SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Born to be Wild: The "Trans systemic" Programme at McGill and the De Nationalization of Legal Education

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A. Introduction

Legal education is changing. What is changing is our understanding of "education", of how we learn and how we should teach.[1] Also changing is our understanding of how to define what is "legal" about "legal education". Most will nowadays agree that legal education should be more than a vocational training for the practice of the profession in a particular jurisdiction. In analyzing the development of legal education in recent years, we can distinguish two trajectories. Firstly, there is the ongoing attempt of specifically the North American legal academy to make legal studies a transdisciplinary endeavour, a development closely connected to the major "paradigm shifts" in legal theory in the 20th century.[2] Secondly, it seems that jurisdictional boundaries have lost significance in an internationalized, globalized and post regulatory environment.[3] This calls into question the very notion of "law" itself, at least as traditionally understood as a system of posited norms within a given jurisdiction. How should both developments be reconciled?

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I. USA: Challenging disciplinary rather than jurisdictional boundaries

North American legal education has a longstanding tradition of self reflection. The situation here is different from that in Europe, where there is little incentive for legal scholars to devote a considerable amount of time to a serious scholarly treatment of the issue of legal education. In North America, particularly in the USA, well established institutions such as the "Journal of Legal Education", first pu.8&830TD<0003>Tjnb.2f4.73650TD0Tc<0003>Tj/TT121Tf issue5750T5

of communication about law, a

existed, by professors who know only one legal system.[26] William Twining, professor at University College in London, commented on this state of affairs in 2001:

> "I suspect that professional qualifications and other requirements for initial certification will continue to act as both a barrier to and barometer of the extent of transnationalisation of primary legal education and training. And until university law teachers take the idea of life long learning education seriously and act on it, our law schools, schools, and ide2 674.22 Tm .0004 Tc (idea)Tj /TT7 1 Tf 1.73

inspire a process of re thinking the goals of national legal education in the European context. Such a development would reflect the spirit of the Bologna process, whose ten "Action Lines" not only call for the promotion of mobility and the compatibility of degrees, but also for the promotion of the "European dimension" in higher education.[30]

Within the context of legal studies, the promotion of the "European dimension" can be taken to imply an even stronger

after Langdell, Harvard Law School (HLS) has been leading the American charge towards a new internationalism: in 2006, HLS changed its "Langdellian" first year curriculum and added mandatory courses with international implications to the classic first year canon in order to prepare students, as Dean Kagan put it, for the "new complex global challenges of this millennium". Each student now has to take one of three courses "introducing global legal systems and concerns Public International Law, International Economic Law, [or] Comparative Law".[38]

Reactions from Europeans have been more cautious.[39] McGill hosted two conferences ("Roundtables"), gathering American and European scholars to discuss the workability of "trans systemic" legal education in different contexts, and particularly to highlight the connection between substantial *rapprochement*, which is at the heart of so many European projects at the moment, and a change of "legal culture" that is unthinkable without changing the culture of legal education. Opinions voiced at theseications

overcome the traditional Western bias of conceptualizing law as nothing but a "system" that is enacted by a state, and to free the educational discourse about law from its positivistic constraints.[41] In that sense, the programme is not tied to Québec as a mixed jurisdiction, given that its ambition goes far beyond the teaching of the mixed law of Québec. More important is the intellectual climate that forms the condition of possibility for such a project. Without a doubt, the mindset prevalent in a mixed jurisdiction, the experience of being mixed, interstitial and in flux, is particularly conducive to an experiment such as McGill's.[42] Eventually, however, the *conditio sine qua non* for its existence is a *mindset*, such as the particular North American tendency towards a less positivistic and more intellectual legal education: a culture rather than a place.

B. Historical Background: Legal

of the so called Québec Act of 1774, the British guaranteed freedoms important to the "French" identity of the populace. That private disputes would continue to be adjudicated according to the rules of French civil law – meaning, at this point, according to the *Coutume de Paris* – was one of these guarantees. The fact that law figures so prominently next to religion underlines that even "legal culture" can be the focal point of a group identity. Thus, the ingredients of the mixture were defined: French civil law within the framework of English public law and laws of procedure.

In addition to the *Coutume de Paris,* Québec private law has its historic origins in the original 1865[45] and the contemporary

can only be one answer to a legal question; not only do judges give individual opinions, but frequently dissenting ones, too.[49] "Although *stare decisis* is not part of Québec law, court decisions are given very considerable weight in judicial analysis."[50]

II. Legal Education in

administration of justice until the re affirmation[53] of the *Coutume de Paris,* but that "since that period, they have been loud and frequent, and in my humble opinion have arisen from the Anarchy and confusion which prevail in the laws and the Courts of Justice in the province."[54] Looking for guidance through education, requests to McGill College were made, particularly by the Montreal Anglophone community, to offer courses in law; in 1848, University records first mention the "Law Class of McGill College".[55]

In a speech held in 1859, M. Desiré Girouard, later a Supreme Court justice, still decried the state

were offered alongside the regular civil law program. However, it took another fifty years before a "National Programme" was formally offered to incoming students.[61]

The philosophy of this National Programme, first adopted in 1968, was fairly straightforward. It was based upon the conviction that knowledge of both Canadian legal traditions was an asset, intellectually and professionally.[62] In the broadest sense, it could be seen as contributing "to the promotion of mutual understanding between different regions of the country."[63] By providing students with training that allowed them to qualify as lawyers in both civil law and common law jurisdictions, the National Programme not only increased professional mobility in the country but also began to produce jurists who could more easily find work in transnational and international environments. Indeed, double degree graduates were fully qualified to practice law across Canada, and were increasingly qualified for practice in a number of American and other jurisdictions. Moreover, as one professor pointed out, "it is noticeable that students proceeding to graduate work, at McGill and elsewhere, are more often than not those with th[illegible]

1999, streaming has been abandoned. All students are admitted into a single integrated program, and all graduate with both degrees. Basic private law courses are no longer taught in function of a single legal system but in function of overarching categories of law such as contracts and civil responsibility.[70]

II. From "Law's Empire" to "Law's Cosmos"[72]

The new program fits in the movement toward a more academically ambitious model of legal education. While a trans systemic legal education is without a doubt "an open door on the world"[73], its architects thought of it, first and foremost, as "an invitation to students and scholars to think of law in a new way, in terms other than those of the jurisdictional or geographical representations of law that have dominated North American legal education in the past."[74]

The reform of 1999 was also the occasion for an introspective debate on the skills imparted by the programme and on the particular form of jurisprudential awareness it can cultivate in students.[75] With a view to developing new learning opportunities, the Faculty approved an ambitious Human Rights internship programme, Minors in other disciplines, Majors in particular fields of legal specialization and an Honours thesis.[76] Again, the rationale for these innovations stemmed from a vision of law as a discipline with a firm place in the academy among the social sciences and humanities.

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Whether they are engaged in drafting or analysis of contracts, litigation, advocacy, policy making in government service or work for NGOs, jurists need to be sensitive to the influence of different systems. Within the EU a lawyer called upon to apply the *ECT* article 288 will surely benefit from training that calls for the ability to think of legal rules outside a single jurisdiction. A jurist called upon to work with a common code governing commercial contracts will understand the principles of the code far more readily if she comes at it from a perspective which is not tainted by the instinctive belief that there is only one genuine legal system – that in which they were first trained. Administrative lawyers working with the EC concept of general principles of law can do so much more readily if their judgment is not clouded by instinctive fidelity to their

endangering graduates' "employability" – the European positivist objection to the ideology underlying the programme – seems unfounded.

It is also hard to assess whether the programme has come up to its own intellectual expectations. As Harry Arthurs, former Dean of Osgoode Hall Law School and former President of York University, has remarked: given the complex theoretical justifications for the curriculum change, judgments about the operation of the programme are confronted with the conceptual problem that "the standard of judgment the programme has defined for itself is not how it functions at any given moment, but rather how it evolves over time".[81] Indeed, to assess whether the programme has evolved even further before concluding that it "functions" in the first place seems hardly feasible. However, it can be said that the whole faculty at least is engaged in a permanent attempt to propel such an evolution: at McGill there is an ongoing process of critical self assessment and self reflection, documented by faculty seminars, conferences and scholarly publications on the topic of legal education. At the moment, a committee struck by the faculty is charged with a review of the achievements of the programme. Critique from the outside has been taken seriously, such as Peter Strauss's admonition to better include other emanations of the civilian tradition than French and Québec law[82] – one of the considerations taken into account when it was decided to hire civil law trained faculty from Puerto Rico and Germany.

In addition to pointing out the difficulties of realistic self assessment, Harry Arthurs has put forward what is probably the most challenging critique in regard to the substantive focus of the programme: In its strong belief in the value of comparative law, Arthurs claimed, the McGill programme went "madly off in one direction". Its revolutionary fervor, he implies, is somewhat stuck in a "legal" perspective, while a true effort to make legal education an interdisciplinary endeavour has so far been lacking.[83]

The programme does already include a number of courses with an interdisciplinary ambit. Nevertheless, Arthurs's point is well taken, and the commensurability of the "trans systemic" programme and an even more trans disciplinary approach to legal studies is a much debated question. The trans systemic project, which is at heart a comparative project, still emphasizes "law" and the comparison between "laws" as a major focal point. From the perspective of a radical claim to anti formalism and interdisciplinarity, Arthurs's critique must seem, to a certain degree, well founded: relying on comparative law as a pedagogical tool shows a [illegible]

approach that starts from an internal analysis of law. Indeed, the organic integration of more trans or interdisciplinary courses in the curriculum, and, on a more general level, the adoption of a more trans disciplinary

the training of jurists for this new reality. As this process accelerates, it is important that the process be understood as one of the central features of the development of the EU, not only as a legal undertaking but also as a human and political community. It calls for a new mentality, for a true understanding of pluralism rather than the extension of the positivistic mindset to a multitude of legal orders. Europeans should remember their heritage: regain the insight that the *ius commune* that is so readily invoked in current discussions was a *common culture* rather ofo7 Tf .479 0 TD <0003>Tj /TT15479 0 TD <0003>T-1.2216 TD (herit