

Challenging the Existing Paradigm: How to Transnationalize the Legal Curriculum

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Introduction

I was absolutely delighted to be invited here today, not only as a *Canadian*, but as a Canadian from la province du Québec, a civil law jurisdiction, to present on the topic of transnationalizing the legal curriculum at an *American* association of law schools' meeting. The fact that you want to hear from someone from another jurisdiction and another legal system gives credibility to your interest in learning about incorporating perspectives of others into your curricula, and I have been quite heartened by the positive response that has been given to this topic throughout the day. The other reason that I am delighted to be here is that it gives me a chance to share with you the unique and exciting way that my faculty, the Faculty of Law at McGill University, has chosen to approach integrating transnational perspectives into our curriculum. Peter Strauss did steal a bit of my thunder this morning, but I will pick up from where he left off. I will also talk about the challenges that such an approach can entail; the techniques that we found useful in overcoming these challenges; the rewards that are there at the end of the day when you do adopt such an approach; and what you and others in the United States can learn from our approach and our experience.

Transnational law, which is a phrase coined by Philip Jessup, is not the term we use at McGill and as we saw this morning, it is a term that has several connotations—from international law to comparative law—or as Dean Harold Koh of Yale said, “a hybrid of national and international law that’s downloaded and uploaded.” We use a different term. Rather than transnationalism, we use the term “Transsystemia,” or

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rather a transsystemic approach to legal education, meaning at its most basic level, if you dissect the word, “trans” for many and “systemic” for legal system. The nub of what we have tried to do is to integrate transnationalism into our curriculum by freeing the study of law from jurisdictional or systemic boundaries and thereby to broaden the perspectives to that legal education, hopefully, along the way, developing more agile legal minds in our students, and more outward-looking and more broadly trained lawyers or legal professionals in our graduates.

The McGill Program

Before I describe our program, let me outline the juridical reality in Montreal, Québec, Canada where McGill is fortunate to be situated and which, in large part, lends itself more naturally to the needs of this type of legal study. The Law Faculty finds itself smack in the middle of downtown Montreal, and if you have ever been there, you know that it is a beautiful, livable, vibrant and bilingual city. McGill finds itself within the province of Québec, which by virtue of the Act of Québec of 1774 (following the military defeat of the French by the British of the colony of New France in 1763) guaranteed Québec two things that changed its history forever: its Catholic religion and its civil law. As such, Québec law, at least in the private sphere, followed in principle the law of France, and continues to apply the civil law tradition as do much of Continental Europe, South America and parts of Asia, not to mention Louisiana where we all hoped to be for this conference. McGill finds itself further within the country of Canada which follows, as does the U.S., the English common law tradition. It also finds itself, as we all do, in an increasingly globalized world.

We can ignore or run away from this interesting, yet potentially conflictual juridical and political situation, or we can embrace it. McGill has chosen to do the latter—to embrace and seize upon this complex reality to create a program of legal study that reflects all the strands of its complicated existence—a program that is bilingual, bi-juridical, outward-looking, transnational and all that adds up to transsystemic.

We know that Rome was not built in one day. We at McGill did not wake up one morning and say, “let’s start teaching law in a way no one else does in the world, where all our students will graduate with both civil and common law degrees (which by the way they all do today) and all doors throughout the world, at all levels of legal practice, will swing open wide for them.” We developed this slowly and for thirty years, we offered what you may call the poorer man’s version of this concept whereby we taught mainly Québec civil law and Canadian common law traditions to our students, but in a purely comparative and sequential

manner.¹ When I was a student at McGill in the late '70s and early '80s, in my first year, I took the course Civil Law Obligations, and in second year, I took the equivalent courses of Common Law Contracts and Torts. I graduated with an understanding of the world's two major legal systems, but (and I am exaggerating slightly) as if I had gone to two law schools sequentially and received two law degrees in that manner. It is fairer to say that I learned the civil law and the common law in two extremely well-taught silos. What was missing was the integration. Gradually, over the years, we refined our program to allow more and more integration until finally in 1999, we began to offer a new program of transsystemic legal study. I think it is very important to ask ourselves, and for me to explain to you, how this differs from conventional comparative law. I think there are two essential elements that explain this difference.

The first is the move from the sequential to the integrated. The goals of legal education under our transsystemic program have expanded because no longer is it seen as adequate to teach, no matter how well, distinct systems of legal thought in separate silos. The goal now is to create minds that are so agile and creative that they can think open-mindedly within alternative systems of thought, nimbly moving across and, as need be, transcending the boundaries of these systems.² We have quite firmly rejected the model of some isolated comparative courses here and there in favor of the fully integrated approach. If you look at our curriculum, you will see many, and more and more as each year goes by, so-called blended courses. If I may take my area of teaching, which is Contracts, as an example, there are no longer separate first-year courses on Common Law Contracts and Civil Law Contractual Obligations, or Torts and Extra-Contractual Obligations. This continues on to upper years where we offer blended courses in Civil Procedure, Business Law, Security on Property and so on. But more than merely having blended courses, within each blended course the goal is not simply to graft conventional comparative law, that used to take place within two courses, into one course. What was needed was a new approach to teaching law altogether. Working with different legal traditions, having distinct historical and methodological underpinnings, the goal is to hone our students' skills of imaginative insight, all the

1. Roderick A. Macdonald, *The National Programme at McGill: Origins, Establishments, Prospects*, 13 DALHOUSIE L.J. 211 (1990).

2. This description is taken from a presentation by my colleague, Jean-Guy Belley, on "McGill's Approach to Teaching Comparative Law," organized for Vietnamese Senior Comparative Law Research Personnel under the auspices of the Vietnam Legal Reform Assistance Project, Faculty of Law, McGill University, Nov. 2, 2004 [unpublished].

while undermining the fallacious notion that there is one structure of reality.

Transsystemic teaching required us to take creative approaches to our course outlines, our teaching plans and our evaluations and I will discuss this in more detail in the challenges portion of my presentation. Suffice it to say at this juncture that the nomenclature in the two legal systems does not correspond neatly, and doctrines in one system do not necessarily relate to the other. Our classes are quite something to witness because they move back and forth between legal traditions, of mainly civil and common law but increasingly, we are trying to incorporate aboriginal and religious legal systems where appropriate. Classes move back and forth amongst primary and secondary materials from a variety of jurisdictions. In my Contractual Obligations course (and that is its blended name), I regularly expose my students to legislative, jurisprudential and doctrinal materials from, as you would expect, Québec, Canada, and England but increasingly, France, the United States, Australia, Germany, and many unifying European codification projects as well. Some people react to this by asking whether this is not too confusing to students. Admittedly, students are somewhat confused in the beginning but in the end, rather than confusion, it creates in students a dexterity of mind absent in monojuridical training where only one structure of reality is presented. Perhaps the best analogy here is the study that linguists have done with young children's ability to learn two languages at once, versus their ability to do so sequentially, first mastering one and then moving to the other. The children who are exposed to two languages at the same time end up, in my experience, perfectly bilingual and we believe that the same is true of our students being exposed to both civil and common law right from the beginning.

The second essential element that exemplifies our move to transsystemia entails the notion of linking the various perspectives to distinct mentalities and historical and intellectual traditions of the legal systems themselves. The McGill program is predicated on the sincere belief that legal systems have distinctive structures of thought, transcendent values and principles, and intellectual traditions.³ This is one of the reasons that our curriculum offers two compulsory upper-year courses in Advanced Civil Law and Advanced Common Law so as to examine more deeply and critically the understandings of the overall mentalities and methodologies of the two great occidental legal traditions. It is, therefore, not just that there is a multiplicity of

3. Nicholas Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. LEGAL EDUC. 29, 37-39 (2002).

perspectives that is key to operating in a transsystemic world, it is that these perspectives are linked to global systems of thought.

Apart from being intellectually stimulating and interesting, this vision of legal education carries with it two great advantages. The first is that by studying law from the perspective of a legal system, rather than from the perspective of legal rules, one gains the ability to work through a foreign legal system that one has never before encountered because one understands its basic underlying traditions and elements. We recognize that we can never expose our students to every jurisdiction in the world but we believe that even though the Belgian Civil Code may be different from the French Civil Code or the Québec Civil Code, by learning about codes and civil law methodology and tradition, our graduates could work their way through the Belgian Civil Code without ever having had exposure to it in law school.

Secondly, by linking perspectives to legal traditions, we overcome the dangers of comparative law that consist merely in side-by-side comparisons of different doctrines and principles. The danger of that lies precisely in that this survey is disjointed from the respective legal traditions and many jurists believe that this is one of the root causes of poorly done legal transplantation. Mr. Justice Charles Gonthier, a former justice of the Supreme Court of Canada, stated that, “we must be mindful of the dangers of comparative law unequipped with full information and understanding of other legal systems.”⁴ In an article by William Bishop, he said very eloquently, “any legal system is a complex interlocking balance, perhaps a delicate balance. . . . There are important differences between common law and civilian systems (but) . . . it is not prudent to consider one difference in isolation from the others. Indeed, casual comparisons across very different legal systems may not only mislead, but mislead systematically.”⁵ As such, in our integrated courses, our approach is not to say simply that in the common law (or a particular common law jurisdiction), this is what happens, and now in the civil law (or a particular civilian jurisdiction), that is what happens. That is straight comparative law at its most basic level. That is where transsystemia simply begins. The similarities and differences are examined, questioned and rationalized in light of historical, methodological, philosophical, economic, social and any other perspectives that lend themselves to that particular issue.

I have recently published an article in the McGill Law Journal entitled “Where Law and Pedagogy Meet in the Transsystemic Contracts

4. *Laferrière v. Lawson* [1991] 1 S.C.R. 541, 601.

5. William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299, 318 (1985).

Classroom.”⁶ In that article, I take a discrete area of the law, specific performance as a remedy for breach of contract, in order to illustrate a transsystemic approach and in order to demonstrate the multitude of perspectives to which such an integrated study can expose one’s students. I also try to show that at McGill, we are not only interested in having a multitude of perspectives to legal issues or questions, we also try to frame a given legal issue within the larger concepts of the tradition in question. As such, in examining an area like specific performance, it is not enough to say the civil law has one tendency, the common law has another tendency, here is the historical perspective, here is the methodological perspective, here is a philosophical perspective, here is an economic perspective. We must go further and ask how this all fits within the ways that each of the legal systems have viewed remedies generally. It is a whole picture. The bottom line is that we feel that it is insufficient for students merely to understand the different conceptions of civilian and common law counterpart doctrines because that does not tell the whole story. It is important for students to realize how these different conceptions link up with the entire mindset of the tradition in question.

Challenges

Whether or not I have convinced you that this more complex way of teaching and living the law is worth anything at all, I am sure you do not need any convincing to realize the challenges involved in such an approach. When one of my colleagues, Rod Macdonald, went to speak to the Faculty of Law at Harvard University about our program, he actually entitled his paper “If it’s not impossible, it’s not worth doing!”⁷ I have been asked by the organizers of this session to discuss the various challenges involved in mounting a legal program of this kind. The following list is by no means exhaustive.

The first challenge is a linguistic one. The more languages you know, or more accurately, the more languages you can read, the easier it is to access foreign legal materials, a necessity for integrating other approaches into your curriculum. At McGill, our professors and our students need to have at least passive language skills, meaning the ability to receive written and oral information, in English and in French. That seems to cover most North American and European materials but we

6. Rosalie Jukier, *Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom*, 50 MCGILL L.J. 789 (2005).

7. Roderick A. Macdonald, “If It’s Not Impossible, It’s Not Worth Doing: The Challenges of Trans-systemic Legal Education,” presentation to the law faculty at Harvard University (Nov. 23, 2004).

recognize that knowledge of German and Spanish would be increasingly helpful, but how realistic is that.

The second challenge is the need to have knowledge of more than one legal tradition amongst the professors of your faculty. This has been an issue that has been raised throughout the day in the various break-out sessions. One way to achieve this, of course, is to hire professors who have been trained in both civil and common law, and I liked Peter Strauss' suggestion that U.S. schools should start raiding McGill! But we want to be realistic and I am not sure that is going to happen. I should also reassure you that although McGill has hired many of its own graduates, and I am one of them, no law school wants to be entirely inbred and we have hired many wonderful professors who have been trained only in one legal system, but who were willing to undertake the commitment to learn another legal system. The challenge, of course, is that it takes time, energy and hard work.

The third challenge I have listed is the absence of legal materials on the market. I think I speak for just about every law professor here this afternoon who, when asked by their Dean to teach a new course, breathes a sigh of relief knowing that there is a really great textbook and casebook on the market that you can pick up and use, at least in the first year or so. We at McGill did not have that luxury because there were no transsystemic casebooks or textbooks on the market and we had to create them, from scratch, in year one.

Reorganizing course outlines was another challenge that I alluded to earlier. Course outlines and teaching plans had to be completely rethought for, as imaginative and creative as the material we present our students may be, the fact remains that most course outlines are organized around traditional legal concepts. We cannot organize our course outlines in that conventional way because civilian and common law doctrines do not match up. The nomenclature and syntax are completely different. The common law terms such as "consideration" and "fiduciary duty" mean little in the civil law. Similarly, the term "intensity of obligations" means little to the common law professors here today. This requires us, as I tell my students, to "turn the sweater inside out" and to organize our courses around broad themes and large questions. While traditional doctrines, concepts and understandings are certainly canvassed, as are extra-legal concepts such as feminist, economic and sociological perspectives on law, they are canvassed not for the sake of their being an established legal doctrine, but rather as an illustration of a particular perspective on a larger and most often common legal issue.

We also had to rethink our methods of evaluation. How do you evaluate students in a transsystemic program, particularly through the traditional method of the written examination? We had to rethink the

traditional law school exam exemplified by the three page fact pattern with everything, except for the kitchen sink, thrown in, followed by the simple question requiring the student to advise an unfortunate party of all his legal rights. That is more difficult to do when you are not operating within one discrete jurisdiction. We have altered our evaluations in many ways but I will share one I use often with you. I have found a convenient, and of course make-believe, place I call "Transania" where much of what happens in my exams takes place. This avoids my students being able to give me an answer out of the Québec Civil Code, the Uniform Commercial Code, or a case from England. Rather, it forces my students to answer my exam questions in the way I have taught them to think in class. What is the problem here, wherever this fact pattern takes place? How would I go about trying to solve it? What issues do I see arising? What are the perspectives to this that we have learned throughout the course, and throughout the various jurisdictions and legal systems we have seen?

A further challenge is to achieve both internal and external "buy-in" to a new way of teaching and learning. When we went through the difficult process of adapting our program to this new transsystemic approach, not everyone was on board. Nobody, including law professors, likes change. It is scary and daunting. It takes work and it takes risks. It took a while to get sufficient internal faculty buy-in at McGill and I cannot tell you that every single professor is totally on board even today. But change can never happen with unanimity and the only thing that needs to be carefully monitored is avoiding the creation of a divisive two-camp faculty. I can safely say that we remain a cohesive, collegial faculty.

If you think that you only need to sell this type of change internally to your professors, that is not the case. You have to sell this to the community out there, which includes prospective students (and I will talk about the impact on recruitment and admissions in a moment), and to the legal community. The legal community, in our case, was made up of the bars of the various provinces and some of the U.S. states which qualify our graduates, as well as the law firms which are made up of the people who hire our graduates and who donate much needed sponsorships and endowments to maintain the excellence of our programs. Community outreach is not only a dean's job along with some external associate deans. It is actually the role that every professor on faculty who comes into contact with any member of the legal community must play.

Finally, while much can be done through hard work, commitment and ingenuity of human resources or intellectual capital, financial resources is another challenge that we face, and one that is particularly acute at McGill where we are a publicly-funded university that has

absolutely no control on the tuition fees that we charge. Suffice it to say that running a program in two languages (as all of our first-year and compulsory courses are offered in French or English at the option of the student) and in multiple legal systems, where all students graduate with two law degrees, is much more expensive than simply offering one, unilingual, three-year, single-degree program. "If it is not impossible, it is not worth doing!"

Overcoming Challenges

I have also been asked to present some of the ways in which we overcame these challenges. I am aware that the subtitle to this session is "Institutional Support" and admittedly, institutional support is important in order to effect any type of change. But before you can move to institutional support, if you do not have internal people support, you have nothing. We could not have done at McGill what we did without collegiality amongst our professors and our staff, and collaboration between all of us. Egos have to move aside because senior and junior members of staff are equally at sea in a new program. You all have to share knowledge, material, ideas and time with each other. You have to be willing to give your colleagues that time and that support.

Then comes institutional and faculty support. Looking back, I think that the greatest support that we, as professors, were given was the understanding on the part of the institution that our publication record would slow down in the short run as we embarked on the venture of learning a new way to teach and to learn. This was seen as short-term pain for long-term gain that came with the belief that ultimately, the research that we will produce will be of a deeper and more interesting quality. This is beginning to happen and out of interest, the 50th anniversary issue of the 2005 edition of the *McGill Law Journal*, to which many McGill professors contributed, is devoted to the theme of "Beyond Borders: Pluralistic and Multi-Systemic Approaches to the Law." Several teams of law professors are also beginning to work toward publishing transsystemic teaching and research materials.

Apart from that understanding, there are a variety of institutional responses to help faculty undertake the incorporation of transnational perspectives into their courses. One important aspect of institutional support at McGill was the organization and support for team-teaching. In the beginning, we devoted two professors to one course, one more versed in the civil law tradition, the other in the common law. They would both teach, each from their own perspective, and they would each learn from each other directly in the classroom, thereby preparing them to offer the course on their own at a later time. Joint preparation of

teaching materials is another way to overcome some of the challenges as I am not sure that anybody can prepare transsystemic teaching materials on their own, or do so as well as they could without the collaboration of other colleagues.

Joint research projects is both a way of overcoming challenges, as well as a reward for moving in this direction, since transnationalism, as transsystemia, lends itself more readily to this form of cooperative research. Working on joint research projects with other colleagues leads to a greater appreciation and knowledge of different approaches, different sets of knowledge and, of course, different perspectives.

Participation in exchange programs and international consortia, as well as exposure to international law students, is also invaluable. Remember, the goal of transnationalism is not to become more *like* the other, but to learn more *about* the other and, in the process, learn more about oneself. The more exposure you have to others, the easier this is to do and so you have to seize all of the opportunities available. I know that Lauren Robel will be speaking about foreign graduate students. I will just share one thought about that. At McGill, we are very lucky to have a very international graduate student body. Last year, I had a graduate student from the Netherlands who wrote a fascinating thesis for me entitled "Towards a European Ius Commune: What lessons can we learn from Québec's mixed legal system?"⁸ Forget what she learned from me and from Québec's legal system, I learned an incredible amount from her about European sources of law that I have since incorporated into my courses.

Many professors at McGill have also participated in a variety of international consortia. I participated in the program organized by the American University, Washington College of Law, when it instituted an international consortium on legal education.⁹ Several of my colleagues have participated in the Trento Common Core project in Italy.¹⁰ And of course, we have student exchange programs, which bring to our classrooms students from a variety of countries. Just in the last year, I have had students from Belgium, France, Turkey, Brazil, the U.S. and Australia, who bring so much both to the classroom and to the independent research papers they write under your supervision.

We also participate in some organized exchanges such as NACLE, the North America Consortium on Legal Education, which is an organization that promotes not only student exchange but faculty

8. Henriëtte van Hedel, thesis submitted in partial fulfillment of the degree of LL.M, Institute of Comparative Law, McGill University, granted Feb. 2005.

9. Oct. 2004 under the direction of Dean Claudio Grossman.

10. M. Bussani & U. Mattei eds., *THE COMMON CORE OF EUROPEAN PRIVATE LAW* (The Hague: Kluwer Law International, 2003).

exchange as well. I am not sure that we actually have enough faculty exchanges. We benefit enormously from students crossing borders but I also think that there is a need for faculty to cross borders as well.

Rewards

On my outline, I have listed the rewards of transnational or transsystemic teaching. Without repeating them all, I will simply flesh them out with one or two interesting facts. On the student side of things, our admissions picture has never looked better due to this unique and valuable product we now offer. Our applicant pool has increased by 64% since the inception of the program. Our yield ratio (which is the percentage of students that we accept who take up our offer of admission) was 77% last year which is very high comparatively. The market seems to like our product as well as more and more legal employers come to recruit at our Faculty and most of our graduates are easily placed upon graduation. I should mention that 12 to 15 graduates a year, which is about 10% of our graduates, go to major New York law firms alone. Student satisfaction is up and aspiring professors are knocking down our doors to get teaching jobs at McGill, despite the fact that we publicize the need for knowledge of two languages and two legal systems. And our job satisfaction has increased. We get much more enjoyment from our classes and our students, and we get to teach at a higher and more intellectual level. Granting agencies seem to be willing to fund cutting edge legal research that seeks to change the existing paradigm. I am involved in one such project where we obtained a major research grant to begin a publication project on transsystemic Contracts and Extra-Contractual Obligations.

Conclusion

I began my talk, and I will end it, with the proviso that McGill University, being situated where it is, has a set of complex and unique juridical and political circumstances that may not be as relevant to you here in the United States. And I am the first to admit that adopting our fully integrated McGill program is not appropriate for most of you. But none of us can escape the fact that we are living in an increasingly globalized world where knowledge about the other is becoming more and more relevant. So no law school can ignore that reality, and all law schools must begin to incorporate transnational perspectives directly into the curriculum rather than having them offered in separate silos. I recently came across a quotation by Proust that I cannot resist using every time I speak of the McGill program because it seems so relevant to McGill's experiment in transforming legal education. He said that "the

real voyage of discovery consists not in seeking new landscapes, but in having new eyes.” That is what I think integrating transnational perspectives into the curriculum is all about. I invite you all to think about ways of incorporating new eyes from different cultures, different jurisdictions, and different legal systems into your curricula, and you will see how learning about the other ultimately teaches you more about yourself. Thank you.