

Chapter 16

The Impact of ‘Stateless Law’ on Legal Pedagogy

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I. Introduction

The national paradigm for understanding law has brought with it many implications for both the legal profession and legal pedagogy, resulting in the development of one of the most jurisdictionally restrictive professions and boundary-laden university disciplines. As Daniel Jutras has aptly pointed out, ‘Law ... is generally taught in universities as though its only important manifestation is that of the political state in which the faculty is located’.¹ The traditional model of legal education has been built around boundaries created by political geography and state normativity, and has faced even further restrictions due to its taxonomic structures and doctrinal categories.

This chapter will assess developments in legal pedagogy occasioned by the move away from the national paradigm towards a more pluralistic, multisystemic, global and perhaps even ‘stateless’ concept of law and law teaching. It will draw upon the experience of teaching what is still thought of as a core, substantive private law subject – Contracts – in an integrated, transsystemic curriculum at McGill University’s Faculty of Law, and canvass the insights gained from breaking the mould of legal nationalism in the classroom.

The chapter will conclude by asserting that pedagogically, much is to be offered by integrating the study of multiple legal traditions and perspectives in the classroom. Principal among these benefits is the opportunity it affords law professors to inculcate flexible thinking skills in their students. The ultimate goal of this pedagogical model is to graduate jurists who are able to think critically about the law and to deal creatively with contemporary problems of justice.

II. What is ‘Stateless Law’?

Before, however, one can begin to assess the impact of teaching stateless law on legal pedagogy, one must define the particular sense in which the concept of ‘stateless law’ is to be understood. After all, stateless law is not, in and of itself, a term of art, nor a term readily imbued with a particular meaning to most jurists. In fact, stateless law can be taken to refer to a variety of meanings.

For some, it may invoke the image of international law which, while in part linked to states through the bilateral and multilateral treaties into which they enter, is not readily associated with the formal law of any one particular state. Further, it is often not seen as traditional state law because it lacks the ‘hierarchically-based commands backed by coercive power’.²

Others may understandably interpret ‘stateless law’ to reflect the growing number of law harmonization projects. Often termed ‘soft-law’, these uniform legal compendia, such as Unidroit, the Principles of European Contract Law or the Draft Common Frame of Reference, reflect concerted efforts by international committees or academics to recast an entire area of law in uniform and harmonized terms to reflect shared values and

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¹ 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*, vol 3: *Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive* (Baden-Baden: Nomos, 2001) 75 at 84 [Jutras, “Two Arguments”].

² Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 S Cal L Rev 1155 at 1197.

practices. While these are clearly important projects with many practical legal implications,³ these are termed soft-law precisely because they are non-authoritative. They may hold persuasive power, but given that they are not the enacted law of any one state, they might be classified as stateless law.

Alternative dispute resolution falls into another category to which one may ascribe the term 'stateless law'. By choosing to resolve disputes through arbitration, for example, the parties remove their problem from the confines of state institutions created for the resolution of legal disputes – the courts. Arbitrators, unlike judges, do not derive their authority from the state and have more flexibility in the 'law' they apply to the resolution of parties' disputes voluntarily conferred to their authority. Arbitrators may, accordingly, be seen as applying and acting pursuant to 'stateless law'.

Finally, stateless law may be seen to refer to what is often termed 'everyday law': the implicit, generally unarticulated, unofficial normative order that, according to Rod Macdonald, 'allows us to confront and resolve opportunistly most of society's central legal conundrums'.⁴ Be it household rules, societal customs regarding queuing up, soccer game rules or corporate practice concerning the performance and enforcement of contractual obligations,⁵ many legal scholars recognize the significance of everyday law as 'a separate site, or a separate collection of sites, of human interaction'.⁶ Many might legitimately think, therefore, that teaching stateless law may refer to incorporating these informal, but crucially important and pervasive, 'microlegal systems'⁷ into one's teaching.

The meaning ascribed to 'stateless law' in this chapter is distinct from the above permutations. Put simply, the 'stateless' nature of law herein refers to the abandonment of the 'posited law of the nation state as [the] lode star'.⁸ It refers to what Harry Arthurs has described as 'decoupling the idea of law from the idea of the state'.⁹ It reflects the curricular and pedagogical innovation of McGill's law programme, known unofficially as the 'transsystemic program',¹⁰ which was inaugurated in 1999 and, at the time of the Stateless conference, celebrated its tenth year of graduates. This 'unusual curriculum experiment'¹¹ is personified by the transformation of comparative legal pedagogy from the sequential to the integrated; by the creation of blended courses that incorporate a multiplicity of perspectives, voices and lenses in a 'dialog with otherness',¹² and through inclusion and integration of multiple legal traditions and alternative sites of law. What differentiates this pluralistic vision of legal education from others, in which theoretical, interdisciplinary and non-state legal orders are incorporated into law courses, is not the mere fact of the integration of multiple perspectives, but

3 For instance, in addition to the uniform principles serving as the articulation of generally recognized standards and as potential models for legal reform, parties may formally incorporate these provisions contractually or indicate their wish to have them apply if they bring their dispute to arbitration.

4 Roderick A Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press for the Law Commission of Canada and the School of Policy Studies, Queen's University, 2002) at 6 [Macdonald, *Lessons*].

5 JG Belley, *Le contrat entre droit, économie et société : Etude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean* (Montreal: Yvon Blais, 1998).

6 Macdonald, *Lessons*, *supra* note 4 at 8. See also Daniel Jutras, "The Legal Dimensions of Everyday Life" (2001) 16 CJLS 45.

7 So termed by Reisman: W Michael Reisman, *Law in Brief Encounters* (New Haven, Conn: Yale University Press, 1999).

8 McGill University Faculty of Law and Quebec Research Centre of Private and Comparative Law, Call for Conference Papers, "Stateless Law? The Future of the Discipline" (conference: 28–29 September 2012), online: MUFL <http://www.mcgill.ca/files/_nea/213935_Call_for_papers_Stateless_law_Sep2012.pdf>.

9 Harry W Arthurs, "Law and Learning in an Era of Globalization" (2009) 10 German Law Journal 629 at 635 [Arthurs, "Law and Learning"].

10 See 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"]; David Howes, "Maladroit or Not? Learning to Be of Two Minds in the New Bijural Law Curricula" (2002) 52 J Legal Educ 55; Armand de Mestral, "Guest Editorial: Bisystemic Law-Teaching – The McGill Programme and the Concept of Law in the EU" (2003) 40 CML Rev 799; Peter L Strauss, "Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?" (2006) 56 J Legal Educ 161; Helge Dedek & Armand de Mestral, "Born to be Wild: The 'Trans-systemic' Programme at McGill and the De-Nationalization of Legal Education" (2009) 10 German Law Journal 889.

11 Termed as such by Harry Arthurs, "Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme" (2005) 50 McGill LJ 707 at 709 [Arthurs, "Madly Off"].

12 Morissette, *supra* note 10 at 22.

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the linking of those perspectives to the transcendent values and perspectives of legal traditions.¹³ Perhaps Arthurs's qualification of 'polyjural'¹⁴ is the best single indicator of its essence.

This understanding of 'stateless' law may, as a result, seem somewhat skewed or even dishonest since state law, in addition to the many forms of stateless law described above, admittedly forms a large part of the curricular content of transsystemic courses. The key, however, is that the reference to the doctrinally limited epistemology of a *particular* state law is not the central focus, or lodestar, of the course. Rather, the goal is to free the teaching of law from jurisdictional boundaries so as to focus on the fundamental structures, ideas, values, techniques and processes of law, ultimately aiming to undermine the fallacious notion that there is but one structure of reality. As Arthurs puts it, this prepares students to 'live at ease with multiple truths, irresolvable conflicts, abundant ambiguities and ironies galore'.¹⁵ In addition, as noted above, I hope to demonstrate that it also makes students more successful critical and flexible thinkers, developing agile and creative minds that enable them to think open-mindedly within alternative systems of thought, nimbly moving across and, as need be, transcending the boundaries of these systems.¹⁶

III. Aspirations for Teaching 'Stateless Law'

There are multiple goals, justifications and rewards associated with moving legal education from the traditional model, bounded by state normativity, to one that is unbounded and aspires to be uniquely comparative, multisystemic, pluralistic and dialogic.¹⁷ Many of these reasons existed at the outset when the new McGill programme was debated and adopted;¹⁸ others have been recognized subsequently, as a result of living and teaching within this new pedagogical paradigm. While not exhaustive, the following is an attempt to capture the myriad of opportunities that the transsystemic programme represents both to those within the Faculty, as well as to outside scholars.

From an incoming student's perspective, there are, of course, practical reasons for pursuing such a stateless law programme. At an instrumental level, graduating with both civil and common law degrees¹⁹ from a Faculty of Law that is known to offer an academically strong programme of study, producing graduates who are bilingual and bijural, is tangibly beneficial: it opens up the doors to legal practice in a wider variety of legal jurisdictions and in a broader array of non-standard, law-related career opportunities. This, in turn, benefits the Faculty because the attraction of the programme affects the number and quality of applicants, potentially yielding a stronger and more diverse class to teach.

The Faculty itself, however, has focused on other important purposes and consequences of the programme that shape not only the manner of teaching in the classroom but extend, as well, to the nature of legal research and scholarship pursued by its professoriate. One of the initial pedagogical justifications for transforming the curriculum was the idea that teaching the two major legal traditions of the western world in an integrated fashion would enable us, quite simply, to teach law comparatively in a more effective manner. Several decades of teaching the civil law and common law in separate courses and discrete programmatic streams demonstrated that it was difficult to achieve the desired result of a truly comparative legal education by teaching distinct traditions of legal thought as separate bodies of knowledge. As Armand de Mestral has noted, in integrated or transsystemic courses, 'students cease to carry the sole burden of comparative analysis'.²⁰ Being taught by

13 See Rosalie Jukier, "Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom" (2005) 50 McGill LJ 789 at 797–801 [Jukier, "Law and Pedagogy"].

14 Arthurs, "Law and Learning", *supra* note 9 at 636.

15 *Ibid.* at 639. See also Roderick A Macdonald & Kate Glover, "Implicit Comparative Law" (2013) 43 RDUS 123.

16 I have used this phrase before: see Rosalie Jukier, "Law and Pedagogy", *supra* note 13 at 795.

17 These are all descriptors that have been used in reference to the McGill programme.

18 The programme, which was adopted at the Faculty level in March of 1998 (and came into force in the fall of 1999), underwent a lengthy and complex process of curricular reform and was the subject of serious debate and self-reflection over four years, involving the work of many *ad hoc* committees and focus groups including alumni and students.

19 All graduates of the McGill programme now earn both civil law (B.C.L.) and common law (LL.B.) degrees.

20 De Mestral, *supra* note 10 at 806.

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professors whose perspectives are no longer unisystemic, ‘comparative analysis ceases to be an addition and becomes central to their work as law students’.²¹

Both of these reasons are reinforced by the contemporary economic and societal reality often referred to as today’s globalized or transnational world.²² A natural consequence of this globalization is that ‘it is unrealistic to expect legal rules based on territory to be satisfactory’²³ and there is, therefore, a need to educate ‘lawyers who are fluent in several languages and legal vernaculars’²⁴ – transnational lawyers with ‘a pluralistic legal identity’.²⁵ The result has been articulated as the desire to educate the ‘cosmopolitan jurist’.²⁶ Evocative of Jeremy Waldron’s notion of the cosmopolitan individual who ‘refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language’,²⁷ but is, rather, embodied by a ‘kaleidoscope of cultures’²⁸ living a ‘hybrid lifestyle’,²⁹ McGill likewise seeks to graduate cosmopolitan lawyers, at home in different legal traditions and at ease with different legal languages.

The idea of educating the cosmopolitan jurist carries with it many of the practical benefits highlighted above, but also bodes well for a more academic and intellectual model of legal education, another objective of the transsystemic programme. Rather than catering to law as strictly professional training, which befits a state-centric and positivist approach to legal education, the stateless law curriculum assumes that the study of law is ‘an end in itself ... an academic discipline’³⁰ that firmly belongs in a university setting.³¹ While this conception of legal education is certainly not unique to McGill or to faculties that endorse a polyjural curriculum,³² Nicholas Kasirer has explicitly linked the transsystemic programme to the concept of law as a liberal education and foundational discipline, calling it ‘an opportunity to locate law more resolutely in the university, not as a matter of geography but of ideas’.³³ The openness to other modes of legal thought, emanating from legal traditions and systems with no practical import to the jurisdiction in which they are explored, underscores the relevance of law as belonging to a world of ideas.

The opportunity to teach law from a stateless perspective, of course, enables one to do more than ‘structure the comparative endeavour by reference only to political units (states); [or to] limit our inventory of comparative objects to official legal artefacts and to exegetical doctrinal understandings of these artefacts’.³⁴ Freeing courses from jurisdictional boundaries also opens the door to incorporating interdisciplinary perspectives into the curriculum, thereby moving legal education beyond ‘the narrow focus and confined boundaries of linear thinking that define traditional law practice’,³⁵ that narrowness consisting of ‘defining problems as exclusively involving adversarial contests of rights’.³⁶ As Rod Macdonald has pointed out, ‘to

21 *Ibid.*

22 See also Arthurs, “Law and Learning”, *supra* note 9.

23 Berman, *supra* note 2 at 1182.

24 Arthurs, “Law and Learning”, *supra* note 9 at 636.

25 Jutras, “Two Arguments”, *supra* note 1 at 79.

26 Richard Janda, “Toward Cosmopolitan Law” (2005) 50 McGill LJ 967 at 984.

27 Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” (1992) 25 U Mich JL Reform 751 at 754.

28 *Ibid.* at 762.

29 *Ibid.* at 763.

30 Jutras, “Two Arguments”, *supra* note 1 at 83.

31 See generally Roderick A Macdonald, “Does Law Have a Place in the Modern University? Or Every Great University Needs a Legal Studies Programme”, LSE Law, Society and Economy Working Papers 4–2012 (2012), online: London School of Economics <http://www.lse.ac.uk/collections/law/wps/WPS2012-04_Macdonald.pdf>. See also Jutras, “Two Arguments”, *supra* note 1 (asserting that the ‘professionalism of legal education ... conflicts with its status as a university discipline’ at 85).

32 See e.g. Pierre Schlag, “Ten Thousand Cases, Maybe More – An Essay on Centrism in Legal Education” (2010) 3 Stanford AGORA 1, online: <<http://agora.stanford.edu/agora/volume2/schlag.shtml>> (lamenting the pervasiveness of ‘case law positivism’ in legal education).

33 Kasirer, “Bijuralism”, *supra* note 10 at 30.

34 See the introduction to Macdonald & Glover, *supra* note 15.

35 Janet Weinstein, “Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice” (1999) 74 Wash L Rev 319 at 340. The lack of explicit reference to interdisciplinarity in the McGill programme was critically discussed in Arthurs, “Madly Off”, *supra* note 11 at 715–19.

36 Thomas D Barton, “Creative Problem Solving: Purpose, Meaning, and Values” (1998) 34 Cal WL Rev 273 at 284 [Barton, “Purpose, Meaning, and Values”].

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see any particular incidence of human interaction through the lens of law is a choice³⁷ and interdisciplinarity demonstrates to students that law is but one lens through which to analyse and solve human problems.

Moving the curriculum in this stateless direction also paves the way, more broadly, for a pluralistic conception of legal education. Without venturing into the complexities of the various schools of legal pluralism,³⁸ which is beyond the scope of this chapter, what legal pluralists have in common is their recognition that 'law does not reside solely in the coercive commands of a sovereign power'.³⁹ Instead, legal pluralism accepts that there are multitudes of norm-generating communities – from the household to the workplace, from religious communities to the international commercial arena⁴⁰ – that contribute to the creation of a complex web of overlapping sites of law and normative activity.

Of course, both interdisciplinarity and pluralism have become well-known themes at many law faculties, and neither of these approaches is within the exclusive purview of faculties whose mission it is to teach law comparatively or transsystemically. However, bringing this form of hybridity into the classroom becomes easier, or more natural, once one abandons the allegiance to state normativity and jurisdictional boundaries tacit in many conceptions of legal education. Paul Schiff Berman notes the inter-relationship between the concepts of multiple legal orders and legal pluralism when he applies what he terms 'a pluralist framework to the global arena' and 'conceptualize[s] a world of hybrid legal spaces'.⁴¹ The similarity in approach of legal pluralists and transsystemists is indeed interesting to note. Berman asserts that 'pluralism fundamentally challenges ... assumptions that there can ever be a single answer'.⁴² This is, of course, a foundational premise of transsystemic teaching: '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'.⁴³ Furthermore, similar to transsystemic law teaching, 'a pluralist conception ... deemphasizes territorial location and recognizes the importance of multiple communities'.⁴⁴

The above overview reveals the myriad of articulated purposes and implications of moving from a legal curriculum based on state allegiance to one that advocates a more 'stateless' pedagogy. Given that law teaching is a personal and subjective enterprise, there can be no consensus as to the primary goal or effect of this conception of legal education. Each of the aspirations articulated above has been the subject of serious thought and scholarship, and it is fair to say that each – to varying degrees for individual professors and students – captures the transformative potential of teaching stateless law.

The following section identifies an additional advantage of teaching law in this manner, one that has been implicitly recognized but deserves explicit articulation. In particular, this way of teaching stateless law will be linked to the pedagogical objective of cultivating critical and flexible thinking skills in law students, thereby developing not only cosmopolitan jurists, but creative ones as well.

IV. Stateless Law as a Vehicle for Teaching Critical Thinking

It takes only a quick survey of recent literature in the field of higher education to recognize that inculcating critical thinking skills in students, whatever their academic discipline, has become an important objective of the pedagogical process. Those who have attempted to define the concept of critical thinking all acknowledge

37 Macdonald, *Lessons*, *supra* note 4 at 7.

38 From social-scientific legal pluralism to critical legal pluralism: see Martha-Marie Kleinhaus & Roderick A Macdonald, "What is a *Critical Legal Pluralism*?" (1997) 12 *CJLS* 25.

39 Berman, *supra* note 2 at 1157.

40 Klaus Peter Berger, "The New Law Merchant and the Global Market Place – A 21st Century View of Transnational Commercial Law" in Klaus Peter Berger, ed, *The Practice of Transnational Law* (Kluwer Law International, 2001) 1 at 19–21.

41 Berman, *supra* note 2 at 1159.

42 *Ibid.* at 1165.

43 Jukier, "Law and Pedagogy", *supra* note 13 at 795. I wrote that phrase in 2005 without the benefit of reading Berman's later article, "Global Legal Pluralism", *supra* note 2.

44 Berman, *supra* note 2 at 1229.

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that it is hard to do so with precision,⁴⁵ but most agree that it encompasses ‘higher-order thinking processes that are reflected in the higher end of Bloom’s taxonomy of educational objectives’.⁴⁶ This higher-order thinking is characterized by the skills of analysing, evaluating and creating as opposed to remembering, understanding and applying. Often described by the colloquialism ‘thinking outside of the box’,⁴⁷ critical thinking focuses on questioning underlying assumptions,⁴⁸ ‘discovering that which is hidden’,⁴⁹ and challenging orthodoxy through ‘knowledgeable and skilful disobedience’.⁵⁰ The goal is to create independent and innovative, as opposed to mechanistic, thinkers,⁵¹ and overcome ‘intellectual myopia’.⁵² The emphasis is shifted to the process, rather than the result, to the question, rather than the answer, to the ‘how’ and ‘why’, rather than the ‘what’.

The purpose of this chapter is not to add to the already rich literature on critical thinking, but rather to connect and apply it to the pedagogical approach of teaching ‘stateless law’. At an aspirational level, there is clear overlap in the articulation of the goals of critical thinking and those of teaching transsystemically. Both stress the imperative of considering multiple perspectives, looking at issues through different lenses, transcending and challenging orthodoxy and focusing upon the questions rather than on the answers. In this part of the chapter, I will move beyond the aspirational level and present concrete examples of how teaching in a stateless manner seeks to attain – and succeeds in attaining – the desired outcome of critical thinking. I will then explain how the unique need in transsystemic courses to transcend the boundaries of the taxonomic and doctrinal structures inherent in traditional legal education helps to inculcate flexible thinking skills in students.

A. How a Transsystemic Contracts Class Achieves the Stated Outcomes of Critical Thinking

It has frequently been asserted that teaching from a multisystemic perspective leads to a richer⁵³ or ‘thicker’⁵⁴ understanding of law. It is the very ‘cross-cultural dialogue in law’⁵⁵ and the attempt to teach ‘to the meeting point between the legal traditions’,⁵⁶ termed ‘*métissage*’ by Nicholas Kasirer, that enables this deeper understanding. At first blush, it may appear reasonable to assume that this shift in pedagogical approach leads merely to an understanding of *more* legal systems.⁵⁷ Yet, experience and closer analysis reveal that the enterprise of learning from the other actually results in teaching us more about ourselves. The irony of this is that as we advocate a move away from positivistic and geographically based conceptions of legal education and incorporate a more pluralistic orientation into the curriculum, the result is often a deeper understanding of the very state law we seek to diminish in importance.

45 Lisa Tsui, “Cultivating Critical Thinking: Insights from an Elite Liberal Arts College” (2006) 55 *Journal of General Education* 200 at 201; Nicholas James, Clair Hughes & Clare Cappa, “Conceptualising, Developing and Assessing Critical Thinking in Law” (2010) 15 *Teaching in Higher Education* 285 at 287. Janet Weinstein goes so far as to say that defining creative problem solving may paradoxically mean that ‘once confined to a definition, the concept no longer permits creativity’: *supra* note 35 at 321.

46 Tsui, *supra* note 45 at 201; see also David R Krathwohl, “A Revision of Bloom’s Taxonomy: An Overview” (2002) 41 *Theory Into Practice* 212 at 215.

47 Tsui, *supra* note 45 at 206; Weinstein, *supra* note 35 at 321.

48 Patricia H Hinchéy, *Becoming a Critical Educator: Defining a Classroom Identity, Designing a Critical Pedagogy* (New York: Peter Lang, 2008) at 14ff.

49 James, Hughes & Cappa, *supra* note 45 at 287.

50 *Ibid.*

51 Tsui, *supra* note 45 at 206, 222; James, Hughes & Cappa, *supra* note 45 at 289.

52 Tsui, *supra* note 45 at 209.

53 I have attempted to show this using the example of teaching specific performance in Jukier, “Law and Pedagogy”, *supra* note 13 at 801–8.

54 Jutras, “Two Arguments”, *supra* note 1 at 86.

55 Nicholas Kasirer, “Legal Education as *Métissage*” (2003) 78 *Tul L Rev* 481 at 483.

56 *Ibid.* at 484.

57 Stephen Smith has argued that comparative legal scholarship is no different in kind, but merely in degree, from ordinary domestic legal scholarship due to the fact that it merely examines ‘a broader range of data’: Stephen Smith, “Comparative Legal Scholarship as Ordinary Legal Scholarship” (2010) 5 *Journal of Comparative Law* 331 at 334.

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1. Questioning assumptions

One of the central components of critical thinking involves questioning assumptions,⁵⁸ daring students to challenge existing orthodoxy so that they can develop the ability to think independently and engage in creative problem solving. As Patricia Hinchey states, 'the focus in a critical classroom is ... on questioning, on examining existing conditions and proposals with a sceptical eye'.⁵⁹ The dialogic encounter and intersection between legal traditions does just that. Learning other perspectives diminishes the chance that a given jurisdiction's legal response, or a particular legal tradition's doctrinal reality, will be taken for granted as orthodox wisdom. The common law doctrine of consideration in Contract law offers a simple example in support of this assertion. Consideration – the elusive, confusing and somewhat artificial *sine qua non* of all common law contracts – still forms a significant component of first-year Contracts courses. While there are, of course, multiple ways to make its study challenging and critical, there is nonetheless a greater likelihood that students will simply accept the doctrine of consideration as a reality if only exposed to a common law perspective. When students confront the fact that consideration finds no voice in the civil law, and therefore in the multitude of jurisdictions that function within this tradition, it becomes easier for them to question the wisdom of the doctrine's very existence, and the possibility of serious alternatives to it.

Ten years of practical classroom experience demonstrates that learning law bilingually (or multilingually) offers a greater chance of producing jurists who bear less allegiance to one legal nationality. Before the Faculty of Law at McGill moved to a transsystemic approach, students who were educated monojuridically developed a natural tendency to adopt a civilian or common law identity. Those who began in the civil law stream⁶⁰ had a natural scepticism for the common law that they learned subsequently, given that they had already formed a civilian identity and parallel attachment to its structure and methods. They would regularly bemoan the common law's disorganized state and the practical difficulties that some of its arcane doctrines, such as consideration and privity, cause in everyday transactions. The same was true of the common law students who took civil law courses sequentially; they would habitually belittle the misleadingly simple structure of the Code and what they perceived to be a less sophisticated legal system. Teaching multiple perspectives simultaneously undermines this myopic tendency and increases the probability of approaching law from a more critical perspective, or at least one that does not tend to adopt, or take for granted, one way of seeing things as reality. Stateless law produces stateless students, able to question the wisdom and perhaps embrace the idiosyncracies of all legal systems within their knowledge.

2. Uncovering hidden assumptions

Critical thinking is not only characterized by questioning assumptions, but by uncovering hidden assumptions⁶¹ as well. Just as the ability to question orthodoxy is amplified by exposing students to multiple perspectives, so too is the ability of students to explore the hidden reasons and justifications underlying a legal doctrine or outcome.

By way of example, we may turn to the teaching of the common law doctrine of undue influence. An equitable doctrine unique to the common law, undue influence enables a party to ask for relief from a contract into which he or she entered due to an abuse of a relationship of trust and confidence, presumed or proven, which enabled the stronger party to take unfair advantage of the contracting party. The intricacies of this doctrine go beyond the scope of this chapter but suffice it to say that much more can be learned about it in the comparative classroom than in the monosystemic one. In the transsystemic classroom, it is precisely the lack of direct equivalent comparators in the civil law tradition that raises the most interesting questions. Students

58 Hinchey, *supra* note 48 at 14.

59 *Ibid.*

60 In our former National Programme, while students had the option of graduating with both the LL.B. and B.C.L. degrees, they would nonetheless begin the programme in one 'stream' or the other. The Programme was therefore: compartmentalized and involved a side-by-side or sequential treatment, in other words a juxtaposition of civil and common law, rather than a truly integrated approach. Students completed basic private law courses in one or the other tradition in the first year, and not as a matter of choice but as was determined by their entry stream. Subsequently, in the second year or later, they had to complete the corresponding basic private law courses in the other tradition [Morissette, *supra* note 10 at 18–19].

61 As James, Hughes & Cappa say, 'discovering that which is hidden' (*supra* note 49 at 287).

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initially express surprise at the lack of civilian counterpart to the doctrine as it exists in the common law; how can one legal system survive without the benefit of a tool that seems so intrinsic to another? The advantage of the transsystemic classroom is that confusion can soon be transformed into a more profound understanding, not just of the approaches of different legal systems, but also of the ideas that animate and underlie these very systems. By being forced to ask how the civil law persists – and continues to aspire to fairness – without the benefit of the tool of undue influence, students must confront why the doctrine exists in the first place, understand the problems it was designed to address and consider alternative approaches to those problems.

In this vein, it is interesting to venture outside the classroom and compare mainstream Canadian common law contract law textbooks, such as those written by Waddams⁶² and McCamus,⁶³ with Atiyah's treatise on the *Introduction to the Law of Contract* written by Stephen Smith.⁶⁴ The former provide interesting and useful commentary on the leading case law on undue influence and the inner workings of this somewhat complicated doctrine. By contrast, the latter includes a lengthy discussion of the basis for relief under the doctrine,⁶⁵ examining hypotheses that include whether it merely fills the gap that duress and unconscionability leave open, or whether it is more realistically based on the impaired consent of the contracting party seeking relief. Smith asserts that 'presumed undue influence is a particular kind of impaired consent ... most closely related to the defence of incapacity'.⁶⁶ This explanation is the most interesting, and likely the one most inspired by an understanding of the civil law, in which the integrity of consent of the contracting parties is critically important.⁶⁷ It is perhaps no accident that Smith teaches at McGill and has accordingly been examining common law undue influence in *métissage* with the civil law, rather than in isolation. The very lack of civilian counterparts to this doctrine is what opens one up to questioning, and perhaps uncovering, the underlying assumptions of the doctrine itself.

B. How Transcending Doctrinal Boundaries Enhances Critical Thinking Skills

Both critical thinking and transsystemic teaching espouse 'transcend[ing] traditional perspectives and approaches'.⁶⁸ Teaching in a stateless manner requires not only that 'traditional borders between juridical orders or legal systems be transgressed',⁶⁹ but that the very doctrinal categories and taxonomic structures that define these juridical orders and legal systems be abandoned. It is this necessity to eschew established doctrinal categorization that provides the true 'new mental map'⁷⁰ in stateless law pedagogy and is the key to instilling more flexible thinking skills in budding jurists.

One of the effects of teaching law in the traditional jurisdictionally restrictive model is that the doctrinal and taxonomic structures inherent to a given legal tradition inevitably inform the organization of course syllabi. Before the implementation of the integrated programme, many of McGill's law courses followed this conventional model of legal education, emulating its divisions by organizing course material into established doctrinal categories. When, however, a course becomes integrated, it does not take long to discover that this established structure breaks down. In most cases, the nomenclature and syntax of the different legal traditions simply do not match up. The concept of 'Remedies', for example, a well-known and amply developed area of the common law of Contracts, finds no linguistic equivalent in the civil law. Authors grapple with attempted synonyms such as *recours* or *sanctions* but ultimately, these are imprecise translations that actually serve to

62 SM Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 2010).

63 John D McCamus, *The Law of Contracts* 2d ed (Toronto: Irwin Law, 2005).

64 Stephen Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed (Oxford: Oxford University Press, 2006).

65 *Ibid.* at 288–91.

66 *Ibid.* at 290.

67 Civil Code of Québec, art 1399:

Consent may be given only in a free and enlightened manner.

It may be vitiated by error, fear or lesion.

68 Tsui, *supra* note 45 at 206.

69 Shauna Van Praagh, "Navigating the Transsystemic: A Course Syllabus" (2005) 50 McGill LJ 701 at 704.

70 Arthurs, "Law and Learning", *supra* note 9 at 635.

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evidence an underlying difference in mentality concerning the consequences of inexecution of contractual obligations in the two traditions.⁷¹

This inability to match nomenclature has the fortunate effect of requiring course syllabi to be reorganized around broad underlying themes and larger questions rather than dogmatic doctrinal categories. For instance, as it is obviously impossible to retain the heading of 'Consideration' on a stateless course syllabus given that this particular rite of passage for common law contracts is meaningless to the civilian tradition,⁷² stateless law courses must find other, tradition-neutral headings, such as 'Conditions of recognition of contracts by the state' or 'What else besides consent?' The result is that lectures are framed by ideas and problems rather than traditional legal doctrinal topics.

While this move away from the binds of legal taxonomy is certainly possible in programmes and courses that seek to teach from an interdisciplinary, pluralistic and non-positivistic perspective, it is not a *necessary* component in the same way as it is in stateless or transsystemic teaching. Returning to the example of undue influence discussed above, that topic is ripe for theoretical and interdisciplinary perspectives such as ones based on critical legal studies, law and economics and feminist theories.⁷³ But these alternative insights are still taught as perspectives on the traditional doctrinal topic of undue influence. It is only when faced with teaching multiple legal traditions that one is required to abandon the title of the doctrine altogether and teach the subject matter within the larger context of tools for controlling or preventing the enforcement of contracts due to concerns about procedural fairness, or the social control of contracts through judicial intervention more generally.

Those who have studied and written about critical thinking skills emphasize that inculcating such skills involves not only method (less passivity, more questioning) but curricular decisions as well.⁷⁴ Therefore, the content, or *what* one teaches, is as important as *how* one teaches. Incorporating the content of other legal traditions and systems into the curriculum, resulting in the abandonment of traditional doctrinal taxonomies, is conducive to instilling flexible thinking in students and lays fertile ground for them to 'think outside the box'. Restricting teaching to one legal system's responses to legal issues, on the other hand, merely fosters thinking within one box, not outside of it.

It may seem strange for a law professor to appear to advocate the eschewing of categories and organization of legal knowledge. After all, 'one of the crucial tasks of lawyering and judging is to organize the chaos of facts into the ordered patterns of law'.⁷⁵ This chapter is not, of course, proposing anything of the sort. Law students need to acquire the crucial skills of organizing information appropriately. What is being advocated instead is that law students should not become *prisoners* of such categories. The goal of critical thinking is 'dedicated to generating new mentalities and skills to be applied to problems'.⁷⁶ It is inherently more difficult to generate these new mentalities if 'by tradition or lack of imagination, a problem is imprisoned within a decisional procedure'⁷⁷ or 'channeled too rigidly into contests of rights created under the rules'.⁷⁸ Teaching without reference to rigid doctrinal categories decreases the inclination of students to apply mechanically what seem to be obvious, formulaic responses to legal issues. If they do not learn law in silos, students will have a greater chance of being able to engage with alternate systems of thought and to think more openly about a wide array of possible solutions to the problems that necessitate law in the first place.

71 See Helge Dedek, "From Norms to Facts: The Realization of Rights in Common and Civil Private Law" (2010) 56 McGill LJ 77. See also Rosalie Jukier, "Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 87.

72 The same would be the case for the heading 'Intensity of Obligations', given that it would only be a recognizable topic to those studying a civilian-based legal tradition.

73 Put forward in Richard Devlin, Anthony Duggan & Louise Langevin, "Doing Contract Theory in First Year Law School: The Iceberg Method" [2007] Canadian Legal Education Annual Review 1.

74 Hinchey, *supra* note 48 at 14.

75 Schlag, *supra* note 32 at 3.

76 Thomas D Barton, "Conceiving the Lawyer as Creative Problem Solver: Introduction" (1998) 34 Cal WL Rev 267 at 269.

77 Barton, "Purpose, Meaning, and Values", *supra* note 36 at 275.

78 *Ibid.* at 296.

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This phenomenon can be illustrated by an example from a recent Contractual Obligations exam (co-written by myself and my colleague Professor Stephen Smith). One fact pattern question concerned a contract that, as is usually the case on law school exams, went awry. The potential defendant in this scenario told the victim of the alleged contract breach that she had no legal recourse because their contract contained an exclusion of liability clause. Students were asked to advise the victim of the alleged contract breach. In so doing, the majority immediately veered to the sources of the law, in both the civil and common law traditions, on exclusion of liability clauses. They then formulated arguments, some very sophisticated, using those sources to argue for the invalidity or non-applicability of the clause, thereby affording the plaintiff access to a variety of legal remedies.

The better answers, however, came from the students who were able to transcend the natural or automatic tendency to apply, by way of knee-jerk reaction, the law within the doctrinal topic of exclusion clauses. Those students recognized that the parties had – on the facts provided – already formed an oral contract, without any discussion of potential exoneration for breach, before the signing of the unread written document that contained the exclusionary clause. Many went on to point out that if the fact pattern took place in a common law jurisdiction, the subsequent written document could be considered a modification of contract without the necessary requirement of fresh consideration and, as a result, the exclusion clause would not apply. Furthermore, others argued, even if the exclusion clause were to be considered as part of the obligational content of the contract, principles of judicial interpretation of contracts would likely have the intended effect of rendering the clause inapplicable to the situation at hand. Only as a last resort, asserted the students thinking in this more creative manner, should the victim of the alleged breach invoke the precarious doctrines of unconscionability⁷⁹ or abusive clauses⁸⁰ and the isolated decisions⁸¹ that make headlines precisely because they find some way to relieve a party from an exclusion clause.

It is not only a stateless law programme that holds the monopoly on imparting critical thinking skills to its students. Such skills may, of course, be inculcated through other means in monosystemic law programmes. However, learning law without the usual emphasis on one jurisdiction's state law, and its particular set of doctrinal categorization, effectively forces students to get into the habit of thinking about legal problems holistically and thereby lends itself more naturally to the development of such skills.

The above example demonstrates that legal pedagogues should challenge students to avoid the automatic tendency to apply the law of an obviously relevant doctrinal category, however well, and encourage them to think outside that category, or box, to imagine other solutions and other lenses through which they can solve legal problems. This is what Weinstein refers to as creative problem solving for lawyers: it consists of 'looking at problems in new ways – different from the traditional classification of problems into legal categories ... and looking for new solutions that might stretch beyond the traditional boundaries'.⁸² This is a tall order, as students have been taught from a young age to apply vertical thinking skills, finding the appropriate category into which a problem falls and solving it using the mechanistic formula provided by established orthodoxy. We must teach students to add horizontal thinking skills to their repertoire of thinking tools. An effective way of doing so is by eschewing the doctrinal categories and taxonomies that state normativity thrusts upon us, and teaching in a less compartmentalized manner. This method opens students' minds to a wider array of possible solutions and offers them tools to deal creatively with contemporary problems of justice.

Viewing the benefits of teaching stateless law in this manner serves to meet the oft-encountered reaction of many that, while extremely interesting and perhaps 'one of the most unusual curriculum experiments in

79 For a recent discussion of the limits of unconscionability in Canada, see *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69, 315 DLR (4th) 385.

80 See *Civil Code of Québec*, art 1437:

An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

81 See e.g. *Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA).

82 Weinstein, *supra* note 35 at 321. While Weinstein is describing the creativity that comes from incorporating interdisciplinarity into the legal curriculum, her words are equally applicable to approaching the teaching of creativity and flexible thinking skills through teaching law in a stateless manner.

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the annals of legal education',⁸³ this sort of legal pedagogy is not relevant for those in jurisdictions that are not systemically bilingual as is the province of Quebec, Canada. Of course, one cannot diminish the practical relevance of such a law programme in a mixed jurisdiction or deny that '[t]he epistemology of McGill's law school is largely a product of a uniquely Canadian brand of legal pluralism rooted in its Quebec location and identity'.⁸⁴ However, in a world that increasingly demands creative problem solving, viewed from a pedagogical perspective of helping to inculcate critical thinking skills, this type of teaching begins to make much more sense, even where the practical importance of exposing students to different legal traditions is perhaps minimal.

V. Conclusion

'If we would get stuck on a particularly thorny problem, it was very often helpful to switch gears and adopt the lens of another tradition in order to gain a point of entry'. These are the words of one of my students, Alain Henri Deschamps, after his first year of law studies in McGill's version of a stateless law programme. He went on to say, unprompted, that this method of learning law 'gave us an instinct for flexible thinking'. Another of my students, Nicola Langille, after two years in the programme, stated that 'McGill students know that they will inevitably have to confront a given problem from the perspective of at least the two major legal traditions of the civil and the common law, and often from multiple legal systems within those traditions. The most effective (not to mention interesting) way to do so is not to become trapped within the starting points and assumptions of one legal system, but rather to conceive of the scenario as presenting simply a human problem that must be addressed. It is the development of and ability to demonstrate this legal agnosticism that best encapsulate the benefits of the McGill programme'.

This chapter has attempted to demonstrate that in addition to the many aspirations and benefits of teaching law without reference to the state as its lodestar outlined above, one of the most pedagogically useful results is that of connecting the dots between teaching in this manner and inculcating critical and flexible thinking skills in our students. The hope is for our students to become cosmopolitan jurists who can meet contemporary issues of justice and public policy head on with the most creative and open of minds.

83 Arthurs, "Madly Off", *supra* note 11 at 709.

84 Nicholas Kasirer, "'K' as a Structure of Anglo-American Legal Knowledge" (1997) 22 Can L L 159 at 164.

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