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Integrating Civil and Common Law Teaching Throughout the Curriculum: The Canadian Experience

H. Patrick Glenn*

We are, of course, faced with a problem of language in attempting to discuss our subject. The word “international” does not seem entirely appropriate, suggesting as it does that we are concerned with the relations between states, as entities, and the traditional domain of public and private international law. Nor do notions of “inter-systemic” or “trans-systemic” law or legal education entirely capture the dynamic of the contemporary world, in continuing to place the emphasis on an underlying notion of autonomous, and even conflicting, legal systems. The notion of a legal tradition is one which transcends state law, but there is no accepted or likely-to-be-accepted language of the “multi-traditional” or “pan-traditional.” So the most acceptable language appears to be that which was given prominence by Philip Jessup a half-century ago in speaking of “transnational law.”¹ Jessup was himself concerned almost entirely with public and private international law and used the notion of the transnational only to encompass relations between private persons or corporations and foreign states. The analysis was overwhelmingly in terms of structured, institutional relations.

The major challenge facing legal education in the 21st century, however, would be that of capturing a more dynamic relationship between the laws of the world, given the heightened mobility of people and ideas, and a dramatic increase in private, non-state, cross-border relations. The word “transnational” appears capable of encompassing these developments, if taken beyond the original sense given to it by Jessup. Transnational legal education could thus deal with both transnational law, for example, the new *lex mercatoria*, and with the process of cross-border judicial dialogue which is now developing in

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1. P. Jessup, *TRANSNATIONAL LAW* (1956).

many challenging areas of law.² National law, then, becomes transnational law to the extent that it is used and cited beyond its national origin. Transnational legal education would facilitate such legal work and thinking. Its product would be cosmopolitan lawyers, those capable of thinking and working in terms of more than one national legal system, or more than one legal tradition.

Transnational legal education represents a challenge since most of the legal theory and legal education of the last centuries has been devoted to the construction of national legal systems. The challenge is to contextualize this theory and teaching and to nest it in a wider range of normativity. The eventual model would be that of teaching transnational legal principles, using national laws as illustrations or exemplifications, or as contrary, ongoing argument.

My colleague Yves-Marie Morissette has written that movement towards more universal forms of legal education appears driven by the particular circumstances of individual law schools.³ So, I present some of these universalizing particularities found in Canadian law schools, in the hope that elements of these programs may be of interest for the particular circumstances of other law schools.

If we look rapidly across Canada we see a number of examples of these universalizing particularities. The detail of all of them can be found on their respective web sites. The two law Faculties of the west coast, those of the Universities of Victoria and British Columbia, have extensive teaching and research programs in Asian law. In Toronto, the center of much Canadian international economic activity, the University of Toronto has initiated a series of endowed chairs in specialized international and transnational subjects such as trade, the environment, and technology. The Osgoode Hall Law School, also in Toronto, has created a designated major within its basic three-year program, the International, Comparative and Transnational (ICT) Programme. The Law Faculty of the *Université de Sherbrooke*, in Quebec, has also just created a transnational program. In Ottawa, the bilingual national capital, the Faculty of Law of the University of Ottawa gives degrees in both civil and common laws, in both English and French, and both degrees in four years. At the *Université de Montréal*—the large, francophone, civil law Faculty in Montreal—a distinct, new graduate

2. See, for example, Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U.RICH.L.REV. 99 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VIRGINIA J. INT'L. L. 103 (2003); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 O.J.L.S. 499 (2000); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987).

3. Y.-M. Morissette, *McGill's Integrated Civil and Common Law Programme*, J. LEGAL EDUC., at 1 (forthcoming).

degree has been created, beginning this year, in North American common law, with courses in both French and English.

Generally across Canada, because of the Canadian particularity in North America that Canadian law students pay very little for their legal education, exchange programs are very popular and successful. At my Faculty, McGill, we have 32 bilateral or multilateral exchange programs, including the North American Consortium on Legal Education (NACLE), and at any given time approximately 10% of our student population is away on exchange and replaced by exchange students. Exchange students are an interesting addition to transnational legal education, bringing another perspective to instruction given in the classroom. If you think in terms of culinary metaphors, I have heard Tony Weir, of the Law Faculty of Cambridge University, refer to them as the shrimp in the risotto.

The most particular Law Faculty in Canada, however, is my own, and out of loyalty I will therefore devote the remainder of this essay describing the reform processes that have taken place at McGill over the last 35 years, and more particularly in the last 4 years.

For about 120 years, from 1850-1920, McGill was an English-speaking, civil law school, whose Bachelor of Civil Law (B.C.L.) degree was modeled on that of Oxford, with its original concentration on Roman law.⁴ In the late 1960s, however, the Faculty created what it then called its "National Programme," which essentially involved three things: 1) awarding a common law LL.B. degree in addition to the B.C.L.; 2) allowing both degrees to be awarded in a fourth year following completion of the first, other degree; and 3) beginning to teach a significant number of courses in French, to ensure greater linguistic equality in the Faculty and provide the occasion for more bilingual training. There has been a great deal of debate over the past thirty-five years as to how best teach multiple laws or legal traditions to the same people in a single institution, but there have been, I think, two very broad themes or developments.

The first theme of the McGill reforms has been the multiplication of transjurisdictional or transnational courses. This has taken place largely outside of the core curriculum and in areas which lend themselves to this treatment. The course in Private International Law or Conflicts of Laws has thus been taught for decades as a joint civil law/common law course, drawing case law examples from Quebec, common law Canada and the Commonwealth, France, and the United States. Civil procedure has been taught in the same way across the Quebec/Ontario border, a development

4. On the history of the Faculty, see R. A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects*, 13 DALHOUSIE L.J. 211 (1990).

facilitated by the common form of adversarial procedure shared by the two provinces for the last century or more. Both provinces, moreover, are moving towards forms of case management which recall in some measure the investigative procedure of New France. The new Principles of Transnational Civil Procedure being developed jointly by the American Law Institute and UNIDROIT will be a useful addition to this form of cross-jurisdictional understanding of procedure. A whole range of international business courses are also taught in this way, as is the first year introductory course in law entitled Foundations of Law. This latter course has long been a rather desultory introduction to the civil and common law traditions, a smorgasbord-like mix of legal history, legal philosophy, and professorial idiosyncrasy. Of late, however, with some success, it has branched out to deal with the major legal traditions of the world, a development which reflects both the multicultural character of the first year class and many contemporary problems of the world. The course which I myself found most interesting to teach was a course in North American Litigation, dealing with the laws of Canada, the United States, and Mexico. This course was oversubscribed the first and only time it has been given, and appears to correspond both to student interests and to the increase in cross-border transactions and litigation amongst the NAFTA countries.⁵

The second major theme or development at McGill has been with respect to the teaching of the core curriculum of the two degrees. Here, the movement over 35 years has been one of greater and greater integration in the teaching of civil and common law, though this has not been without protest. There have been three phases in this development towards integrated teaching of different legal traditions.

The first phase was that of the early years of the so-called National Programme. Here the teaching of each tradition was essentially separate and the two degrees were received according to a 3 + 1 model, in which 3 traditional years of instruction in one legal tradition were followed by a fourth, supplementary year in which basic courses of the other tradition were taken. Fourth year students thus appeared in first-year classes in the cross-over degree. This phase lasted some fifteen years. It involved little or no innovation in terms of transnational legal education, novel as it was at the time.

The second phase was provoked by a sense of wasted opportunity and by the realization that the entire burden of understanding the

5. For a proposal for coordination of teaching in the Americas, including a common NAFTA degree, see Mark A. Drumbel, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053, [notably at] 1107 (1998).

relationship of laws and legal concepts, across borders, was being left to students. The result was a move to a 2 + 2 model of teaching, in which students essentially took back-to-back first years, of each tradition, before going on to two years of advanced, upper-year courses. This model was thought to accommodate more readily the existing knowledge of students, so that courses in the other tradition, taught in the second of their first years, could be built to reflect that which students had learned in their first year. This proved to be an overly optimistic objective, and in some cases competing forms of legal indoctrination appear to have developed, depending on the whims and foibles of individual instructors! This phase also lasted approximately fifteen years, so we know that transnational curriculum development is a slow and challenging process.

The third phase or model was that adopted only two years ago and which will produce its first graduates only this year.⁶ It is essentially a three-year, integrated programme, though students have the option of extending it to three and one-half or four years. The model is integrated in the sense that distinct degree streams in the Faculty have been eliminated and all students follow an identical core curriculum leading to the granting, for all students, of both civil and common law degrees. The most interesting pedagogical feature of the new model is that most courses are now designed to be taught in an integrated manner, with both civil and common law taught by the same instructor in the same classroom. This is notably the case for first year Obligations courses (Contract and Tort), but is extended as well to other first year courses (Family Law), and upper-year courses (Commercial Transactions, Evidence, Security on Property, etc.). Only the law of Property continues to be taught in a tradition-specific manner, as the most deeply-rooted and contextual form of private law. There was also some sentiment that the simultaneous conceptualization of civil and common law property was simply too Herculean a task. Property may forever remain jurisdiction-specific.

What general observations can be made as a result of these experiments in transnational legal education? I will offer four.

First, I think experience to date shows that the teaching of multiple laws in a single classroom is both possible and justifiable, in varying measure and according to local circumstance, in the present state of the world.

6. On the new McGill Programme, designated as such, see Y. M. Morissette, *supra* note 3; D. Jutras, *Énoncer l'indicible: le droit entre langues et traditions*, R.I.D.C. 2000.781, at 791 ff; D. Jutras, *Two Arguments for Cross-Cultural Legal Education*, in *DIFFERENT LEGAL CULTURES: CONVERGENCE OF LEGAL REASONING* 79-82 (Heinz-Dieter Assmann et al eds., 2001); Julie Bédard, *Transsystemic Teaching of Law at McGill: Radical Changes, Old and New Hats*, 27 *QUEEN'S L. J.* 237 (2001).

Second, the task of teaching multiple laws effectively is a very challenging one. Both hegemony and confusion must be avoided, and critical appraisal, across borders, must replace national closure. Again, there are culinary models. The French say of Irish cooking that the surprising thing about Irish cooking is not that it's bad, but that the Irish think that it's good.⁷ So, as with Irish cooking, very serious reflection is required as to standards, methods, and content.

Third, the object of transnational legal education is not legal unification or even facilitating convergence, but rather understanding of difference, and the underlying reasons for difference. My colleague Adelle Blackett has thus written of the importance of developing a "layered vision of the legal world."⁸

Fourth, and finally, transnational or integrated teaching of law provides more legal resources in the ongoing struggle against deconstruction of law, in all its manifold forms. If western law is being challenged in all parts of the world—western and other—then it is appropriate to rely on all of western law in response.

7. H. GAULT & C. MILLAU, *GUIDE JULLIARD DE L'IRLANDE* 10 (1964) ("La drame de la cuisine irlandaise, ce n'est pas qu'elle soit mauvaise, c'est que les Irlandais croient qu'elle est très bonne") and 11 (on Irish favorite dish of "crushed potato" ("la pomme de terre écrasée").

8. A. Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 *COL.J.TRANS.L.* 57, 79 (1998).