Teaching of International Law in India in 2000 A. D. – Some Non-Utopian Proposals

Upendra Baxi

INTRODUCTION

We preface our inquiry into the teaching of international law with four principal observations.

First, a subject called “International Law” has ceased to exist. It is no more possible to do the conjurer's trick and divide a course called “International Law” into the law of peace and of war. The sixties and seventies have witnessed evolution of new domains: the law of human rights, international business transactions, international economic law, the law of the sea and of the outer-space, the North-South and South-South relations law, the law of disarmament and of the right to development. “International Law” is one label; but many subjects. No one may legitimately claim today specialization in International Law as such; but specialization in some aspects merely of the above illustrative domains.

Second, we point to the dramatic and exciting growth of international law and international institutions, reflecting the rapidly developing interactions between peoples and states. Our conception of international law must cater to this growth in a number of ways. Initially, the dynamic qualities of international society spawn suspicion of black-letter generalisations of the “international law is . . .” type. Then the increasing involvement of non-state entities in the international legal processes must be accommodated. This relates especially, of course, to international organisations, but it also extends to other groups such as multinational business enterprises. From the traditional confines of international law – especially British “public” international law – we detect a movement of the focus towards what Jesse calls
"transnational law". Consequently, we call for renewed efforts to appreciate the importance of international law to legal and political organisation at the state level.

Third, we note the disagreements and confusion concerning the objective of legal education to which international law (like most other subjects) remains vulnerable. The proffered major objectives have now a familiar, platitudinous ring, and reflect personal predilections. Even when the objectives are sought to be implemented, performance usually fails to measure up to promise.

Our fourth preliminary point is: How much do we know about the teaching of international law? An essay on the "Teaching of International Law" can be an exercise either in prediction or in programming. Either way depends on an examination of the place, past and present, of the subject in Indian law and political science schools. But how reliable are the normal research resources — the course, descriptions and the book lists of the various law schools? Courses vary; the description often stays the same. Book lists become exercises in planned obsolescence. Emphasis distorts. Students do not enroll, wherever an international law subject is an elective. Courses though listed are not offered. Proper fieldwork in the law schools might provide a scientific check to impressionism in thinking about teaching of international law in the future.

In the absence of more intensive empirical scientific investigation we offer our own observations, hypotheses and disguised prejudices. And in so doing we risk the charge of creating and combating strawmen. But these are the perils that any pre-scientific enterprise must face.

STOCKTAKEING

The Indian contribution to international law, in terms of eminent scholars and international lawyer statesmen, (from Radha Binod Pal to Nagendra Singh) measures up well. In an Olympic games of international lawyers, we might even rate a medal.

Yet teaching of international law in India on the whole can only be branded conventional, if not mediocre. Typically, in approach, the common law myths control: law, including international law, is presented as a closed, self-contained, automatic, syntactical system. Dealing with abstract generalities, inconsistencies are brushed aside. The distinction of "ought" and "is", regularly contributing to the ambiguity of generalisations, is rarely admitted. (All general textbooks falter on the same hurdle.) Any link to underlying world conditions is shunned (that's politics, not law!). Typically, in approach, teaching is expository — demanding little involvement of the class, little reaction to the contemporary crises. Further, research skills are glossed over, assessment being largely based on reproduction from memory. Because of the contents of the course — "52 topics in 52 lectures" or "Law of Peace and Law of War" — superficial abstractions dominate. Meagre or non-existent library resources also nurture the natural reluctance of students to research "impractical" topics. Overall, a less creative diet would be hard to construct (although some courses in jurisprudence show that it is possible!). We have inherited the worst of the British teaching system and yet rejected some of its redeeming graces (such as individual discussion). We lack the refined ability of, say, the French to synthesise. We lack the ideological commitment of the Americans. The casebook method of teaching (generally after our weaning from the United States) is increasingly used in fields other than international law. Suitable solid, comprehensive materials are lacking. How far away is a multi-factorial, transnational, problem oriented book in the ilk of Chayes, Ehrlich and Lawenfeld? Is it any wonder, then, that Indian students who specialise overseas are not enthused to return to the Indian teaching fold?

DIAGNOSIS

The paradox of eminent personal success and our teaching mediocrity depends on numerous factors. First, one might speculate, the installation of international law as a subject for the LL.B. degree in the early decades of this century may well have been a difficult marriage. For international law does not fit easily into a traditional common law curriculum. Was the high degree of traditionalism in structure and content, then, the price paid for legitimacy of the subject? If so, then limited resources only could be expected, as well as few incentives for specialisation. (Such features remain dominant today.) With limited facilities being devoted to legal education in general a high priority could not be attached to international law — the step-child. Clearly, too, the law schools were sensitive to the inbred demands of the profession. Prior to independence and even now, the demand from business and government for lawyers conversant with international legal aspects was extremely limited. In other words, international status might
greet the wandering intellectual, but at home he has been smothered by an indifferent environment and the low status-ranking of his subject.

In two significant aspects, Indian courses in international law have failed to escape their stultifying habitus. First, primarily because of the rule-oriented nature of texts and teaching generally there has been a demonstrable failure to realise the social importance of problems. (Again this was a reflection of the law school as a whole.) Surely one of the pivotal social problems of our age, for example, is the challenge of bureaucracy to the status and standing of the individual, the study of analytical rules barely reflects this, and when it does most teachers find themselves incapable of tackling any sustained analysis. In the international domain, as in national law, we must link our descriptive inquiries into past practice and present expectations to explicit policy objectives. Specifically, which international institutions and laws are required to promote what effective and acceptable international policies? How can the developing international legal system be built and contemporary disintegrative conditions controlled? What production and what distribution is to be fostered, with what priority? What national freedom of choice is to be maintained? Then, how do these general policies relate to: law making and law application; participation; control of territory and resources; control of people; jurisdiction; liability of states for torts and business transactions; treaties; coercion and armed force; and settlement of disputes? To isolate and develop policies, linked to realistically observed conditions, often complementary in form and always contentious by nature, to accommodate the competing tugs of the national and the community interest — obviously these are difficult, elusive skills. Basically our suggestion boils down to this realisation: the decision functions of international law, whether organised or decentralised, involve value preferences. From the reality of value choosing there is no escape, and to fail to identify these choices is only to avoid what is already inherent in legal processes. To ignore the major “shoulds” of any slice of legal activity is to obfuscate, and not to elucidate.

We would highlight, secondly, that international law is a distinctive subject in the sense that even its basic understanding presupposes a modicum of inter-disciplinary comprehension. Since 1945, and especially in the 1960's, new developments in international law and organisation have evoked novel methodological responses. These new approaches, usually entailing application to select facets of the international power and legal systems, have produced scholarly writing of a highly specialised kind. Except for introductory texts, the era of comprehensive textbooks on a subject called international law is now past. Comprehensiveness in a single text is an unattainable ideal when international legal activity expands so rapidly. The dogmatic assertions of the text or treatise have become uninteresting, uninspiring and unsatisfactory. At most they are entirely misleading, because, as students quickly ascertain, they foster illusions of certainty. Tautologies and question-begging and intuition substitute for the sizeable reality of on-going, competing claims of the dynamic international legal system. Casebooks, though a necessary tool for the Socratic teacher and the besieged librarian, face similar hazards. Only studies of an interdisciplinary approach escape the shackles of myth and legalistic subterfuge. We refer, for example, to the contributions of Corbett, de Visscher, Stone, Lasswell and McDougal and more recently Carlston, Haas, Hoffmann, Falk, Friedmann, and Kaplan and Katzenbach.

The most obvious correlation of skills is between international law on the one hand and political science and history on the other. (Interestingly enough the political scientists, as we know, find our breed irrelevant if not absurd.) A good deal of international law could be traced to economic demands and needs — yet how many recent Indian articles or books drawn on economic postulates or practice? Most problems of international law, indeed, can only be understood and explained in complex interdisciplinary terms. One cannot talk sensibly about the nuclear non-proliferation treaty without taking account of the current SALT negotiations. But to grasp the problematic of SALT in turn requires an understanding of contemporary strategic thought and military technology. Similarly, can one expound the legal status of the continental shelf without a proper grounding in marine geography, geology and the techniques of ocean-mining? Can incantation of the requirement of “just, prompt and effective compensation” be divorced from appreciation of the host country's socio-economic needs, its stage of development, its life-style pattern and the interplay of world “grants economy”? Finally the peaceful settlement of disputes area, a neat, glossy picture in most general texts, obviously leads to the complexities of the dynamics and strategies of negotiations, including game theories and content analysis.

PROGNOSIS

Unless radical changes are made in the structuring and teaching of international law in the coming years, there is a real danger of it becoming a “non-subject” by 2001. The past contents and structure belong
to a bygone age and bygone world. To cling to them will foster alienation and indifference towards the subject.

We recommend, therefore, a reorientation of international law teaching. This reorientation involves formidable tasks — certainly of the dimensions of the cleaning of the Augean stables.

1. Teachers must be educated to form, and be prepared to pronounce and to defend, their guiding policy preferences. This implies changed thinking about international law. We suggest that international law should be viewed sociologically, as a device of building community institutions by the development of consensus, the search for common interests and the management of conflicts — at the same time satisfying the normal complementary legal needs of stability of expectations and the requirements of change.

2. Teachers must develop interdisciplinary skills at least to the point of becoming specialists in some aspects of international law. They need not seek to satisfy the common conception of the academic who knows "more and more about less and less". But the normal analytical skills typical of Common Law teaching, arid enough in their own narrow confines, are not rewarding ends in international law. We need not repeat our indictment of compendious textbooks. It follows, however, that we encourage specialised monographic writings. This call for empirical in-depth studies must be exemplified, in addition, in increased exploration of national practice of international law. For any problem of international law what is the Indian policy, and how is it furthered nationally and internationally? For too long students and teachers have ignored these demonstrable national endorsements and contributions to the international legal system. Yet we would all agree that national practice is what makes international law tick. Accordingly a full Indian digest is an essential minimal research.

Only with the acceptance of these suggestions will the subjects of international law be liberated from their neatly packaged, pre-digested form. Furthermore, doctrinal and realpolitik aspects must be supplemented by scientific observation and explanation. Functional, phenomenological and systems analysis must be sought which isolate, quantify and qualify past trends, present developments and future options.

3. What, then, of the curriculum? The parameter of a proper course of international law — limited resources and time plus low law school priority — set real limits to any proposals for change. The basic requirements are:

(a) The so-called 'basic', 'Orientation' 'Introductory' Courses labelled as 'Public International Law', 'the Law of Peace' 'the Law of War', 'International Organization' must be abandoned at LL.B. level. The traditional contents of such courses should be distributed as topics in other law courses. We suggest, by way of example, the following redistribution of contents:

<table>
<thead>
<tr>
<th>Course</th>
<th>International Law Content</th>
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<tbody>
<tr>
<td>1. Legal History</td>
<td>History of International Law - South Asian and Indian Evolution.</td>
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<tr>
<td>2. Jurisprudence</td>
<td>Problem of Conceptions and Definitions of International Law; Custom, General Principles, and Agreements as sources of Law.</td>
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<tr>
<td>3. Torts</td>
<td>Problem of Tortious Liability in Inter-State relations (the so-called state liability problems).</td>
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<tr>
<td>4. Contracts</td>
<td>Analogies between treaties and contracts.</td>
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<tr>
<td>5. Statutory Interpretation</td>
<td>Problems of Treaty Interpretation.</td>
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<tr>
<td>7. Company Law</td>
<td>General Problems of TNCs.</td>
</tr>
<tr>
<td>8. Taxation</td>
<td>Double-taxation problems.</td>
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The proposed type of realignment, distribution or more ambitiously, 'integration' of international law contents to the existing LL.B. curriculum has many obvious merits. First, more teachers and students will
be exposed to aspects of International Law than is ever possible in the usual pattern where the International Law courses are optional. Second, consideration of international law issues may enliven and sharpen thought and analysis in traditional legal courses. Third, such ventures of redistribution may help institutionalize awareness of relatedness of international and national legal developments, an awareness hitherto confined to the best among a handful of international law teachers. The costly alienation of law teaching and studies from the context of international law developments will thus be overcome.

We have guarded ourselves against the charge that intrusion of international law topics may overload the teacher and the taught in the so-called common law or straight law courses.

We are not suggesting massive intrusions of international law topics in existing law courses. In fact, our proposal boils down to adding one or two cогnate topics in the existing courses. And we can take care that the blood-groups do match.

(b) Subjects within international law should be initiated as specific undergraduate options. Many mutations are possible. They would include the accepted staples of International Organisation and Air and Space Law, also

(i) LAW AND FORCE: Study of force, order and justice in international relations — legal regulation of use of force through humanitarian rules of warfare and attempts at progressive “outlawry” of war — problem definition of aggression — problematics of “civil” wars — nuclear disarmament — problems of imposed treaties...

(ii) RESOURCES LAW AND DEVELOPMENT: Study of economic development of poor countries through bilateral and multilateral aid; international legal transactions; GATT & UNCTAD; perhaps, ILO; law of state responsibility for injuries to aliens; multinational corporations as subjects of international law... the new international economic order...

(iii) THE UNITED NATIONS: Study of the UN's role in peaceful settlement of dispute — with League background; — Functions/achievements of specialized agencies/voting rules/secretariats;

(iv) ADJUDICATORY & NON-ADJUDICATORY MODES OF DISPUTE SETTLEMENT: Problems of third party settlement — PCIJ &

ICJ — international claims through diplomatic processes...

(v) SYMBOLIC AND RESOURCE ASPECTS OF SOVEREIGNTY OF STATES: Problems of jurisdiction — states rights — domestic jurisdiction — doctrine of equality of states — self determination — immunities...

(vi) HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW.

(vii) ARMS RACE, ARMS TRAFFIC AND DISARMAMENT.

(c) On a broader front, yet pertinent because of the effect on the atmosphere in which one has to teach, we hope to see increasing institutionalisation of extra-university international law research and inquiry. Minimum goals should be the formation of an active international law interest group of teachers, the establishment of local international law societies — hopefully reinforcing the Indian Society of International Law: a viable Yearbook, involving student writing; and increasing interchange with the government offices. Optimum goals raise the prospect of adequately financed functional and regional studies; creation of graduate seminars; and the eventual establishment of an International Law Institute directing its attention to Indian and Asian aspects and bringing together scholars on a regular basis.

We conclude on an optimistic note. International law need not become a non-subject by 2001. Many of the past inhibiting factors today are being severely and properly challenged. India enjoys a special place in the non-aligned states movement of international independence. That the old cry of international law being of no consequence is denied by both big business and big government who need, demand and expect appropriate expertise. The older generation of teachers of international law deserve praise for their sustenance of a subject frequently under attack. The challenge now is to bring relevance to the subject and interest to the student.

NOTES

* Some of the themes of the paper formed part of a joint paper presented by the author in collaboration with W.E. Holder (A.N.U., Canberra, now with I.M.F.) at the Australasian Law Teachers Conference at Adelaide in 1971. The situation so far in the teaching of international law between Australia and India is (surprisingly) similar.