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Teaching of International Law to Law Students

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The Teaching of International Law to Law Students. A point to be noted at the outset, in any discussion of the teaching of international law to law students, is the relatively unimportant place which the subject occupies in the law student's program of study. The students in our law schools are tolerant of the interest which others manifest in international law. Indeed they are themselves greatly interested.

They concede freely that it occupies an important place in the general scheme of things. But most of them feel that professional students cannot afford the time for even an introductory course. It results that courses in international law included in law school curricula are usually elected by a comparatively small group of students, while courses offered in the departments of political science and open to law students are not likely to be elected by any law students at all.

This reflection of attitude and interest in the election of courses is easily explained. In the first place, it is of some importance that international law is not a bar examination subject. It is only natural, when students are required to make a choice between electives, that many of them should incline to choose those subjects in which they will be required to stand an examination before admission to practice. In the second place, it is undoubtedly of much greater importance that an opinion prevalent among law students regards international law as an impractical subject. There is relatively little likelihood, of course, that many of our young intending attorneys, when admitted to the bar, will ever be called upon to advise upon significant international questions. They feel this. Conceding that cultural studies are appropriate enough in an undergraduate's program, they feel that in preparing for their profession it is desirable to elect as many as possible of the strictly professional subjects. In the third place, this opinion that the subject is an impractical one for the professional student is greatly intensified in its effect by the crowded condition of law school curricula. Most good law schools are offering enough of the strictly professional courses to keep students engaged for at least four years. Only a small number of the students remain more than three years. Finally, it should not be ignored that international law is intrinsically no more interesting to law students than many other subjects—for example, equity, constitutional law, labor law, or conflict of laws—any one of which promises more in the way of training and information likely to be useful in actual practice.

Where no course in international law is offered in the law school, but courses are open in the department of political science, everything that has been suggested above will of course operate to discourage the election of the subject by law students. And in addition there will be other factors of which account must be taken. The college class-room in which many of the students are younger, less mature, and probably less earnest, will be unattractive to the student fresh from the business-like environment which is created by a professional school. From the

professional student's point of view, the method of instruction in the college class-room may be especially unsatisfactory. If courses are conducted by the lecture and quiz method, the law student's interest will stand at zero at the end of the first hour. If they are conducted by the discussion of problems, the law student will feel more at home; but the difference between his viewpoint and interest and the viewpoint and interest of the rest of the class will make it somewhat difficult to find common ground for discussion. Consider, by way of illustration, the case of *The Prometheus*, a case which is no doubt familiar to all teachers and students of international law. There was a dispute about a charter-party stipulating that in case of war the steamer should not be required to carry contraband. Sir Henry Berkeley wrote a long and a very interesting opinion. Quite naturally the student of political science will be chiefly interested in discussing what was said about the nature and definition of contraband, the right of a belligerent state to make unprecedented additions to the contraband lists, or the nature and efficacy of international law. The law student, on the other hand, having ascertained that the charter-party was executed at Hong Kong in British jurisdiction, will be chiefly concerned to find out how British courts have been accustomed to define contraband. He is likely to dismiss the rest of the court's opinion as mere obiter dictum.

For the reasons suggested above, and perhaps for others which are local in character, a course in international law for law students is likely to be elected by a relatively small group which is made up of elements in some respects unique. If the school attracts foreign students, it is safe to assume that most of them will sooner or later be found in this course. If there are graduate students in law and the course is made worthy of their interest, most of the number will be attracted by the subject. An occasional student will elect the course because he hopes to teach law and so feels the importance of being more broadly trained. An occasional student will take it because he expects to be interested in foreign trade or to practice near the Mexican border. And a small group of substantial students will elect it because they have become interested in the subject and would like to know more about it. In many respects the class will resemble those little groups of earnest students which frequent the seminars of our better graduate schools. While the class is likely to be small, it should be one entitled to the best the teacher is capable of giving.

It may be said, therefore, that from what may perhaps be regarded as the typical viewpoint of the law student the subject of international

law occupies and is likely to occupy for some time to come a relatively unimportant place in the program of study. As it has been taught in most departments of political science, there is no prospect that it will be attractive to more than an occasional student from the law schools. As it is taught in the law schools, it may be expected that it will continue to appeal to a small group of students worthy of the best possible instruction. Probably the subject has an assured place only in the curricula of the larger law schools where real emphasis is being placed upon the development of graduate study in law, where real effort is being made to enlarge the cultural content of the curricula, and where there is thus assured the presence of a considerable number of students who are intent upon something more than just preparation for practice at the bar.

II

Whatever the size of the class or however heterogeneous its constitution may prove to be, the teacher who essays to present international law to law students will give a good deal of attention to questions of method. He will be working in an environment in which method is something of tremendous moment. And sooner or later the problem of method will become for him the problem of the case-method. Before considering the application of the case system in teaching international law, we should review briefly the case-method in general.

It will be conceded that any method of teaching law has at least three purposes which may be stated in the order of their importance, beginning with the least important, as follows: first, it aims to acquaint students with the bibliography of the subject, to afford them a critical introduction to the source and secondary literature; second, it aims to introduce students to the content of the subject, to give them instruction by imparting information; and third, it aims to educate them in the system of the subject by training them to recognize, value, and apply the leading principles and doctrines. The case-method of teaching law acquaints students with the bibliography of the subject by requiring them to use source materials (principally cases) with supplementary references to other cases, statutes, standard text-books or treatises, and the wealth of material to be found in the legal periodicals. It introduces students to the content of the subject by requiring them to study critically a list of select cases or other source materials so classified and arranged as to present more or less systematically the leading principles and doctrines. It trains students to recognize, value, and apply the leading principles and doctrines by requiring them, in cooperation with teacher and fellow-

students, to extract and systematize the principles and doctrines from select cases in which they have found notable expression.

The principal apparatus of the case method is the case book. This is a carefully edited collection of select cases, supplemented, sometimes, by other materials. The case book has a two-fold purpose: it aims to present the leading principles and doctrines of the subject more or less systematically; and it aims to present them according to a plan demonstrated by the editor's teaching experience to be most effective for teaching purposes. It follows that the case book is something much more complicated than a mere collection of illustrative sources. It combines intricately the systematic exposition of the subject and a method of presenting the subject to students. It is a source book and a teacher's apparatus.

Within limits determined by the nature and scope of the subject, and in some instances by the arrangement of subjects in the curriculum, the precise content and arrangement of the case book will depend largely upon the pedagogic idiosyncrasies of the teacher who edits it. The following categories are not mutually exclusive, nor is the list complete. They are intended to suggest, in a general way, how the law teacher proceeds in selecting materials for his case book. In the first place, the case book may include cases correctly decided for approved reasons. Such cases are especially useful for the information which they impart. Their educational value depends upon the skill required to dissect and analyze them and also upon their arrangement with reference to other cases. In the selection of such cases a great deal of emphasis is usually placed upon educational value. Second, the book may include leading cases which are especially significant because they reveal the development of doctrine, or because they present discriminating analyses of doctrine, or simply because they have been epoch-making in the law's development. Third, it may include close cases on opposite sides of the demarcation lines which the law has established for reasons of logic or convenience. Such cases well arranged may combine instruction in the content of the subject with educational values of a very high order. Fourth, the book may include cases correctly decided for wrong reasons or for right reasons wrongly applied. A limited number of such cases may be used to advantage in training students to recognize, value, and apply legal principles intelligently. Fifth, it may include cases incorrectly decided for wrong reasons or for right reasons wrongly applied. Such cases, also, have educational rather than instructional value and are useful if properly balanced by materials of a different sort. Sixth,

it may include cases incorrectly though plausibly resolved. This is a special category really within the scope of the fifth category above and controlled by similar considerations. Seventh, the book may include cases which are apparently in conflict but reconcilable upon thorough analysis. Materials of this kind, like the materials described in the third category above, are especially valuable because they combine the most useful kind of instruction in content with real education in the processes of legal reasoning. Eighth, the book may include cases in conflict. The discussion of conflicting cases, particularly if the cases are in juxtaposition in the case book, is one of the most stimulating phases of case instruction. An advantageous use and arrangement of cases in conflict is well illustrated in Kales, *Cases on Persons and Domestic Relations*.

The text of the case book should present the living law. Matter which is obsolete or of historical interest only is usually summarized, if it requires notice at all, in brief notes by the editor or in the footnotes. The footnotes may be meager or very full. Excellent case teachers do not agree about the most effective use of annotation. They all agree upon this, however, that if there is to be annotation it should be used to provide supplementary references of value, to call the student's attention to related problems, and the like, and never to provide or even to suggest the solutions which the student ought to work out for himself.

The case teacher usually employs also a more or less elaborate auxiliary apparatus in manuscript or notes which he uses in directing the discussion of the materials in the case book, in invigorating the discussion with related problems not suggested in the case book, and in keeping up to date his references on topics which are changing rapidly. This auxiliary apparatus is changed from year to year as experience with the course dictates. Its scope and content also depend much upon the pedagogic idiosyncrasies of the teacher. Not infrequently it requires as much labor to prepare a really good auxiliary apparatus as it does to prepare a good case book.

It is obvious that the preparation of a real case book worthy of preservation in permanent form is not a task to be undertaken lightly. There would appear to be at least two prerequisites. In the first place, the printed case book should be the work of a teacher actively engaged in giving instruction in the subject. Unless it is a teacher's apparatus constructed in the light of a teacher's experience, it is no case book worthy of the name. In the second place, the printed case book should be the

mature product of the editor's teaching experience. An experienced teacher has remarked that one should give a course at least five times before attempting to get out a case book. To this excellent precept it might be well to add that one should try out an intended case book on his classes, by having it mimeographed or printed in temporary form, at least five times before having it published. Unless the subject is new to the curriculum, or circumstances are otherwise exceptional, there is no longer any excuse for hastily prepared case books.

The superiority of the case system of teaching law, as compared with methods which rely chiefly upon text-books, assigned readings, lectures, and quizzes, depends largely upon its superior efficacy as a method of education in legal reasoning. As regards introduction to the literature, the case-method has no distinctive merit. The student probably retains more of what he learns about the literature of the subject in so far as he actually makes more use of the literature; but on the other hand his introduction to sources is frequently haphazard, unsystematic, and incomplete. As regards instruction in content, or the imparting of information, it may be doubted whether the case-method has distinctive merit. The student learns less about content because the method is slower and what he does learn is usually presented less systematically. On the other hand, there are evident advantages in having the student derive his information directly from the sources; and much more of what he learns will actually be retained because he has done for himself a large part of the work of extracting it from the sources.

It is in training students to do their own critical thinking, to use the raw materials of the subject intelligently, and to apply the principles extracted to new situations that the case system of teaching law is superior to other methods. As Dr. Redlich has said, in his study of *The Common Law and the Case Method* (page 39), the case system emphasizes "the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system." The class room itself is a visible sign of the case system's emphasis. Of dry lectures and dismal quizzes there are none. The class room becomes a laboratory wherein the living law is dissected, debated, and reconstructed.

While the case system of teaching law is immeasurably superior pedagogically to any method which relies exclusively upon text-books,

assigned readings, lectures, and quizzes, it has its defects. It has been objected that it leaves students without a general picture of the law as a whole, that they learn a great deal about trees and very little about the forest. This defect was stressed by Dr. Redlich, who recommended that the schools provide something of the nature of an introduction at the beginning of the course and something by way of integration at the end. It is the present writer's opinion that the defect has been exaggerated. One of the best ways to know the forest is to study trees; and it is hard to believe that a prolonged and intensive study of trees can leave the student without a fairly adequate general picture. Moreover, the general picture which the student thus obtains, imperfect as it may be, is likely to be truer to the facts than one neatly constructed and dogmatically present at the beginning or the end of a course of study.

It has been objected that the case system develops in the student, particularly in the more apt student, a readiness in dialectic and a skill in highly refined casuistry which is somewhat remote from the pragmatic application of law to the affairs of life. It is evident that the system may be abused in this respect. It would seem, however, that the objection indicates a danger rather than a defect and that the danger is by no means peculiar to the case system.

One of the most serious defects in the case system, and a defect of which account must be taken in applying the case-method to the teaching of international law, is the unscientific attitude toward the law's development which it tends to encourage in students. Pedagogically scientific, the case system's contribution to the development of law tends to be unscientific. If case law covered every conceivable situation, if it never changed, if the cases were all in harmony, and if the course only declared the law, there would be no substance in this criticism of the case-method. But of course the established law covers only a relatively small part of the conceivable situations; it is constantly changing; the cases on many of the most important and difficult problems are in confusion and conflict; and the courts make law as well as declare it. It results that in any first rate law school a great deal of time is given to considering what the law ought to be. There is much discussion of what the rule really means, whether it is sound, whether its traditional application is justified, how it may be applied by analogy to new situations, and which of conflicting rules should be accepted where the matter is still undetermined by precedent. Such questions receive more attention in the study of less mature and more plastic subjects like torts, equity, or constitutional law than in the more settled fields of

contract or property law. But in all branches a great deal of the best work of teacher and student is certain to be thus directed. Through the legal periodicals, the law books written by teachers, and the students who graduate to become practitioners and judges, such work becomes increasingly influential.

The suggestion is offered that if attention to what the law ought to be were scientifically directed in the law schools, both teachers and students would find it necessary to do more than merely to expand, adapt, or develop legal doctrines by such processes of legal reasoning as courts are wont to use. The processes of legal reasoning may be appropriate enough for courts, where particular controversies have to be settled and where facts relevant to such controversies are supposed to be adequately presented. Law teachers and students, however, are not required to settle particular controversies and they are remote from the flesh and blood of controversies which the courts have settled. When they pursue a method which develops law chiefly by legal reasoning, there is grave danger that they will indulge in unscientific generalizations without an adequate knowledge of facts. Nor will it be enough to have fact-finding investigations which are confined to reported cases, for the reports present only particular sets of facts and rarely present them adequately. It is in this respect, in the present writer's opinion, that the case-method has been most deficient. Instead of systematic and intensive study of relevant social phenomena, recourse has been had to analogies, logic, to practical convenience, to justice, or to common sense, to use such words as are bandied about freely in the law school class-room. The case-method of teaching the established law is a science; but too often the case-method of arriving at conclusions as to what the law ought to be has been mere syllogistic philosophy.

III

We come now to consider the application of the case-method in teaching international law. From what has been said about the method in general, it will be apparent that there are limitations upon its availability. In the first place, there are limitations resulting from the nature of international law itself. The case system presupposes rather well established methods of judicial reasoning which may be discovered by analysis of reported cases in which they have found notable expression. International law, broadly defined, is not a system of judicial reasoning. It is extracted from customs and completed from philosophies. It is manifested in action in incidents, arbitrations, and only to a limited extent in court decisions.

In the second place, there are limitations upon the availability of the case-method resulting from the sources of international law. The case-method presupposes that all or most of the law which it is important to consider in an introductory course has found expression in reported cases. Thus the case-method, strictly speaking, is difficult of application to the teaching of legal history, statute law, administrative law, or comparative law. Obviously it will be difficult of application to international law, only a part of which ever finds expression in reported cases. There are many interesting cases to select from in presenting such subjects as recognition, territorial jurisdiction, the immunities of diplomats, the immunities of public ships, or extradition. On the other hand, there are only a few rather unsatisfactory cases involving states as international persons or the international aspects of treaties. There are almost no really useful cases on international arbitration or the diplomatic protection of citizens abroad. The case-method of teaching international law, to be truly international, ought to make use of cases from the courts of many countries; but the availability of reported cases from the civil law countries is much limited by the lack of reports and digests and by the form in which those countries report their court decisions.

It is evident that the teacher of international law, if he is to use the case-method at all, must adapt it in some way to the peculiar nature of his subject. He may approach the problem in either of three ways. He may attempt to cover in an introductory fashion everything which has been traditionally regarded as a part of international law, using cases as illustrative material or as problems for discussion wherever good cases are available. This appears to have been the course pursued in the past in most departments of political science. It is not even remotely related to the case-method of teaching law.

In the second place, the teacher of international law may attempt to cover only as much of the subject as can be taught satisfactorily by using available British and American reported cases. By so confining the course, it is possible to use the true case-method. The writer is informed that this plan has been pursued in a few law school courses. It is possible by this plan to cover only a small part of the subject. Indeed, such a course is not international law at all. It is the Anglo-American municipal law which is applied in cases having certain international complications.

Finally, the teacher of international law may compromise, attempting, on the one hand, to save as much of the true case-method as seems to be

warranted by the nature of the subject and the materials available, and, on the other hand, to broaden the scheme and content of the course by supplementing the usual British and American cases with selected decisions of civil law courts, excerpts from standard treatises, abridged reports of arbitrations, articles from treaties, occasional extracts from state papers, and references to historical materials. Such a compromise is difficult to execute satisfactorily. But it offers a way, if not the only way, to secure the chief pedagogic advantages of the case-method without obscuring the real nature of international law or giving the student a false notion of its sources. It affords the student an opportunity to use a variety of sources. It also gives him an opportunity to work out his own system in coöperation with teacher and fellow students. And it makes possible a classroom in which all may participate in the work of analyzing, comparing, criticising, and applying. If the teacher is alive to his responsibilities, intellectual independence and individual thinking on the part of students need never degenerate into mere dialectic and casuistry. The introduction, from the storehouses of history, of relevant facts in regard to territory, physiography, population, race, culture, resources, industries, wealth, land and sea power, laws, manners, and the like, should make it possible to discuss freely the most primitive and plastic of all branches of the law without lending countenance to barren scholasticism. If the student's notions of international law at the conclusion of such a course are somewhat lacking in symmetry, systematic arrangement, or certainty of outline, may it not be that he has a truer picture than he would have received from more dogmatic instruction?

The preparation of a case book or list of cases and readings for such a course should be at once more difficult and more interesting than the preparation of an ordinary law case book. Every teacher of international law, if possible, ought to edit his own book or list, for the case book is primarily a teacher's apparatus and should be suited to the pedagogic peculiarities of the teacher who uses it. For those who find it possible to edit their own apparatus, the writer would like to offer the following suggestions.

In using the reported cases, it will be well to make selections chiefly from cases which are reported rather briefly or which can be abridged to a reasonable length without becoming fragmentary. An especial note is made of this because it so often happens that opinions on questions of international law are long and discursive. Long, discursive opinions should be cut ruthlessly. The facts, the decision, and the

reasons therefor must of course be saved; but it is well to delete superfluous dicta, long quotations from documents, protracted reviews of authorities, and discussions of technical points of municipal law which are unrelated to the decision on the point of international law. In general, if an opinion cannot be reduced to a comparatively few pages it is better not to use it. There are exceptions of course. But long cases do not make a case book. They make a book of readings.

In using cases on war and neutrality, nothing short of the most extraordinary vigilance is adequate to prevent an improper emphasis. The cases on war and neutrality are the curse of the case teacher. There are so many of them and they present such interesting puzzles. It will be well to make a case book on the law applicable in peace time, spending space generously, and then if space remains to put in a few cases on war and neutrality. Whatever else he may do, the editor should not get out an apparatus devoted mostly to war and neutrality and call it a case book on international law.

In selecting sources other than cases, the editor should avoid the inclusion of merely ephemeral matter. In general, he should make use of authoritative materials only, that is, materials which have served to define an important national viewpoint, or to formulate an important rule, or to establish an important precedent, or to set forth something which has really influenced the law's development. The sources used ought to be sources which are especially worthy of preservation. These materials should be arranged so that the work of analyzing, comparing, criticizing, and applying will be stimulating to the student, so that he will advance eagerly from one section to another. Repetition should be avoided. As far as possible mere illustration should be avoided. The materials may be arranged, for example, so that they will show an important development in practice, inviting comparisons and criticism. Or they may be arranged to present the two sides of a controversy, or alternative solutions for a problem. Sometimes it is possible to construct a case from them, taking a brief statement of facts from a standard treatise, the outcome from a treaty, and the reasons for the final settlement from state papers. Where several cases, thus constructed, can be brought into an advantageous juxtaposition, it may be possible to achieve something which approximates very closely to the true case system. The materials should always be arranged so that the student will be interested and so that it will be easy to challenge him to attack, defend, reconcile, or explain.

Whatever opinion one may hold about the annotation of a case book in private law, it seems clear that the vast scope of international law

makes an abundance of annotation and citation indispensable. The primitive and plastic character of international law, moreover, makes it important that there should be frequent references to sources of information about the facts of international life. The annotations and citations, it is perhaps superfluous to add, should always be supplementary; they should never give away the answers to problems presented in the text. Mr. Pitt Cobbett's scholarly *Leading Cases and Opinions*, familiar to all teachers and students of the subject, is not a case book at all; it is a book of problems with solutions; it is a disguised text-book.

In arranging the materials to present the leading principles and doctrines of the subject, the teacher should never forget that his first obligation is fidelity to the law as it is. The case book should be a faithful exposition of international law as a contemporary system. The teacher should be vigilant to avoid creating an appearance of certainty by using as authoritative what is really argumentative. If the cases or other materials are unduly one-sided or dogmatic, it is important to appose to them or annotate them with something which will restore the balance and give the student a true picture. We cannot advance the cause of international law by inventing harmony where there is in fact discord.

Enough has been said to suggest the importance of conservatism in regard to publication. It takes a great deal of teaching experience to make a good case book. It will be well to experiment with the apparatus for a long time before attempting to put it into permanent form. The apparatus may be used in mimeograph, in multigraph, in temporary printing, or, if the class is small, simply as a list of marked cases, until there is reasonable assurance that it is not only a good apparatus for the editor, but also one which may be useful to other teachers. A very crude collection of materials is much better for the teacher who has made it than a better collection made by someone else, but it is not worthy of publication for general use.

Finally, it must be emphasized again that the case book is a personal apparatus, which should be suited to the individual teacher's own conception of the subject and his own ideas of method, and also that it is a teacher's apparatus, which should be constructed in the light of an active teacher's experience. While there may be notable exceptions, of course, the utility of new case books or of old books revised by those who are out of touch with the teaching business may be seriously doubted. In general, case books should be made only by those whose ideas of method are constantly being modified and enriched by contact with students.

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