

How to Introduce Similarities and Differences and Discuss Common Problems in the Classroom

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Introduction

There is little doubt that the reality of today's "transnational explosion" has caused a fundamental change in the way law faculties are conceiving of legal education. As a result of the decreasing importance of political geography or state normativity, the traditional law school curriculum, tied to the rules in force in a given local legal jurisdiction¹, is giving way to a variety of comparative, international and transnational curricular aspirations. This change in the legal curriculum has been termed by one academic as "law without the state"².

Some law faculties have been prompted to introduce changes of this kind to the curriculum for what one may term instrumental reasons – as a reaction to market changes both in the general economy and in the legal profession. Law programs are increasingly trying to prepare students for what they anticipate will be their practice in global law firms, international agencies and with clients conducting transnational business³.

Other law faculties, among which McGill may be counted, have introduced transnational legal education primarily for academic reasons – as a move towards intellectual pluralism. As stated eloquently by Professor Peter Strauss of Columbia Law School commenting on the McGill Programme, the goal is to "catch (students) in a University enterprise, to get them thinking about law in an intellectual and not an instrumental way"⁴.

The Theory of Transsystemic Teaching at McGill's Faculty of Law

Since 1999, McGill University's Faculty of Law has been offering what has been termed a "transsystemic" program of legal study⁵. This transsystemic focus enables

¹What McGill's Dean Nicholas Kasirer has termed "law's empire" to be distinguished from "law's cosmos". See Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29.

² Harry W. Arthurs, "Law and Learning in an Era of Globalization", a paper delivered at the Learning and Law Annual Conference, United Kingdom Centre for Legal Education, University of Warwick, January 4, 2007 (on file with author).

³ See Arthurs' paper generally, *ibid*.

⁴ Peter Strauss, "Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?", (2006) 56 J. Legal Educ. 161 at 165.

⁵ This program builds on the National Programme offered in the Faculty from 1968 – 1999 pursuant to which McGill offered a common law and civil law programme albeit one that was primarily sequential rather than integrated in nature.

students to study civil and common law legal traditions⁶ in an integrated fashion and in a uniquely comparative, bilingual, multi-systemic, pluralistic and dialogic legal curriculum. And while this type of law program may well better prepare students for a global law practice, we believe that the study of law from a transsystemic perspective is a value in and of itself. As former Dean and now the Honourable Mr. Justice Yves-Marie Morissette has stated, McGill “has always been habited by the conviction that a great deal can be gained...from a sustained and humble dialog with *otherness*”⁷. In this sense, the theme of this entire conference, with its emphasis on “learning from the other”, echoes this intellectual and academic mission of McGill’s Faculty of Law. As another former Dean of the Faculty, Professor Roderick Macdonald, has stated, teaching transsystemically has enabled us to concentrate on the fundamental ambitions of law teaching which “focus on the goals we seek to achieve through law”⁸

Most importantly, as the teaching of law decouples from the law of the State, professors and students are encouraged to approach legal study as a way to develop the important skill of imaginative insight, the ultimate aim being to undermine the fallacious notion that there is one structure of reality.⁹ “Transsystemic teaching challenges the notion that law’s logic and ambition are pre-determined; it confronts students with the paradox that law is best learned when its values are contested and its methods up for debate”¹⁰.

Turning Theory into Practice – How Can One Teach Transsystemically?

It is tempting to focus on the long list of challenges entailed in offering a program of legal study that is comparative, bilingual, multi-systemic, pluralistic and dialogic all at the same time and simply give up the enterprise, no matter how attractive the goals of such a program may be. Such challenges would include the need for adequate linguistic ability to access legal materials in foreign jurisdictions, the lack of faculty expertise to teach foreign legal materials, a lack of teaching materials facilitating transnational teaching currently on the market, and difficulties in course organization and evaluation of

⁶ All students in the Faculty of Law graduate with two law degrees: the B.C.L. (civil law) and the LL.B. (common law).

⁷ Yves-Marie Morissette, “McGill’s Integrated Civil and Common Law Program” (2002) 52 J. Legal Educ. 12 at 22.

⁸ Roderick Macdonald, “On Teaching Law Transsystemically” *in* Focus McGill Faculty of Law publication, Spring-Summer 2007 at 4.

⁹ For a broader discussion on this theory, see Rosalie Jukier, “Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom” (2005) 50 McGill L.J. 789.

¹⁰ Macdonald, *supra* note 8.

student performance to list just a few¹¹.

Instead of focusing on the difficulties and challenges, the following are some suggestions on “how” one can move towards a more integrated, transnational and multi-systemic perspective to law teaching.

Prepare your students for what lies ahead

It is helpful to emphasize to your students, at the outset of their legal education, that they will be “embarking on a course of study, and ultimately on a career, that will require them to live at ease with multiple truths, unresolvable conflicts, abundant ambiguities and ironies galore”¹². Law professors have long been telling students that there is “no right or simple answer” and most of us already teach in a way that eschews black-letter answers to questions. Most of us already challenge students to think creatively about legal solutions to problems. Incorporating transnational perspectives simply takes this one step further. Instead of focusing on mono-systemic sources of law to teach students to “think like a lawyer” in a given jurisdiction, a transsystemic approach uses a multitude of formal materials (such as cases, codal provisions, statutes, international harmonization projects such as Unidroit) as *hypotheses* of appropriate legal responses to the common problems people face.

Focus on overarching themes and theoretical underpinnings

Spend some time at the outset of a course discussing overarching themes and theories that transcend any one legal system. Using the course on Contractual Obligations as an example, discussions of promissory theory, will theory, individualistic versus altruistic goals of contract law, or distributive justice approaches to contract law are some examples of how students can, at the beginning of a course, focus on the intellectual structures of law in the area of contracts and emphasize the commonalities of the problems underlying a given law course. Make sure that writings of this sort emanate from a myriad of jurisdictions – the U.S., Canada, France, England. Instead of beginning with the traditional method of reading a case, which in and of itself predisposes students to common law methodology, spending a few classes on these overarching themes and theories sensitizes students to the non-jurisdictionally confined approach to the course and to important policy considerations that will play out in the remainder of the course.

Do not organize courses around established doctrines

Most course outlines and teaching plans, no matter how imaginative and creative,

¹¹ A fuller discussion of these and other challenges may be found in my paper presented at the AALS Conference in January 2006 and published in the Penn State International Law Review and in my article published in the Journal of Legal Education. See Rosalie Jukier, “Challenging the Existing Paradigm: How to Transnationalize the Legal Curriculum” (2006) 24 Penn State International Law Review 775 and Rosalie Jukier, “Transnationalizing the Legal Curriculum: How to Teach What We Live” (2006) 56 J. Legal Educ. 172.

¹² Arthurs, *supra* note 2.

remain rooted in doctrinally orthodox legal concepts that are tradition-specific. Transsystemic course outlines cannot, however, be organized in that way because civilian and common law doctrines do not neatly match up – the nomenclature and the syntax are entirely different. The concept of “consideration”, for example, means little in the civil law and the theory of nullities or the concept of intensity of obligations means little in the common law. As such, course outlines must be organized around broad themes and large questions that transcend any one legal system or jurisdiction (such as: what constitutes an agreement?; what makes an agreement enforceable?; how do we inject social control over contracts?). As Peter Strauss says, “if one approached the matter from the perspective of human problems (which are universal), and desired outcomes (also widely shared), the question of how one got from point A to point B was just a system whose particulars could be learned”¹³.

Offer a multi-systemic perspective

There is no doubt that professors naturally tend to favour local materials and at McGill, primary and secondary materials from the usual jurisdictions of Quebec, Canada and England still make up the majority of our course materials. However, increasingly, it is important to broaden this perspective by including materials from other jurisdictions and at McGill, professors increasingly use materials from the U.S., France, Germany, and Australia to name just a few. In addition to looking beyond traditional jurisdictions, professor must broaden the type of pedagogical materials presented to students and balance local and national materials with transnational harmonization projects (such as Unidroit, Principes de droit européen, Uncitral) as well as transnational norms and practices. The next challenge is to move beyond exposing students merely to Western legal traditions and include perspectives from religious, aboriginal and chthonic legal traditions.

Move comparative teaching from a sequential to an integrated approach

The traditional method of presenting multi-jural perspectives is to do so in a sequential, side-by-side, comparative manner. While this sort of comparative pedagogy certainly introduces additional perspectives into the classroom, true comparative teaching must create a *dialogue* between the various perspectives and concentrate on the “interplay of multiple distinct forces in a constant state of flux and engagement”¹⁴. At McGill, we have come to the realization that it is no longer adequate to teach, no matter how well, distinct systems of thought in separate silos. We would be failed pedagogues if within our blended civil and common law courses, we simply spent half the class talking about how the common law views a certain doctrine and then the second half of the class how the civil law views a similar

¹³ *Supra* note 4 at 169.

¹⁴ Desmond Manderson, “What Does Transsystemia Look Like?” *in* Focus McGill Faculty of Law publication, Spring-Summer 2007 at 5. In this piece, Manderson equates transsystemic legal study to the art form of pointillism where close up, the painting reveals pixels of different colours and where “to truly study the painting is to study the interplay of multiple distinct forces in a constant state of flux and engagement”. See also, Nicholas Kasirer, “Legal Education as *Métissage*” (2003) 78 Tul. L. Rev. 481.

concept. Classes must move back and forth between traditions and amongst materials from a variety of jurisdictions and perspectives thereby creating an openness to ideas and solutions and a dexterity of mind absent in a purely monojuridical training.

Link perspectives to legal traditions

The McGill Programme is predicated on the belief that legal systems have particular structures of thought, transcendent values and principles and intellectual traditions.¹⁵ As such, materials from different jurisdictions belonging to distinct legal traditions must not be presented in the abstract but rather must be linked to a deep and critical understanding of the overall mentalities and methodologies of the two great occidental legal traditions. It is thus not just the multiplicity of perspectives that is key to operating within a transsystemic world, it is that these perspectives are linked to global systems of thought.¹⁶

Distinguish legal systems within traditions

While recognizing that the Civil Law and the Common Law each evidence coherent and distinct historical, methodological and principled intellectual traditions, and that it is important to link perspectives to those legal traditions, it is also important to expose students to the instances where jurisdictions within the same legal tradition, such as France and Germany, France and Quebec or England and the U.S., diverge considerably on a given issue.

Abandon the “mirror-image” approach

Comparative pedagogues are often pre-occupied with the need to present students with a mirror image approach to legal issues, ensuring that each legal tradition gets “equal time” in the classroom. This, however, is both an unrealistic, and even pedagogically unsound, way of approaching transsystemic teaching. There are legal issues and doctrines that predominate one legal tradition and not the other, and legal problems which have been dealt with in much more detail in one legal system than another (the doctrine of consideration and the problems created by privity of contract in the common law for example). As such, many classes will not give equal time to civil and common law comparators and that, in and of itself, serves to educate students about the structures and underlying values of the distinct legal traditions.

Favour knowledge over information

At the Association of American Law Schools’ conference on “Integrating

¹⁵ See Kasirer, “Bilingualism”, *supra* note 1 at 37-39.

¹⁶ For a more complete explanation on the importance of linking comparisons between different conceptions of civilian and common law counterpart doctrines or approaches to the mentalities of the traditions in question, see Jukier, “Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom” *supra* note 9 at 798-801.

Transnational Perspectives into the First Year Curriculum”¹⁷, many leading academics claimed that while they were theoretically attracted to adopting a more transnational approach to teaching, this was practically difficult to do as there were already insufficient credit hours devoted to their courses in the law school curriculum, leaving barely enough time to cover local law, let alone perspectives from other jurisdictions and other legal traditions. Insufficient credit hours is a perpetual complaint of law professors. It underlies the reality that even in a mono-systemic course that concentrates only on local law, it is impossible to teach it all. Therefore, what is important to pass on to students is not the entire spectrum of “law’s empire”, but rather “the intellectual structures law brings to the resolution of disputes, and the difficulties those structures...present”¹⁸.

Conclusion

McGill, situated as it is in a bilingual city and in a province where private law is governed by the civil law tradition and public law, like the law in the rest of the country, traces its origins to the English common law tradition, has naturally been offering comparative, bi-jural, and now transsystemic, legal education for the past four decades. But increasingly, many other law faculties are seeking to adapt their curriculum and reinvent their teaching of law to incorporate global, multi-systemic and transnational perspectives. Hopefully, McGill’s experience can help others “use a new mental map to navigate ordinary courses in contracts, criminal law, labour law and family law”¹⁹. Ideally, more and more faculties will create in their classrooms a “Babel of inquiry and understanding”²⁰, freeing the study of law from jurisdictional, temporal or systemic boundaries, multiplying the perspectives to legal education, and truly accomplishing the ultimate goal of learning from each other.

¹⁷ Association of American Law Schools, Annual Meeting, Washington, D.C. (Jan 2 – 7, 2006)

¹⁸ Strauss, *supra* note 4 at 164.

¹⁹ Arthurs, *supra* note 2.

²⁰ Manderson, *supra* note 14.