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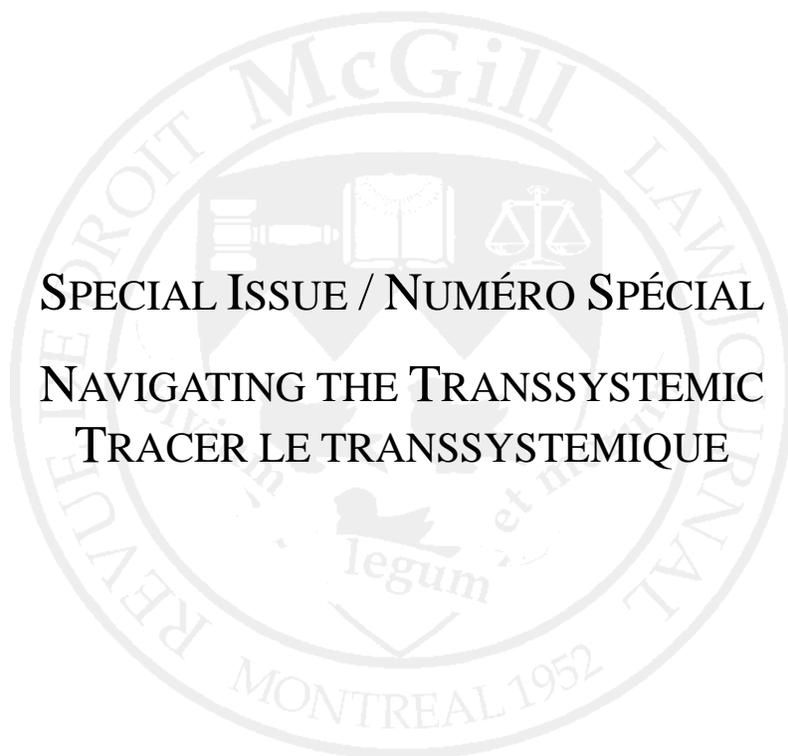
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NAVIGATING THE TRANSSYSTEMIC  
TRACER LE TRANSSYSTEMIQUE



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## *Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom*

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Rosalie Jukier\*

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In this article, the author examines how the transsystemic McGill Programme, predicated on a uniquely comparative, bilingual, and dialogic theoretical foundation of legal education, operates “on the ground” in a first-year Contractual Obligations classroom. She describes generally how the McGill Programme distinguishes itself from other comparative or interdisciplinary projects in law, through its focus on integration rather than on sequential comparison, as well as its attempt to link perspectives to *mentalités* of different traditions. The author concludes with a more detailed study of the area of specific performance as a particular application of a given legal phenomenon in different systemic contexts.

Dans cet article, l’auteure examine comment fonctionne «sur le terrain», dans un cours d’Obligations contractuelles de première année, le programme transsystème de McGill, bâti sur des fondements théoriques de l’éducation juridique qui sont à la fois comparatifs, bilingues, et dialogiques. Elle explique comment, de manière générale, le programme de McGill se distingue d’autres projets juridiques comparatifs ou interdisciplinaires, de par son insistance sur l’intégration plutôt que sur la comparaison séquentielle, ainsi que de par son objectif de relier les perspectives et mentalités propres à différentes traditions. L’auteure conclut avec une étude plus approfondie de la doctrine de «specific performance» en tant qu’application spécifique dans divers contextes systémiques d’un phénomène juridique donné.

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\* Associate Professor, Faculty of Law, McGill University. I would like to thank Professor Roderick Macdonald, who read and commented on earlier versions of this paper. I would also like to acknowledge the invaluable help of my research assistant, Kirk Shannon, who was hired under a research grant from the Wainwright Trust of the Faculty of Law, McGill University.

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## Introduction

Many scholarly and thoughtful articles<sup>1</sup> have been written about what Harry Arthurs has termed “one of the most unusual curriculum experiments in the annals of legal education,”<sup>2</sup> otherwise known as the McGill Programme. Although omitted from its official title, the McGill Programme offers what we refer to as “transsystemic legal education”. While the term “transsystemia” is not universally endorsed, and is even questioned by some,<sup>3</sup> it is the nomenclature most often used at McGill to describe a programme of legal education that is exemplified by a “uniquely comparative and bilingual environment,”<sup>4</sup> one that focuses on the “dialogue between legal traditions and legal cultures,”<sup>5</sup> and one that reflects the goals of “cosmopolitan jurisprudence”.<sup>6</sup>

What exactly transsystemia means is not possible to pinpoint with any accuracy or consensus. One of my colleagues has likened it to “nailing jello to a tree.”<sup>7</sup> Most of us actually engaged in the enterprise of transsystemic teaching certainly have a strong sense of what it involves, but find it incredibly difficult to articulate—almost in the same vein as asking someone to articulate what it means to be an American or a Canadian or a member of an ethnic community. We feel it, act it, live it and intuit it, but when it comes to describing it, we are often at a loss for words.

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<sup>1</sup> See generally Yves-Marie Morissette, “McGill’s Integrated Civil and Common Law Program” (2002) 52 J. Legal Educ. 12; Nicholas Kasirer, “Bijuralism in Law’s Empire and in Law’s Cosmos” (2002) 52 J. Legal Educ. 29 [Kasirer, “Bijuralism”]; Daniel Jutras, “Two Arguments for Cross-cultural Legal Education” in Heinz-Dieter Assmann, Gert Brüggemeier & Rolf Sethe, eds., *Different Legal Cultures—Convergence of Legal Reasoning: Grundflagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, vol. 3 (Baden-Baden: Nomos Verlagsgesellschaft, 2001) 75 [Jutras, “Two Arguments”]; Armand de Mestral, “Guest Editorial: Bisystemic Law-Teaching—The McGill Programme and the Concept of Law in the EU” (2003) 40 C.M.L. Rev. 799; David Howes, “*Maladroit* or Not? Learning to Be of Two Minds in the New Bi-jural Law Curricula” (2002) 52 J. Legal Educ. 5; Julie Bédard, “Transsystemic Teaching of Law at McGill: ‘Radical Changes, Old and New Hats’” (2001) 27 Queen’s L.J. 237; Nicholas Kasirer, “Legal Education as *Métissage*” (2003) 78 Tul. L. Rev. 481; Daniel Jutras, “Énoncer l’indicible : le droit entre langues et traditions” [2002] R.I.D.C. 781; Roderick A. Macdonald, “Still ‘Law’ and Still ‘Learning’? / Quel «droit» et quel «savoir»” (2003) 18 C.J.L.S. 5 at 17; Pierre Larouche, “L’intégration, les systèmes juridiques et la formation juridique” (2001) 46 McGill L.J. 1011.

<sup>2</sup> Harry Arthurs, “Madly Off in One Direction” in this issue of the McGill L.J.

<sup>3</sup> See Roderick A. Macdonald & Jason MacLean, “No Toilets in Park” in this issue of the McGill L.J. at 736ff. See also Jutras, “Two Arguments”, *supra* note 1 at 80.

<sup>4</sup> “Admissions”, online: Faculty of Law, McGill University <<http://www.law.mcgill.ca/undergraduate/admission-en.htm>>.

<sup>5</sup> Nicholas Kasirer, “A Message from the Dean”, online: Faculty of Law, McGill University <[http://www.law.mcgill.ca/welcome/dean\\_message-en.htm](http://www.law.mcgill.ca/welcome/dean_message-en.htm)> (also what he terms “dialogic jurisprudence”).

<sup>6</sup> *Ibid.*

<sup>7</sup> Professor Wendy Adams, Faculty of Law, McGill University.

What is clear, and undoubtedly agreed upon by McGill colleagues, is that the McGill Programme has recast the teaching and study of law. The transsystemic focus has freed the faculty from viewing law within the constraints of a doctrinally based professional vocation, and has enabled it to shift toward a more intellectual model of legal education.<sup>8</sup> This is because transsystemia focuses on the fundamental structures, ideas, values, techniques, and processes of law, rather than the laws or legal rules of a single jurisdiction.

The object of this article is not to add to the literature on the McGill Programme or further seek to refine it in any theoretical sense. Rather, this article is an attempt to describe, from the vantage point of experience, what this innovative approach to legal education has done to legal pedagogy on the ground, so to speak. What actually happens in the classroom as the professor interacts with a group of eager first-year students who have all cited McGill's "uniquely comparative and bilingual programme" as the reason they wish to attend *this* law faculty above all others in their admissions applications? Their statements are made in good faith, but with little understanding as to what they actually mean other than the instrumental fact that after three to four years of study, they will graduate with two law degrees (the B.C.L. and the LL.B.).

This article will first attempt to outline the aspirations of transsystemic teaching in a general sense and then move to a more detailed illustration of this approach using contract doctrines, including the legal concept of specific performance, as examples.

## I. The Aspirations of Transsystemic Teaching

The motivating force behind McGill's transsystemic programme was beautifully put by former Dean and now the Honourable Mr. Justice Yves-Marie Morissette, when he stated that McGill "has always been habited by the conviction that a great deal can be gained ... from a sustained and humble dialog with *otherness*."<sup>9</sup> Otherness refers, of course, to other legal systems that have distinct historical developments and distinct modes of organization and that evidence other ways of structuring and thinking about law. The goal of incorporating otherness into our pedagogy is not motivated by a desire to become more like the other, as is the case with many contemporary European harmonization movements,<sup>10</sup> but rather to gain a better

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<sup>8</sup> For a general discussion, see Kasirer, "Bijuralism", *supra* note 1 at 31.

<sup>9</sup> Morissette, *supra* note 1 at 22.

<sup>10</sup> As Walter van Gerven mentions in his article "Codifying European Private Law? Yes, If...!" (2002) 2 Eur. L. Rev. 156 at 175: "[M]any projects are already underway to discover, understand and rebuild a European common legal heritage." These include: *Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994); Ole Lando & Hugh Beale, eds., *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague: Kluwer Law International, 2000); Ole Lando *et al.*, eds., *Principles of European Contract Law, Part III* (The Hague: Kluwer Law International, 2003); M. Bussani & U. Mattei, eds., *The Common Core of European Private Law* (The Hague: Kluwer Law International, 2003); Beale *et al.*, eds., *Contract Law* (Oxford: Hart, 2002). For general discussion, see Arthur Hartkamp *et al.*, eds., *Towards a European Civil Code*, 3d ed.

understanding of the other. It is the desire to free the study of law from jurisdictional, temporal or systemic boundaries, and to multiply the perspectives on legal study, that best exemplifies our original motivation for the adoption of this programme.

While, like most truths, this seems both simple and self-evident, there is, by no means, universal buy-in to this concept in the legal world. One need only consider the recent statement by Mr. Justice Scalia of the US Supreme Court, dissenting in *Lawrence v. Texas*,<sup>11</sup> criticizing the majority judgment for its reference to foreign nations and their treatment of similar cases. He states: “The Court’s discussion of these foreign views is ... meaningless dicta. Dangerous dicta, however, since this Court ... should not impose foreign moods, fads, or fashions on Americans.” One can also point to a recent bill before the US Congress which, if passed, would forbid the US Supreme Court from considering foreign judgments in cases before it. House of Representatives Resolution 568 expresses “the sense of the House of Representatives that judicial determination regarding the meaning of laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions”<sup>12</sup> and constitutes a reaction against US judgments, such as the recent case of *Lawrence v. Texas*, which, in the majority opinion, has done just that.

While these sorts of statements admonish us not to take the concept of otherness for granted, one must recognize the greater acknowledgment of the notion in Canada, given its bijural nature. But even in the United States, there is an increasing awareness in legal academia of the importance of adapting legal education to the new “transnational” reality.<sup>13</sup> It is quite clear that in the United States, there is an incipient

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(Nijmegen: Kluwer Law International, 2004); Michael Joachim Bonell, “The Need and Possibility of a Codified European Contract Law” (1997) 5 E.R.P.L. 505; Ole Lando, “Why Codify the European Law of Contract?” (1997) 5 E.R.P.L. 525.

<sup>11</sup> 539 U.S. 558 (2003) at 598 (a case concerning the constitutional validity of a Texas statute making it a crime for two persons of the same sex to engage in sexual conduct).

<sup>12</sup> U.S., H.R. Res. 568, *Expressing the Sense of the House of Representatives that Judicial Determinations regarding the Meaning of the Laws of the United States Should Not Be Based on Judgments, Laws, or Pronouncements of Foreign Institutions Unless Such Foreign Judgments, Laws, or Pronouncements Inform an Understanding of the Original Meaning of the Laws of the United States*, 108th Cong., 2d Sess., 2004, presented by representatives Feeney and Goodlattee.

<sup>13</sup> For example, the Association of American Law Schools’ Annual Meeting in January 2006 included a workshop on “Integrating Transnational Legal Perspectives into the First-Year Curriculum”. Professor Peter Strauss of Columbia School of Law has been a strong proponent of the way in which the McGill Programme broadens legal perspectives and has likened it to the innovations in legal education led by Harvard with the institution of the case method in the late nineteenth century: Peter Strauss, “Transsystemia: Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?” (Paper presented to the American Association of Law School’s Annual Meeting, January 2006) [forthcoming in J. Legal Educ.]. See also J. Vescovi & S. Wampler, “Educating the Next Generation of Law Faculty” *Columbia Law School Report* (Spring 2002) 1 at 10-11, where McGill’s programme is lauded. Beyond academia, one can also refer to US Supreme Court Justice Stephen Breyer’s public endorsement of the value of comparative law. The aim is, in the words of Emily Bazelon of the Atlantic magazine, “to ‘cast an empirical light’ that will reveal new solutions to shared

movement toward integrating transnational legal perspectives into the basic law curriculum. As Dean Grossman of the American University, Washington College of Law has stated:

Lawyers practicing in a global environment must understand legal traditions that influence other countries, an understanding that goes beyond international laws and norms regulating the conduct of nation states. This knowledge includes an understanding of the legal culture, whether it is common law, civil law, religious law, or customary law.<sup>14</sup>

If more jurists are “catching on” to the move toward learning about the other, what remains unique about the McGill Programme? What, in essence, makes it different from the myriad of comparative approaches to law that exist around the world and in turn, makes teaching and learning at McGill so different? As stated earlier, while McGill colleagues universally acknowledge that transsystemia opens up vistas and frees law from jurisdictional boundaries enabling us to appreciate, as Nicholas Kasirer has said so eloquently, law’s cosmos as opposed to its empire,<sup>15</sup> transsystemia has inspired everyone in a unique way. For my part, explaining the aspirations of teaching transsystemically can be summarized by focusing on two notions.

### **A. Moving from the Sequential to the Integrated**

The first major respect in which transsystemia distinguishes itself from more usual forms of comparative law lies in the move from the sequential to the integrated. There are many law programmes that offer, alone or in partnership with other faculties, sequential, side-by-side, comparative legal education.<sup>16</sup> From 1968-1999, under the auspices of the National Programme, McGill’s Law Faculty did just that.<sup>17</sup> McGill students were regularly taking courses in Common Law Property, Contracts, and Torts in one year, and Civil Law Property and Obligations (both contractual and extra-contractual) in another year. While that approach to legal education certainly enabled students and professors to adopt a comparative approach, such an approach was necessarily limited by the very fact that the law was taught in separate courses by

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legal problems” (Emily Bazelon, “What Would Zimbabwe Do?” *The Atlantic* 296:4 (November 2005) at 48). See also Ann Althouse, “Innocence Abroad”, *New York Times* (19 September 2005).

<sup>14</sup> Claudio Grossman, “Building the World Community: Challenges to Legal Education and the WCL Experience” (2002) 17 *Am. U. Int’l L. Rev.* 815 at 834. American University, Washington College of Law has also initiated the creation of an International Consortium on Legal Education, the first meeting of which took place in Washington in October 2004, followed by a second meeting in Turkey in July 2005.

<sup>15</sup> Kasirer, “Bijuralism”, *supra* note 1 at 31.

<sup>16</sup> A non-exhaustive list includes: University of Ottawa, Université de Sherbrooke, Université de Montréal, Louisiana State University, Tulane Law School. Also, joint programmes are offered by University of Western Ontario and Université Laval, Université de Sherbrooke and Queen’s University, Osgoode Hall Law School and Université de Montréal.

<sup>17</sup> See Roderick A. Macdonald, “The National Law Programme at McGill: Origins, Establishments, Prospects” (1990) 13 *Dal. L.J.* 211.

different professors whose perspectives were each monosystemic. What was missing was the integration between the subjects in the various legal traditions.<sup>18</sup>

The goals of legal education under the transsystemic programme have expanded. 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 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.<sup>19</sup>

This means much more than just having “blended courses”. It is not sufficient that there are no longer separate courses on Contracts and Civil Law Contractual Obligations, or Torts and Extra-Contractual Obligations. Within each blended course, the goal is not simply to graft conventional comparative law that used to take place within two courses into the one course. What is needed is a new approach to 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 while undermining the fallacious notion that there is one structure of reality. We would be failed pedagogues if, within our Contractual Obligations courses, we simply spent half the class talking about how the common law views the doctrine of *Mistake*, and then the second half of the class how the civil law views the concept of *Error*. That would be more of a formal rather than a substantive change.

Instead, the significant changes inherent in our transsystemic teaching are apparent from our course outlines, our teaching plans, and our forms of evaluation.<sup>20</sup> All three required creativity. Taking course outlines and teaching plans as an example, they were complicated by the very fact that conventional civilian and common law doctrines do not match up—the nomenclature and the syntax are entirely different. The term “consideration” means little in civil law and the term “intensity of obligations” means little in the common law. This forces us, as I often tell my students, to “turn the sweater inside out” and to organize our courses around broad themes and large questions as opposed to established doctrines. While traditional doctrines, concepts and understandings are certainly canvassed, 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 legal issue.<sup>21</sup>

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<sup>18</sup> As Armand de Mestral points out in his article “Guest Editorial: Bisystemic Law-Teaching—The McGill Programme and the Concept of Law in the EU”, *supra* note 1 at 806, this meant that students carried the “sole burden of comparative analysis” as they were being taught these various legal perspectives by “professors whose perspectives [were each] unisystemic.”

<sup>19</sup> See Jean-Guy Belley, Presentation on “McGill’s Approach to Teaching Comparative Law”, programme organized for Vietnamese senior comparative law research personnel under the auspices of the Vietnam Legal Reform Assistance Project, Faculty of Law, McGill University, 2 November 2004 [unpublished].

<sup>20</sup> For a description of innovative forms of evaluation, see Macdonald & MacLean, *supra* note 3 at 772-77.

<sup>21</sup> According to Kasirer, “Bijuralism”, *supra* note 1 at 36, as “different ways to imagine law.”

Classes move back and forth between traditions and amongst primary materials from a variety of jurisdictions, creating in students a dexterity of mind absent in monojuridical training. For example, in discussing the issue of the obligational content of a contract (of both explicit and implied terms), a matter of preoccupation for jurists of every tradition has been how to deal with “incorporation of terms”, or the extent to which external clauses or referenced printed conditions form part of the parties’ contract. This classical question of contract law, first raised by the famous so-called ticket cases of the nineteenth century,<sup>22</sup> is today a burgeoning area of the law given the exponential growth of electronic contracting through the Internet. Particularly in the United States, cases and doctrinal articles are beginning to treat interesting questions dealing with the applicability of standard form terms in what is often termed “click-wrap” and “browse-wrap” agreements.<sup>23</sup>

The following is an illustration of how a transsystemic classroom would treat legal material in this area. As one would in a common law Contracts class, students are first taken through the well-known English House of Lords decision of *McCutcheon v. David MacBrayne Ltd.*<sup>24</sup> involving the incorporation of an exoneration clause in a consumer contract in which the terms were standard form, the clause part of a set of illegible and incomprehensible conditions in what was a monopolistic setting. However, rather than focusing on “what the case says about the law on this issue,” students are focused on a passage by Lord Devlin in which he incites the legislator to intervene to “secure that when contracts are made in circumstances in which there is no scope for free negotiation of the terms, they are made upon terms that are clear, fair and reasonable ...”<sup>25</sup>

That passage is used to segue into the Quebec Civil Code, which was recodified in 1994. The Quebec legislator appeared to heed Lord Devlin’s advice by enacting three codal articles,<sup>26</sup> applicable only in consumer and adhesion contracts,<sup>27</sup> aimed at

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<sup>22</sup> *Parker v. South Eastern Railway* (1877), 2. C.P.D. 416, [1874-80] All E.R. 166 (C.A.), and as more recently dealt with in *Thornton v. Shoe Lane Parking Ltd.* (1970), [1971] 2 Q.B. 163, [1971] 2 W.L.R. 585 (C.A.).

<sup>23</sup> Recently a topic at the Association of American Law Schools Conference on “Exploring the Boundaries of Contract Law”, 14-17 June 2005. Professor Juliet M. Moringiello presented a paper entitled “Signals, Assent and Internet Contracting” (2005) 57 Rutgers L. Rev. 1307. See also Robert A. Hillman & Jeffery J. Rachlinski, “Standard-Form Contracting in the Electronic Age” (2002) 77 N.Y.U.L. Rev. 429; *DeJohn v. TV Corporation*, 245 F. Supp.2d 913 (N. D. Ill. 2003); *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002). In Canada, see *Rudder v. Microsoft* (1999), 2 C.P.R. (4th) 474 (Sup. Ct. Ont.); *Kanitz v. Rogers Cable* (2002), 58 O.R. (3d) 299 (Sup. Ct. Ont.); *Dell Computer Corporation v. Union des Consommateurs*, [2005] J.Q. No. 7011 (C.A.) (QL); and *Aspencer1.com v. Paysystems*, [2005] J.Q. No 1573 (C.Q.) (QL).

<sup>24</sup> [1964] 1 All E.R. 430 (H.L.).

<sup>25</sup> *Ibid.* at 439.

<sup>26</sup> Article 1435 C.C.Q. protects consumers and adhering parties against “external clauses”, article 1436 C.C.Q. does the same for “illegible and incomprehensible” clauses, and article 1437 C.C.Q. seeks to control “abusive clauses”.

mitigating the problem of external, illegal, incomprehensible, and abusive clauses. The class then discusses a case decided in Quebec in 2004<sup>28</sup> involving an innocent purchaser of a lottery ticket faced, after the fact, with the alleged applicability of a condition printed on the back of the ticket which, if applicable, would preclude him from claiming his winnings. The pedagogical question facing the class is whether the new provisions in the Quebec Civil Code proved to be a panacea. This is answered in the negative for the purchaser of the lottery ticket lost nonetheless. The class discussion focuses *not* on what the law purports to say in these different jurisdictions but rather on a contextual analysis<sup>29</sup> of this legal issue, as well as how best to deal juridically with this prevalent societal problem, creating a dialogue using sources from different jurisdictions and different legal traditions.

### **B. Linking Perspectives to Legal Traditions**

If transsystemic legal education is indeed unique, it must mean something more than merely disassociating legal study from doctrinally limited epistemology, because many law faculties have moved in that direction, creating more critical and intellectual approaches to legal education. It must also mean something more than the opening up of a multiplicity of perspectives since we can look to many other faculties as well that have incorporated, to mention just a few, economic, feminist, sociological, and linguistic approaches to legal education. The unique perspective offered by a transsystemic approach to legal education lies precisely in the opportunity it provides to link the various perspectives offered to the mentalities of the different legal traditions.

The McGill Programme is predicated on the belief that legal systems have particular structures of thought,<sup>30</sup> transcendent values and principles<sup>31</sup> and intellectual traditions.<sup>32</sup> This is one of the reasons our curriculum offers two compulsory second 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.<sup>33</sup> It is thus not just the

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<sup>27</sup> Consumer contracts are defined in article 1384 C.C.Q. and an adhesion contract is defined in article 1379 C.C.Q.

<sup>28</sup> *Chevalier v. Société des Loteries du Québec*, [2004] R.J.Q. 1984 (C.Q.).

<sup>29</sup> Contextual analysis is not meant to be construed only in the sense of “social context” but in the broadest sense as including a multitude of dimensions (such as social, economic, historical, methodological, etc.).

<sup>30</sup> See Kasirer, “Bijuralism”, *supra* note 1 at 37-38.

<sup>31</sup> See *ibid.* at 37.

<sup>32</sup> See *ibid.* at 38-39.

<sup>33</sup> This examination in these upper-level courses is intended to encourage students not only to compare the two occidental traditions but also to examine the different tendencies amongst various jurisdictions within each legal tradition. The Foundations course in first year described in Macdonald & MacLean, *supra* note 3, incorporates other legal traditions in addition to civil and common law including chthonic (religious and aboriginal traditions), and the goal within the rest of the transsystemic programme is to move toward incorporating non-Western legal traditions as well.

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

This concept of transsystemia mitigates the dangers of comparative law consisting merely in the side-by-side comparisons of different doctrines or principles. The danger lies precisely in that this survey is disconnected from the legal traditions and legal systems in question and we need only think of the many sad examples of poorly done legal transplantation that have resulted from this approach.<sup>34</sup> As Mr. Justice Gonthier said in the Supreme Court case of *Laferrière v. Lawson*,<sup>35</sup> we must be “[m]indful of the dangers of comparative law unequipped with full information and understanding of other legal systems.” This is because, as William Bishop has said:

Any legal system is a complex interlocking balance, perhaps a delicate balance, achieved after experiment, adaptations, and reform. There are important differences between common-law and civilian systems of contract, differences that affect the formation, content and discharge of contract as well as remedies for breach. ... It is not prudent to consider one difference in isolation from the others, for that difference may so easily be balanced by some other factor not considered. *Indeed casual comparisons across very different legal systems may not only mislead, but mislead systematically ...*<sup>36</sup>

It is therefore not enough that students understand the different conceptions of civilian and common law counterpart doctrines, but rather that students realize how these different conceptions link up with the entire mentalities of the traditions in question and, where relevant, the mentalities of particular jurisdictions within those traditions.<sup>37</sup> I will illustrate this by using two examples taken from the law of contracts.

The first example deals with the classic contracts issue that arises when a party enters into a contract upon a mistaken assumption. A somewhat superficial comparative approach to the teaching of contracts would view the civilian concept of the defect of consent of *Error* as the mirror-image counterpart to the common law doctrine of *Mistake*. While the two concepts bear many similarities, in the transsystemic classroom, where students are immersed in the entire tradition-specific mindset of the subject matter, it becomes apparent that viewing error and mistake as counterparts is too superficial a view. So to return to the concept of the “complex

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<sup>34</sup> See generally Jonathan M. Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) 51 Am. J. Comp. L. 839; Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4 M.J.E.C.L. 111.

<sup>35</sup> [1991] 1 S.C.R. 541 at 601, 78 D.L.R. (4th) 609.

<sup>36</sup> William Bishop, “The Choice of Remedy for Breach of Contract” (1985) 14 J. Legal Stud. 299 at 318 [emphasis added]. It is worth pointing out that in the McGill Programme, the factors we ask our students to consider in order to achieve this deeper understanding go beyond the standard inventory of legal rules and concepts.

<sup>37</sup> This is necessary, for example, where jurisdictions within the same legal tradition, such as France and Germany, or France and Quebec, diverge considerably on a given issue.

interlocking balance” of which William Bishop spoke,<sup>38</sup> it is only through the endeavour of trying to understand the legal system as a whole that one can understand the role and significance of a legal concept. Error, as Jacques Ghestin has pointed out,<sup>39</sup> is often used in civilian systems as a substitute for the lack of a coherent doctrine of protection against exploitation (or what the common law would term *unconscionability*) due to the civil law’s general resistance to remedies of *lesion*.<sup>40</sup> Speaking about the defect of consent of error in the French Civil Code, Ghestin says that along with other remedies that ostensibly protect consent, error is often a device that is used to protect “la justice contractuelle” and that “en pratique, très fréquemment, l’article 1110 [the error provision in the French Code] permet de réparer une lésion.”<sup>41</sup>

This is nicely illustrated in a recent case decided by the Superior Court of Quebec<sup>42</sup> involving an egregiously unfair contract of sale of a baking business between contracting parties with extremely unequal bargaining powers. The court characterized the state of the contract as being “unconscionable and abusive”<sup>43</sup> and concluded that, “[t]hrough [the purchaser’s] failure to understand the value of the business sold, the price to be paid, and its manner of payment, her consent was vitiated by an *error* as to an essential element of the contract.”<sup>44</sup>

While the substantive outcome of the decision is undoubtedly a fair one, its basis in the civilian doctrine of error is problematic since the only mistake the defendant made with respect to this contract was its economic feasibility and fairness of price<sup>45</sup> due to the exploitative and unfair circumstances surrounding its formation.<sup>46</sup> Error is undoubtedly masquerading as *lesion* in this instance.

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<sup>38</sup> *Supra* note 36.

<sup>39</sup> Jacques Ghestin, “L’utile et le juste dans les contrats” (1981) 26 *Archives de philosophie du droit* 35 at 48 [Ghestin, “L’utile”].

<sup>40</sup> *Lesion* being the defect of consent which in the civil law protects parties who have entered into contracts in which their prestations are seriously disproportionate due to a situation of exploitation. Generally speaking, this protection is afforded only in limited circumstances involving minors, incapable majors and consumers, and some other limited cases. See as an example, arts. 1405, 1406, 2332 C.C.Q. and *Consumer Protection Act*, R.S.Q., c. P-40.1, ss. 8, 9.

<sup>41</sup> Ghestin, “L’utile”, *supra* note 39 at 48.

<sup>42</sup> *Yoskovitch v. Tabor*, [1995] R.J.Q. 1397 (C.S.).

<sup>43</sup> *Ibid.* at 1405.

<sup>44</sup> *Ibid.* at 1404 [emphasis added].

<sup>45</sup> Economic error is not a cause of nullity in civil law. See Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2005) at 286; J. Ghestin, *Traité de droit civil: la formation du contrat*, 3d ed. (Paris: Librairie générale de droit et de jurisprudence, 1993) at 474-475; Versailles, 7 janvier 1987, D.1987.Jur.487 (Poussin case).

<sup>46</sup> These circumstances included a relationship of subordination between the parties, great disparity between the parties in terms of literacy, language and education, and the fact that the party in the weaker bargaining position was not given time to consider entering into the contract nor time to consult someone she trusted about the terms of the contract.

Another example that affords the professor teaching contracts transsystemically the opportunity to link perspectives to legal traditions is the issue of changing circumstances post contract formation resulting in hardship of performance. This area of the law is what a common lawyer would term *Frustration* and a civilian would refer to as *Imprévision*. A superficial comparative perspective would merely compare and contrast the different approaches of the two major occidental legal traditions. This comparison would reveal that with the exception of a handful of jurisdictions, most notably Germany, the civil law tradition is generally more reluctant to excuse a debtor's performance than is the common law. The civil law sets the bar high by requiring an irresistible and unforeseeable event that causes performance to become impossible, as opposed to simply making it more difficult or impracticable.<sup>47</sup>

But in a transsystemic classroom, an interesting perspective develops as to where and how this would fit within the legal traditions and why the mentality, as opposed to the doctrinal answer, to approaching this issue differs significantly in the two legal systems.

In the common law, Frustration is commonly taught in the context of "excuse for non-performance" and the issue is approached from the remedial perspective of the extent to which the law should excuse a party's breach of contract in the factual scenario of changing circumstances.<sup>48</sup>

In the transsystemic classroom, discussion gravitates to whether the remedial perspective is the appropriate lens through which the law ought to view the issue of changing circumstances. An examination of the development of the law on this topic in Germany opens all our eyes to a completely different vision of this area of the law, shifting it from the remedial sphere of contract law to the framework of contract performance. If the example of Germany<sup>49</sup> is followed in other civilian jurisdictions, it seems that the civil law will ultimately resolve this issue from the perspective of

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<sup>47</sup> See definition of *force majeure* in arts. 1693, 1470(2) C.C.Q.; Baudouin & Jobin, *supra* note 45 at 940; Jacques Ghestin, *Traité de droit civil: les effets du contrat*, 2d ed. (Paris: Librairie générale de droit et de jurisprudence, 1994) at 310-65. Contrast this with common law sources in which futility of performance and impracticability are sometimes seen as sufficient excuses for non-performance. See generally Sir Guenter Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003) at 880-87; P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford: Clarendon Press, 1995) at 232-44; S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at paras. 362-74. See also U.C.C. § 2-615 (1995); *Restatement (Second) of Contract Law* §§ 261-272 (1979).

<sup>48</sup> The excuse being justified either by fictitiously implying conditions (the more traditional jurisprudential explanation) or by a fairness or efficiency rationale: Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 371-72. See also *Taylor v. Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, which advocates the more traditional view, and *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.* (2002), [2003] Q.B. 679, [2002] 3 W.L.R. 1617, [2002] EWCA Civ 1407 (C.A.), which rejects the implied-condition theory.

<sup>49</sup> German cases use § 242 of the German Civil Code, a good-faith provision, to effectively bring in a doctrine of *imprévision*. See Werner F. Ebke & Bettina M. Steinhauer, "The Doctrine of Good Faith in German Contract Law" in Jack Beatson & Daniel Friedman, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) 171.

good faith<sup>50</sup>—by applying a positive duty to collaborate in the *performance* of the contract, which translates into an obligation on the part of the creditor to renegotiate when the debtor is faced with hardship.<sup>51</sup>

These two examples illustrate the aspirations of transsystemic teaching. We aim to reach quite deep into the mentalities of the different legal and intellectual systems as a whole and to weave that understanding into the analysis of traditional legal concepts as applied in manifold legal systems.

## II. Specific Performance as an Illustration of Transsystemic Teaching

A discrete area of contractual obligations that can be used to illustrate, in more depth and detail, our transsystemic pedagogical approach, is that of specific performance as a remedy for the victim of a contract breach. This is an area of law that is not only dealt with differently in civilian and common law systems in terms of both reasoning and outcome, but it is one that is ideally suited to illustrate the importance of analyzing a legal concept in the context of the mentalities of the intellectual traditions of the two legal systems, as well as their distinct methodologies and historical development.

To begin this pedagogical analysis, we can use as a springboard two fairly recent cases, one decided in 1997 by the House of Lords (*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*<sup>52</sup>) and the other decided in 1988 by the Quebec Superior Court (*Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*<sup>53</sup>). The facts are eerily similar (always a fun pedagogical tool) in that both cases deal with a commercial contract of lease—the UK case involving a supermarket and the Quebec case dealing with a restaurant—in which the parties had included an “operating clause” or “continuous operation provision” in which the tenant had agreed to keep the premises open during the usual hours of business for the duration of the lease. In both cases, this proved to be financially problematic in that the tenants’ businesses were losing money and were subsequently closed as a result.

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<sup>50</sup> A concept more established and entrenched in civilian systems than in the common law (see arts. 6, 7, 1375 C.C.Q.; art. 1134, § 3 C. civ.; § 242 German Civil Code; arts. 2, 3 Swiss Civil Code; arts. 1175, 1375 Italian Civil Code; art. 288 Greek Civil Code; art. 762, section 2, Portuguese Civil Code). See also Brigitte Lefebvre, *La bonne foi dans la formation du contrat* (Cowansville, Qc.: Yvon Blais, 1998); Martijn W. Hesselink, “The Concept of *Good Faith*” in Hartkamp *et al.*, *supra* note 10 at 471. For discussion regarding the common law’s more limited concept of good faith, see Brownsword *et al.* eds., *Good Faith in Contract: Concept and Context* (Dartmouth: Ashgate, 1998); Michael G. Bridge, “Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?” (1984) 9 Can. Bus. L.J. 385.

<sup>51</sup> This approach has been advocated in France by Philippe Stoffel-Munck, *Regards sur la théorie de l’imprévision: vers une souplesse contractuelle en droit privé français contemporain* (Aix-en-Provence: Presses Universitaires d’Aix-Marseille, 1994) and in Quebec by Stefan Martin, “Pour une réception de la théorie de l’imprévision en droit positif québécois” (1993) 34 C. de D. 599.

<sup>52</sup> (1997), [1998] A.C. 1, [1997] 2 W.L.R. 898 (H.L.) [*Argyll* cited to A.C.].

<sup>53</sup> [1988] R.J.Q. 716 (C.S.) [*Golden Griddle*].

Breach of contract and entitlement to damages were, of course, not at issue, the sole question before each court being whether the landlord could obtain specific enforcement of the express obligation to stay open for business.

The two cases, each true to their respective legal tradition, were decided differently in that the UK case refused to order specific performance whereas the Quebec case ordered it with gusto. Not surprisingly, the cases also differ significantly in their reasoning. The UK case warns us about the restrictive and exceptional nature of the remedy of specific performance,<sup>54</sup> and the civilian case pontificates about how we cannot forget that the *choice of remedy* belongs to the creditor of the obligation (namely the plaintiff victim of the breach) in that “[i]t is not the role of the Court to select or predetermine the creditor’s recourse but rather to respond to his election.”<sup>55</sup> As a result, specific performance ought to be disallowed only where it is clearly inappropriate for reasons of impossibility, harm to third parties, or the fact that it necessitates physical constraints on a person’s (referring to physical, not moral person) freedom to act.<sup>56</sup>

Predictably, Lord Hoffman of the House of Lords postulates the orthodox common law position to the effect that the remedy of specific performance is by its very nature an exceptional remedy, one that is inherently discretionary and available only in circumstances where damages are “inadequate”.<sup>57</sup> These characteristics of the remedy of specific performance are well-known to most common law students as they form the basic framework of the remedy explained (although, according to Professor Farnsworth, not necessarily justified)<sup>58</sup> by the historical development of specific performance as a remedy of *equity*. It is axiomatic that teaching specific performance offers the opportunity to link the subject to the historical development of the legal system in question.<sup>59</sup> But one can, and often does, do this in monojuridical common law programmes. So where is the difference?

The difference lies in the ability of transsystemic students to recognize the obvious—there is no similar historical background in the civil law as the division between courts of chancery and courts of law is a uniquely English phenomenon. Accordingly, the historical impediment to specific performance in the common law owing to its equitable origin is simply non-existent in the civil law. It would follow logically that the civil law should be free to apply the remedy in a distinctly civilian way, uninhibited by this historical encumbrance.

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<sup>54</sup> *Argyll*, *supra* note 52 at 11.

<sup>55</sup> *Golden Griddle*, *supra* note 53 at 722-23.

<sup>56</sup> This refers to the *nemo praecise cogi potest ad factum* principle, which “reflects an unwillingness to force a person to accomplish an act if the only way to do so is by physical violence or constraint” (Rosalie Jukier, “The Emergence of Specific Performance as a Major Remedy in Quebec Law” (1987) 47 *Rev. du Barreau* 47 at 55 [Jukier, “Emergence”]).

<sup>57</sup> *Argyll*, *supra* note 52 at 11-12.

<sup>58</sup> E. Allan Farnsworth, *Contracts*, 3d ed. (New York: Aspen, 1999) at 769.

<sup>59</sup> This temporal aspect is another manifestation of a transsystemic perspective involving the examination of differences within legal systems throughout time.

The examination of the remedy of specific performance also provides an excellent opportunity to deal with the concept of legal transplantation because, as it happens, Quebec had borrowed the remedy of the injunction (both in its prohibitive and mandatory form) from English law. This at first led civilian judges in Quebec to apply the remedy of specific performance exactly as it was applied in the jurisdiction from which it was borrowed. In fact, the Supreme Court of Canada in 1975 stated that specific performance was “a matter of discretionary power to be exercised having in mind the principles established in common law jurisdictions, *since this is a remedy taken from them.*”<sup>60</sup>

This attitude persisted until quite recently when doctrinal writers urged, and judges ultimately accepted, that they should abandon the English law approach because the historical explanation for the restrictive and exceptional approach of the common law did not fit historically or intellectually within the civilian legal tradition. In 1994, Mr. Justice Baudouin of the Quebec Court of Appeal aptly stated that “[i]t is not because injunction is historically a *common law* procedural remedy that the restrictive approach of *common law* to mandatory injunctive relief should also be followed.”<sup>61</sup>

The point that legal transplantation cannot be wholesale and that it necessitates careful adaptation is not a novel one, nor restricted to the subject of specific performance.<sup>62</sup> Clearly, transplantation can only be successful when done in a way that adapts the borrowed concept so as to fit within the entire mentality of the legal system in question. Adaptation is an ambitious and delicate undertaking and requires a fundamental and profound understanding of the legal tradition in question. Only a programme of legal study that teaches, from the outset, the history, methodology, intellectual traditions and fundamental mindsets of the traditions can create jurists well equipped to do so.

Thus far, the analysis of specific performance has provided merely a negative reason for civilian jurisdictions not to adopt the restrictive common law position. But the teaching of specific performance from a transsystemic perspective should cause us to reflect as to whether there are positive reasons, consonant with civilian theory,

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<sup>60</sup> *Trudel v. Clairol of Canada* (1974), [1975] 2 S.C.R. 236 at 246, (1974) 54 D.L.R. (3d) 399 [emphasis added].

<sup>61</sup> *Varnet Software v. Varnet U.K. Ltd.*, [1994] R.J.Q. 2755 at 2758 (C.A.), 59 C.P.R. (3d) 29, followed in *Aubrais c. Laval (Ville de)*, [1996] R.J.Q. 2239 at 2253 [*Aubrais*].

<sup>62</sup> See *supra* note 34. Another notable area where the subtlety of legal transplantation is at issue lies in the area of the trust, a quintessential common law instrument predicated on the division between legal and equitable ownership nonexistent in the civil law. The Quebec Civil Code has succeeded in fashioning a uniquely civilian solution to the adoption of the trust by creating it as a *patrimoine d'affectation*. See e.g. Madeleine Cantin Cumyn, “The Quebec Trust: A Civilian Institution with English Law Roots” in J.M. Milo & J.M. Smits, eds., *Trusts in Mixed Legal Systems* (Nijmegen: Ars Aequi Libri, 2001) 73 at 74-76; John E.C. Brierley, “Titre sixième: De certains patrimoines d'affectation: Les articles 1256-1298” in Barreau du Québec & Chambre des notaires du Québec, *La réforme du Code civil*, vol. 1 (Sainte-Foy, Qc.: Presses de l'Université Laval, 1993) 735 at 748ff.

that specific performance ought to be, in contrast to the common law, a broad remedy. To do this, we can proceed with a codal, textual analysis, a uniquely civilian methodology.<sup>63</sup> Such codal analysis supports the interpretation of specific performance as a primary remedy. Using the *Civil Code of Quebec* and the German Civil Code as examples, one sees specific performance listed first amongst the various available remedies and one notes the permissive nature of the language used, indicating that the remedy is one for which the creditor may opt.<sup>64</sup> This codal analysis has recently led the Quebec judiciary to assert that the choice of remedy belongs to the creditor.<sup>65</sup>

Furthermore, the study of specific performance also affords us the opportunity to see the link between the remedy and what traditionally has been seen as the foundational premise of the civilian conception of contracts, namely the autonomy of the will. Although watered down and criticized in contemporary contexts,<sup>66</sup> the pre-eminence given to the parties' subjective wills as the creator of their subjective law is, nonetheless, still advanced as the primary justification for the enforcement of promises in the civil law.<sup>67</sup> According to Mr. Justice Steinberg in *Golden Griddle*, "[i]f the will of the parties is the source of contractual obligations, the will of the parties, as evidenced in the contract, dictates that the contractual obligations actually be performed. The obligation to pay damages is clearly subsidiary."<sup>68</sup> This is what

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<sup>63</sup> See Arthur Taylor von Mehren & James Russell Gordley, *The Civil Law System: An Introduction to the Study of Comparative Law*, 2d ed. (Boston: Little, Brown and Company, 1977) at 1134-1135; Mary Ann Glendon, Michael Wallace Gordon & Paolo G. Carozza, *Comparative Legal Traditions in a Nutshell*, 2d ed. (St. Paul, Minn.: West Group, 1999) at 210-11.

<sup>64</sup> See arts. 1590 & 1601 C.C.Q.; § 241 of the German Civil Code. Also, according to Rudolf B. Schlesinger *et al.*, *Comparative Law*, 6th ed. (New York: Foundation Press, 1998) at 739, French and other civilian courts have adhered to the same principle despite codal provisions that "express themselves less clearly" than the German Code.

<sup>65</sup> *Aubrais*, *supra* note 61 at 2251.

<sup>66</sup> See *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 at 145, 176, 74 D.L.R. (4th) 577 [*Houle* cited to S.C.R.]; Rosalie Jukier, "*Banque Nationale du Canada v. Houle* (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law" Case Comment (1992) 37 McGill L.J. 221 at 240-41 [Jukier, "*Houle*"]; Michel Deschamps, "L'autonomie de la volonté dans la détermination de la loi contractuelle et du tribunal compétent" (1990) 24 R.J.T. 471 at 473; Ghestin, "L'utile", *supra* note 39; Michel Coipel, "La liberté contractuelle et la conciliation optimale du juste et de l'utile" (1990) 24 R.J.T. 485 at 488; John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* (Oxford: Oxford University Press, 1998) at 310.

<sup>67</sup> See Baudouin & Jobin, *supra* note 45 at 112-13; Ghestin, *Traité de droit civil: la formation du contrat*, *supra* note 45 at 27; Jacques Flour, Jean-Luc Aubert & Éric Savaux, *Les obligations*, t. 1, 10th ed. (Paris: Dalloz, 2002) at 67-75; Georges Rouhette, "La force obligatoire du contrat: Section I—Rapport français: observations critiques" in Denis Tallon & Donald Harris, eds., *Le contrat aujourd'hui: comparaisons franco-anglaises* (Paris: Librairie générale de droit et de jurisprudence, 1987) 27. See also the recent Supreme Court of Canada decision in *GreCon Dimter v. J.R. Normand Inc.*, [2005] 2 S.C.R. 401, 255 D.L.R. (4th) 257, 2005 SCC 46, where Mr. Justice Lebel cited the autonomy of the parties as a reason to uphold a contractual choice of jurisdiction provision.

<sup>68</sup> *Supra* note 53 at 724, citing Jukier, "Emergence", *supra* note 56 [emphasis removed]. See also Denis Tallon, "Les remèdes: Section I—Le droit français" in Tallon & Harris, *ibid.*, 271 at 290.

Professor Stephen Smith would classify as a “rights-based” justification for the remedy of specific performance.<sup>69</sup>

Most common law jurists would, at this juncture, point to the myriad of practical obstacles facing the remedy regardless of the theoretical analysis undertaken above. It is interesting to see how these different attitudes and systemic mentalities influence the way in which the judiciary treats the so-called practical impediments to specific performance—problems of imprecision and court supervision and issues of hardship.

Not surprisingly, the House of Lords in the UK case of *Argyll* quickly pointed out that an order of specific performance to operate a business was not sufficiently precise and would cause endless problems of court supervision. An order to keep the premises open for trade, said the court, “says nothing about the level of trade, the area of the premises within which trade is to be conducted, or even the kind of trade ...”<sup>70</sup> The imprecision in the terms of the order would, as held by Lord Hoffman, only lead to repeated applications to the court creating wasteful and expensive litigation.<sup>71</sup>

Contrast this with the Quebec case of *Golden Griddle*, in which the court found no imprecision problem with essentially an identical order. Justice Steinberg stated that the order to operate the restaurant was not imprecise and that the self-interest of the company in question would ensure that the level of operation was consistent with its image and would not be so shoddy as to require the court to constantly intervene in the order.<sup>72</sup>

Concerning the argument of hardship, once again, we see a marked departure in mindset. The House of Lords stated that an order of specific performance would “cause injustice [to the debtor] by allowing the plaintiff to enrich himself at the defendant’s expense”<sup>73</sup> in that the costs of complying with the order would outweigh the loss caused by the breach. This would be wasteful of resources and economically inefficient—arguments reminiscent of the cost-of-cure versus cost-of-performance debate we see in well-known common law cases such as *Peevyhouse v. Garland Coal & Mining*,<sup>74</sup> *Ruxley Electronics and Construction Ltd. v. Forsyth*,<sup>75</sup> and *Tito v. Waddell (No. 2)*.<sup>76</sup>

In fact, economic perspectives on specific performance often side with the traditionally restrictive position of the common law. According to Kronman, non-specific relief (in the form of damages) better advances efficient resource allocation

<sup>69</sup> Smith, *supra* note 48 at 389-91.

<sup>70</sup> *Supra* note 52 at 16.

<sup>71</sup> *Ibid.* at 13-14. This, of course, opens the door to the myriad of economic arguments against the remedy. See, most notably, Anthony T. Kronman, “Specific Performance” (1978) 45 U. Chicago L. Rev. 351; Farnsworth, *supra* note 58 at 773; Bishop, *supra* note 36.

<sup>72</sup> *Golden Griddle*, *supra* note 53 at 728-29.

<sup>73</sup> *Argyll*, *supra* note 52 at 15.

<sup>74</sup> 382 P. 2d 109 (Okla. Sup. Ct. 1963).

<sup>75</sup> (1995), [1996] A.C. 344, [1995] 3 All E.R. 268 (H.L.).

<sup>76</sup> [1977] Ch. 106, [1977] 3 All E.R. 129.

in the setting of a market economy. In essence, Kronman argues that damages should be awarded over specific performance in order to promote efficiency by reducing the costs of negotiating contracts by drawing the line between specific performance and damages “in the way that most contracting parties would draw it were they free to make their own rules concerning remedies for breach and had they deliberated about the matter at the time of contracting.”<sup>77</sup> Those advancing economic efficiency theories of remedies most often side with a liability rule (damages) as opposed to a property rule (specific performance).<sup>78</sup>

Economic analysis assumes a rational actor. As recently pointed out by Eric Posner, emotions interfere with such rationality and the analysis of specific performance from an efficiency standpoint is complicated by the interaction between law and the emotions. According to Posner, “emotion introduces an asymmetry into the standard analysis of contract remedies,”<sup>79</sup> since “[a]n angry person’s action tendency is to harm the offender, even at a cost to oneself. ... The calm-state and the emotion-state preferences are in conflict ...”<sup>80</sup> Posner concludes that “expectation damages have the virtue of giving the property right to the calm person, whereas specific performance has the defect of giving the property right to the angry person.”<sup>81</sup> Understandably, the victim of the contract breach will often be angry and desirous of specific performance more out of desire for vindication and retribution than a genuine desire for performance.

These compelling views must be contrasted with those of civilian jurisdictions, which shift the focus from the debtor to the creditor, concentrating on the innocent victim of the breach. The Quebec case of *Golden Griddle* reacts to the question of hardship by simply dismissing it, stating merely that “[h]ardship and personal consequences are irrelevant.”<sup>82</sup> Instead of focusing on economic hardship to the debtor, the judge focuses on the civilian concept of foreseeability in contract remedies, asserting that if the cost of the remedy was a foreseeable consequence at the time of contract formation, then courts should not refrain from enforcing contracts just because the defendant will be inconvenienced or lose money as a consequence. Mr. Justice Steinberg states:

These were readily foreseeable consequences at the time Golden Griddle contracted its obligations under the lease and are commensurate with the

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<sup>77</sup> Kronman, *supra* note 71 at 365. See also Farnsworth, *supra* note 58 at 773 and Argyll, *supra* note 52 at 18.

<sup>78</sup> They do so except in cases of unique goods. See Kronman, *supra* note 71 at 354, 358. See also Bishop, *supra* note 36. This view is not universally endorsed. For a contrary view, see *e.g.* Alan Schwartz, who argues for specific performance from an economic standpoint in “The Case for Specific Performance” (1979) 89 Yale L.J. 271 and Thomas S. Ulen, “The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies” (1984) 83 Mich. L. Rev. 341 at 365-66.

<sup>79</sup> Eric A. Posner, “Law and the Emotions” (2001) 89 Geo. L.J. 1977 at 2008.

<sup>80</sup> *Ibid.* at 2007.

<sup>81</sup> *Ibid.* at 2009.

<sup>82</sup> *Supra* note 53 at 724.

rewards to be earned if the restaurant's operations are successful. It is specious to suggest that courts should refrain from enforcing contracts if the defendant will lose money as a consequence. Judicial intervention is rarely necessary to enforce contracts which will yield a profit to the defendant.<sup>83</sup>

Is the civil law totally oblivious to Posner's image of the "enraged promises [who wish to use] the tool of specific performance ... to exact retaliation"?<sup>84</sup> I would assert that it is not, but that the problem would be resolved in civil law doctrine by employing the civilian concept of the obligation of good faith to prevent vindictive and retaliatory parties from abusing their right to the remedy of specific performance in these circumstances. As a general rule, although to varying degrees, the civil law requires parties to exercise their rights not only with the absence of malice or intent to harm, but within reasonable norms of behaviour as well.<sup>85</sup> Just as the Supreme Court of Canada has used this concept to limit the right of a bank to call a demand loan without notice in the *Houle* decision, in appropriate circumstances, good faith and the doctrine of abuse of rights could be called upon to limit a creditor's right to the powerful remedy of specific performance.<sup>86</sup>

Finally, the transsystemic presentation of this area allows us to examine the general role of remedies in the two systems. Lord Hoffmann in *Argyll* enunciates a general view characteristic of the common law of what may be referred to as the "divorce mentality". This view posits that an award of damages is an appropriate remedy because it "brings the litigation to an end" and as far as the parties are concerned, "the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal."<sup>87</sup> By contrast, all the order of specific performance would do, says the House of Lords, is "[yoke] the parties together in a continuing hostile relationship"<sup>88</sup> thereby prolonging the battle.

Before one is seduced by this "divorce mentality", it is worth turning to the civil law which, in many ways, views remedies somewhat differently.<sup>89</sup> In civil law systems, one notices the existence of a wide array of remedies, in addition to specific performance, available at the option of the creditor who does not simply wish to sever the contractual link and opt for damages. These remedies include the *exceptio non-*

<sup>83</sup> *Ibid.* at 728.

<sup>84</sup> *Supra* note 79 at 2009.

<sup>85</sup> This refers to the civilian concept of abuse of rights, which is analyzed as a particular application of the good faith obligation. See *Houle*, *supra* note 66 at 146 and Jukier, "*Houle*", *supra* note 66 at 226-27.

<sup>86</sup> *Houle*, *supra* note 66. For a discussion of how the concept of abuse of rights may be used to limit the remedy of specific performance in Belgian law, see Patrick Wéry, "Les sanctions de l'inexécution des obligations contractuelles" in Patrick Wéry, ed., *Le droit des obligations contractuelles et le bicentenaire du Code civil* (Bruxelles: La Chartre, 2004) 287 at 301.

<sup>87</sup> *Argyll*, *supra* note 52 at 16.

<sup>88</sup> *Ibid.*

<sup>89</sup> See Tallon, *supra* note 68 at 286-91; Bell, Boyron & Whittaker, *supra* note 66 at 346.

*adimpleti contractus*,<sup>90</sup> which allows the creditor to delay performance until the debtor performs properly, and *quanti minoris*,<sup>91</sup> which gives the court the ability to reduce the correlative obligations of a creditor who is faced with a contract breach.

The first thing this reveals about the general mentalities of the two systems is that the emphasis in civil law is more on the creditor (the victim) rather than the debtor (the wrongdoer). This is consistent with what we have seen earlier with respect to specific performance, where the civil law views it as an option of the creditor and the common law sees it more as a discretionary tool of the court. The second thing one cannot help noticing is that these alternative remedies work counter to the divorce mentality. They all seek to keep the contract, and the contractual relationship between the parties, alive. The broader application of specific performance in the civil law is again consistent with this overall mentality.

## Conclusion

The foregoing examination of the remedy of specific performance in the transsystemic classroom presents students with a rich array of perspectives.<sup>92</sup> Of course, many of these perspectives are examined in monojuridical programmes as well. However, when one opens up the world of resources by including a multitude of jurisdictions from civil and common law legal traditions, in addition to interdisciplinary sources, the perspectives undoubtedly expand. And when one analyzes the comparative outcomes in the context of the respective legal traditions, we move from comparative teaching to transsystemic teaching.

Proust said that “the real voyage of discovery consists not in seeking new landscapes, but in having new eyes.” Admittedly, this quote may be somewhat corny and much over-used. However, it remains extremely relevant to McGill’s experiment in transforming legal education. With only five years of experience in offering this new vision of legal education, this article is but a first in an ongoing endeavour to convey some of the new landscapes seen through the transsystemic eyes we use at McGill’s Faculty of Law.

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<sup>90</sup> Translated in the subtitle at art. 1591 C.C.Q. as the “exception for nonperformance”. For a general discussion, see Baudouin & Jobin, *supra* note 45 at 810-16.

<sup>91</sup> Translated in article 1590(2) C.C.Q. and elsewhere in the Quebec Civil Code as a “reduction in [one’s] correlative obligations”. For a general discussion, see Baudouin & Jobin, *ibid.* at 808-10.

<sup>92</sup> The perspectives canvassed in this paper are certainly not comprehensive and many have not been undertaken including, for example, perspectives that may be gleaned from the structural system of the courts, the legal profession, or the rules of civil procedure.