historical aberrations of a temporary sort in terms of these long-range trends to transnationalism or supranationalism. Biafra may or may not be able successfully to assert its own sovereignty and independence; East Pakistan may or may not be able to translate itself into Bangla Desh; Quebec may or may not be able to acquire "associate state" status with the rest of Canada, or even to separate off. But in the end result one knows that if Quebec separates from Canada, it will probably have to proceed to form a Customs Unit with the rest of Canada and with the United States; and it will certainly, to be economically viable, have to continue to receive substantial financial investment from English-speaking Canada and above all from the United States.

In a sense, this regional building, which emerged as an alternative to the cold war divisions, is part of our times. I suppose, in terms of the skills and trainings of the international lawyer today, it means, in practical terms, that he is going to have to read more than *Foreign Affairs* or the Royal Institute's *International Affairs*, excellent as both those publications are. The international lawyer today is going to have to be a comparative lawyer, too, and this is one of the pieces of advice that Myres McDougal always gave: learn the languages and get into comparative law! It is very vital advice. In the period when the cold war has given way to détente, it is, in a way, the opening towards the solution of the key issues that Falk was writing about, this "endangered world's" key issues. Is it surprising, on the comparative approach to national and international law, that one finds that a Russian lawyer has very much the same view on control or prevention of radioactive fallout as an American lawyer; because of course the fallout occurs on the grass, and Russian cows, like American cows, eat grass that is contaminated by fallout. The problem, on examination, turns out to be one common to

both legal systems, paving the way, of course, to a common, agreed solution such as contained in the Moscow Test Ban Treaty of 1963.²

So that in a way, also, the international lawyer for the next twenty-five years—which is the period you are preparing for—is going to have to be problem-oriented, too. But, in being problem-oriented, he is going necessarily to be a comparative lawyer, and necessarily also to be a linguist. To be honest, if you do not have any languages, as an international lawyer, then you do not have the tools of the trade today. The revolution effected in American legal science fifty years or more ago by the successful introduction of the Brandeis Brief, paving the way to the acceptance of social science materials as part of the legal process, is paralleled in some ways by the new emphasis on skills in language. If you don't speak any foreign languages yourself, you may perhaps be able to employ people to translate intelligently for you; but you can always take the trouble to learn the languages yourself. You might be surprised at the extent of the development of language skills among American law school graduates today—not merely the conventional, Western European languages, but Japanese and Chinese and the like, and that without the students concerned having any distinctive family background in the languages selected for study.

Now, in terms of problem-orientation, I suppose there may be an advantage in coming from a small country, an advantage which the British can certainly claim in relation to the two or three superpowers at least. One is a little bit removed from the exigent here-and-now of solving the cold war or going to summit meetings. One can be rather more detached about solutions of problems that are agony, and life-and-death, to certain people. For example, "What is the principle of self-determination today?" and "How does that principle balance the principle of nonintervention?"

Well, we may try to answer this in a Quebec context or an East Pakistani context or a Nigerian context. It is very painful when you have students from both sides in such a contest, and you try to provide the answers, and you come inevitably to what the sociological school taught us: that the solution of any legal problem is a matter of trying to balance conflicting interests, and in the end it may be the skills of compromise in the choice of ways and means of realizing particular interests that allow of a solution.

²Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, [1963] 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

What I am saying about the ultimate teaching of the American sociological school (and I stress again that although it is associated basically with the United States at the moment, it has roots in the German Social Democrats and the French Social Democrats before World War One, and flowered in the United States really only in the period after 1918) is that any industrial society, and certainly any post-industrial society, must start with a problem-orientation, and must end up with the skills of compromise as the ultimate tools for resolution of the interests-conflict involved.

If you apply a problem-orientation, of course, a good deal of your answers will turn ultimately on how you conceptualize the problem. You really have to find out what the problem is. If I may turn to Dr. Brownlie, I have had the pleasure of reading and reviewing his books, and I admire the excellence of his classical English legal scholarship. But what I miss—if I may add this note to our transatlantic debate—is the hypothesis or unifying generalization at the end. Classical English legal scholarship seems to go all the way up to formulation of an hypothesis, and yet to stop short on the brink without ever propounding or verifying an hypothesis; whereas, by comparison, some North American writers may offer the hypothesis or generalization without having done the field work, in depth, beforehand. Perhaps this is one of the distinctive emphases in the North American approach that you do stop to ask, “What is the problem?” You do try and identify the conflicting values involved, and you do seek to establish the instruments or means available for achieving each particular set of values, and you do attempt some sort of quantification of the social cost of the various alternatives. This approach does not, of course, by itself provide a final, ready-made choice: In the actual art of decision-making, the subjective elements necessarily enter into play. But as Radbruch and others have pointed out, if you go through all those preliminary and intermediate steps in a properly empirically based way up to the final stage of decision, you may at least be spared the perverse or stupid decision.

If I may take this point a little further, I felt in some ways, Dr. Brownlie—perhaps because several of the people concerned have been my students—that your categorization of the distinctively Latin-American approach to the law of the sea was perhaps a little simplistic, and that is why I tried to tempt you on the Canadian matter. I spent a

good deal of time on this problem when the most recent Canadian governmental policies were publicly announced, and I indicated certain disagreements with the choices actually taken: This was the Canadian Government's proclamation in relation to the Arctic waters. One of the difficulties was that I was not satisfied that the Canadian Government was fully clear in its own mind as to what the problem was (perhaps because of conflicts or disagreements between various departments within the Government). Obviously, your authoritative response, as a governmental decision-maker, is going to be different, depending upon what the problem is. If the problem is that great big American oil tankers are coming through the Arctic waters and that they are going to run into icebergs and spew oil out, then I suppose you are going to start inquiries as to what is the frequency of such operations, and what sort of pressure may be put on the Americans to get them to take the tankers elsewhere or else to build a pipeline instead. Anyway, if you go this way, you have a simple, ready-made answer: The *Institute de Droit International*, I thought, came up with a very modest and reasonable solution, in this particular context.

If your problem, however, is really your own national interests in fisheries, then you start lobbying a little with the Russians and others, although you soon find out when you talk to the Russians that they have it all set up as far as fisheries are concerned, because they are the heirs of Peter the Great and a quite considerable body of special "Russian" international law doctrine. (There is something to be said for having a long history: If you have special historically based claims, as Bill Butler here will tell you that the Soviet Union has in regard to the law of the sea, you do not have to enter into any trade-off or quid pro quo with other people.)

If, on the other hand, what you want is to propound your own national sovereignty over the Arctic, then again your choice of instruments, your choice of methods, your choice of tools of the trade, is going to be rather different.

Now, one of the difficulties I had with the Canadian Government's approach, as I have said, was that I did not think they were too clear on what the problem was; and there was confusion, therefore, as to the proper means to be chosen for solution of the problem. Secondly, it seemed to me that some of the means chosen were quite unrelated to achievement of any one of the possible three main objectives, and were based, indeed, on bad fact-finding in themselves. I did not think, for

example, that the exclusion of the World Court jurisdiction in relation to a particular aspect of the Canadian measures was historically sound in terms of long-proclaimed Canadian preferences for extension of the compulsory jurisdiction of the World Court. If we were going to make a change in that long-proclaimed attitude and to eliminate the World Court's jurisdiction, then I think we should have had some more public debate on it beforehand. But the thing that worried me a little was what I myself can only view as very bad fact-finding. My own impression, and it was based on a certain degree of firsthand research, was that the World Court would not have taken the essentially negative, unimaginative approach to control of pollution of the high seas and coastal waters that the Canadian Government indicated that it expected from the Court, and which the Canadian Government offered as its public defense for its exclusion, in advance, of Court jurisdiction in the matter.

So here what I am really saying is that the international lawyer today—and I think this is the emphasis we try to give our students in North America—is going to be solving concrete problems. And so he is going to be a legal tactician; he is going to try and identify values and value presuppositions; he is going also to identify the alternative means of implementing particular values; and he is ultimately going to attempt some sort of quantification of values or social costing, as you do in economics and in related areas. Though this may not be a completely satisfying answer to anyone who has his own built-in set of a priori values, since it does not give any absolutistic, foolproof guide to the actual value-choice involved in any problem, one can perhaps add that, approached in this scientifically based, rigorously empirical way, the problem of ultimate value-choice may be rather less divisive, even in an era of ideological conflict, than it seems from outside the specialized arena of the international lawyer today.

Let me say, by way of conclusion, that my own personal approach to international law has changed considerably since I began my teaching, and that it will continue to change and, I believe, to grow in the future. I expect when I am as old as Professor McDougal (which is not really so old) that I will have an even more developed *Weltanschauung* than I have now. I have a federal law background, a comparative law background, and, for the last four or five years, the science-technology background which is a sort of concrete, field application of the two disciplines I have already been speaking of. But I feel I have had enough, for the moment, of the science-technology field studies, and I am moving on

now to other things in the realm of legal theory-comparative legal theory of international law. I do not think an international lawyer ten years from now is going to be teaching what we are teaching today; but I am sure that what he is going to do will be a logical product of our work today. I have no doubt that the emphasis then, in British as well as in American law schools, will be in substantive legal terms on comparative, eclectic, inter-systemic approaches to international and supranational law and that, in methodological terms, this will mean a scientifically empirical problem-orientation in place of the rather sterile ideological disputes and conflicts over rival sets of a priori values of yesteryear.