

## **GUEST EDITORIAL: BISYSTEMIC LAW-TEACHING – THE McGILL PROGRAMME AND THE CONCEPT OF LAW IN THE EU**

### **1. Introduction**

In recent years much attention has been given in the European Union to the harmonization and the unification of law. There is today a rich body of contemporary comparative law scholarship. This scholarship is powered by the ever greater interpenetration of laws which characterizes legal systems in the EU, but it has deep roots in the great intellectual traditions of European comparative law scholarship over the centuries. Since the end of the Second World War, considerable efforts have been made to promote the harmonization of private law in such institutions as UNIDROIT or in less formal settings such as the Trento project on the Common Core of European Private Law. More recently an important effort has been expended under the aegis of the EC itself. The work of the EC has focused primarily on commercial contract law but has implications for the whole of private law.

What is almost entirely missing from the current European debate on the unification of private and commercial law in the EC is a comparable debate on the teaching of law.<sup>1</sup> In a context where it is increasingly necessary to familiarize students with both the rules and the deep structure of more than one system the question of the best way to inculcate such an understanding is surely important. Law students in the EC are likely to work in an environment where they will have to deal with many legal systems in the context of a single problem. Business relationships are increasingly transnational and multijurisdictional in character and the personal lives of an ever increasing number of EC citizens are constantly crossing jurisdictional lines. The world of the legal issue which fits neatly into a single legal system is a thing of the past, and yet most law students in the EC are still taught as though only one legal system existed, by professors who know only one legal system.

Some efforts have been made in recent years to confront this problem. An increasing number of joint programmes exist in Europe where students are expected to spend an appreciable period of time studying another legal

1. Larouche, "Recueils Jus Commune pour le Droit Commun de l'Europe", 3 Rev. de la common law en français (1999), 99.

system abroad.<sup>2</sup> These intra-university arrangements have recently received much support from the Erasmus programme which seeks to assist students of many disciplines to study in other community countries. This approach has its merits, but it is haphazard; it has no organizing intellectual framework and leaves to each student the burden of drawing appropriate conclusions as to the changing nature of law in the EC. A second more ambitious approach is found in the Hanse Law School programme where students are expected after years of study in both jurisdictions to develop a sound understanding of the law in the Netherlands and in the FRG. This approach is more consciously focused on the mastery of more than one system but it does not necessarily provide an integrated bijural framework from which to understand both legal systems. The third and most ambitious approach is that adopted at only one faculty, that of the Faculty of Law of the University of Maastricht, the European Law Studies programme. In this programme, students having finished a first year of Dutch law, enter a course of studies focused upon the general principles of law common to the fifteen Member States of the EC. This is an immensely ambitious programme and one which legal educators should follow with great interest.

The efforts made in the EC to this date are important, but in relation to the issues they are designed to confront they remain fragmentary and limited in scope and vision. As a contribution to this debate on the teaching of law in the EC, but ultimately on the definition of law itself, the author offers this brief analysis of the efforts made at the Faculty of Law of McGill University, situated in Québec, Canada to develop a genuinely “transsystemic” approach to the teaching of law. The McGill Programme, while not entirely transposable to the EC context, has an important message for legal educators in the European Union.

Founded in 1848, the Faculty of Law of McGill University has always been characterized by a strong tradition of teaching and scholarship in civil law and comparative law. Even more important has been McGill’s iteration of a bisystemic, and recently a genuinely “transsystemic” curriculum, combining the civil law and the common law, and providing students with “a truly national legal education, one which academically and professionally raised legal training above local or provincial parameters.”<sup>3</sup> This unique curriculum, known as the “McGill Programme”, is described below. First, however, we turn to a brief discussion of the bijural context of legal education in Canada.

2. Blanc-Jouvan, “Bijuralism in legal education: A French view”, 52 *J. of Leg. Ed.* (2002), 61.

3. Brierley, “Developments in Legal Education at McGill, 1970–1980”, 7 *Dal. L.J.* (1982), 364 at 364.

## 2. Legal education in a mixed jurisdiction

Canada is a federal country where two systems of private law, a civil law system in Quebec and one or several common law systems outside Quebec, have coexisted since the late XVIIth century.<sup>4</sup> By and large, Canadian bijuralism confines itself to private law, thereby excluding the fields that govern relationships with and between public entities, such as constitutional, administrative, tax and criminal law. Not all private law is bijuridical however. As former Dean Morissette explains:

“[T]here are large swaths of private law proper (divorce, for example), as well as commercial and business law (business associations, banking and bills of exchange, bankruptcy, intellectual property, securities, etc.), or procedural and adjectival law (the structure of the courts, the adversarial system and civil procedure, statutory interpretation), where the common law tradition dominates or occupies the field through and through, or where law has become asystemic.”<sup>5</sup>

Quebec private law has its historic origins in the *coutume de Paris*, the original 1865 and the contemporary 1991 Civil Code, from its provincial statutes and from federal private law. With a predominantly French heritage, the private law of Quebec has however benefited from many English contributions, mainly in the area of commercial law and procedure. Moreover, many of Quebec’s legislative, judicial, executive and administrative institutions and processes belong to the English public law tradition, hence the singular situation of a body of civil law evolving within a common law institutional structure.<sup>6</sup> The manner of reporting judicial decisions in Quebec is inconsistent with the civil law theory that there can only be one answer to a legal question, not only do judges give individual opinions but dissenting

4. For a succinct but scholarly and well-documented overview of the origins and modern implications of this reality, see Part One of Brierley & Macdonald (Eds.), *Quebec Civil Law – An Introduction to Quebec Private Law* (Toronto, Emond Montgomery Publications Ltd., 1993) at 5–198.

5. Morissette, “McGill’s Integrated Civil and Common Law Programme”, 52 J. Leg. Ed. (2002), 12 at 15. Morissette also notes that the particular configuration of this mixity explains why certain commentators have raised questions about the density of the civil law tradition still present in Canada, citing Valcke, “Legal Education in a ‘Mixed Jurisdiction’: The Quebec Experience”, 10 Tulane European and Civil Law Forum (1995), 61; Valcke, “Quebec Civil Law and Canadian Federalism”, 21 Yale J. Int’l L. (1996), 67; and Stein, “Roman Law, Common Law and Civil Law”, 61 Tulane Law Review (1992), 1591 at 1602.

6. Brierley, “Bijuralism in Canada” in *Contemporary Law: Canadian Reports to the 1990 International Congress of Comparative Law, Montreal 1990* (Cowansville, Qc., Yvon Blais, 1992).

opinions are frequent.<sup>7</sup> “Although *stare decisis* is not part of Quebec law, court decisions are given very considerable weight in judicial analysis.”<sup>8</sup>

In a mixed jurisdiction such as Quebec, legal education takes on a particular importance. To some degree, all students must possess the civil law tools necessary to analyse a private law problem as well as the common law training to apply Canadian public law. In the words of one author:

“[L]egal players must be capable of playing two games at once, which requires that they be trained to juggle with, and yet never confuse, two distinct set of rules. Only if legal players can properly accomplish this will the integrity of the various games being played be preserved. In mixed jurisdictions, therefore, it is the very identity of the legal games, not just their respective dynamism, that is at stake for legal education.”<sup>9</sup>

Quebec therefore presents itself as an ideal jurisdiction for exploring the plural character of law using the methodology of comparison.

### 3. The National Programme

The McGill Faculty of Law was a pioneer in recognizing and developing the potential for teaching law comparatively. In the mid-nineteenth century, at a time when Montreal was considered Canada’s financial and industrial centre of gravity, the Faculty had to face a particular reality.<sup>10</sup> As the only English-speaking law school in Quebec, “many of its graduates would practise law, and notably commercial law, across systemic boundaries, and they needed some exposure to private common law.”<sup>11</sup> More significantly, however, was the appointment of two successive deans who brought to the Faculty a high degree of commitment to the scholarly study of law.<sup>12</sup> Under their influence, the major elements of McGill’s first polyjural, universalist and bilingual curriculum

7. Bédard, “Transsystemic Teaching of Law at McGill: ‘Radical Changes, Old and New Hats’”, 27 *Queen’s L.J.* (2001), 237 at 246.

8. *Ibid.* Bédard comments that the situation has changed and that the Supreme Court no longer considers itself bound by its own decisions, whether they involve civil law or common law matters.

9. Valcke, “Legal Education . . .”, *op. cit. supra* note 5, at 62.

10. Morissette, *supra* note 5 at 4.

11. *Ibid.*

12. Frederick Parker Walton, appointed Dean in 1897, was a Scottish civilian and romanist from Glasgow, while Robert Warden Lee, appointed Dean in 1915, was an English romanist from Oxford. Another influential addition to the Faculty was Herbert Arthur Smith, trained in Oxford, who had spent a number of years in the United States, and who was recruited by the Faculty in 1920 as Professor of Jurisprudence and Common Law.

were in place, reflecting the dual origins of Canadian law.<sup>13</sup> During the 1920s, common law courses were offered alongside the regular civil law program. However, it took another fifty years before the National Programme was formally offered to incoming students, and three decades of institutional experience would be necessary for the 1968 curriculum to emerge fully.

The philosophy of the National Programme was fairly straightforward. It was based upon the conviction that knowledge of both Canadian legal traditions was an asset, intellectually and professionally.<sup>14</sup> In the broadest sense, it could be seen as contributing “to the promotion of mutual understanding between different regions of the country.”<sup>15</sup> By providing students with a training that allowed them to qualify as lawyers in both civil law and common law jurisdictions, the National Programme not only increased professional mobility in the country but also began to produce jurists that could more easily find work in transnational and international environments. Indeed, double degree graduates increasingly qualified for practice in a number of American and other jurisdictions. Moreover, as one professor pointed out, “it is noticeable that students proceeding to graduate work, at McGill and elsewhere, are more often than not those with the full dual training.”<sup>16</sup>

During the first thirty years of its existence, the National Programme offered three possibilities to students entering law school: (i) completing a civil law degree in three years and in 95 credits, or (ii) completing a common law degree in three years and in 95 credits, or (iii) completing both degrees in four years and in 125 credits. The approach adopted in the early years of the programme was sequential. Rather than integrating the teaching of both legal traditions, the programme juxtaposed them in such a manner that students entering law school were branded as belonging to one or the other of the two traditions. As such, those in the civil law stream completed their basic private law courses in civil law in Year I, and in Year II or over the course of the following three years, they had to complete the corresponding basic private law courses in common law.<sup>17</sup>

Over time, it became apparent that students who had at least one year of exposure to the study of law would not learn the basics of the other tradition in the same manner as their first-year counterparts and, therefore, should be taught differently. From 1985 to 1999, a second pedagogical approach

13. For a thorough account of this period in the Faculty's history, see Macdonald, “The National Law Programme at McGill: Origins, Establishment, Prospects”, 13 Dal. L.J. (1990), 211 at 243–260. See also Brierley op. cit. *supra* note 3 at 364.

14. Ibid. at 365.

15. Ibid.

16. Ibid. at 369.

17. For a detailed discussion of the National Programme from 1968–1998, see Brierley op. cit. *supra* note 3; Macdonald op. cit. *supra* note 13.

emerged with the development of “cross-over” courses designed specifically for students having completed their basic training in one tradition. “[S]econd-year courses were taught in an explicitly comparative basis, drawing insight from the student’s prior exposure to the same ideas in their first year. In the third and fourth year of the program, students would have various options to take courses in the civil law or common law tradition, in order to graduate with both degrees.”<sup>18</sup> Despite the Faculty’s effort to develop the comparative law potential of the National Programme, bijuralism continued to be understood as the cohabitation of two largely autonomous orders of private law and any comparative endeavour remained for the most part secondary. In the words of one professor: “[b]ijuralism at McGill . . . meant peaceful cohabitation rather than active dialogue between the common law and the civil law.”<sup>19</sup>

#### **4. The McGill Programme**

Three decades after the institutionalization of the National Programme came the next major reform of the curriculum. The 1999 reform, known as the McGill Programme, was a response to a number of external and internal pressures, including the desire to make the Faculty more attractive to a wider array of students and the perceived need to locate the teaching of law “more resolutely in the university, not as a matter of geography but of ideas . . . as an example of what might be called a foundational discipline.”<sup>20</sup> The new curriculum developed as the logical extension of its predecessor, diverging from the National Programme largely in degree rather than in kind. In fact “the history of McGill’s law curriculum after 1968 is one of progressive and ever increasing integration of the civil and the common law traditions, from juxtaposition to partial amalgamation where subjects permit it.”<sup>21</sup> Under the new program, implemented in 1999, streaming has been abandoned. All students are admitted into a single integrated program, and all graduate with both degrees. Basic private law courses are no longer taught in function of a single legal system but in function of overarching categories of law such as contracts and civil responsibility.

18. Jutras, “Two arguments for cross-cultural legal education” in Assman, Bruggemeir and Sether (Eds.), *Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, vol. 3 (Baden-Baden, Nomos Verlagsgesellschaft, 2001) at p. 75 et seq.

19. Kasirer, “Bijural Teaching in Law’s Empire and in Law’s Cosmos” (Opening Address, LSU-Canadian Invitational Bijuralism Conference, Paul M. Hebert Law Center, Louisiana State University, 1–3 Nov. 2001); 52 *J. Leg. Ed.* (2002), 29 at 29.

20. *Ibid.* at 3.

21. Morissette, *supra* note 5 at 6.

The cornerstone of the reform has been the advent of transsystemic courses in which an area of law is treated as a unified field across the divide of different legal traditions. The courses that currently qualify for transsystemic teaching are: “Extra-contractual obligations / Torts”, “Contractual Obligations / Contracts”, “Business Associations”, “Comparative Federalism”, “Family Law”, “Evidence (Civil Matters)”, “Private International Law”, “Secured Transactions” and “Sale”. In first year, Civil Law Property is the one private law course that is not taught transsystemically because of its systemic development and its cultural specificity. By integrating what used to be two courses into one, transsystemic teaching is designed to promote a more profound and coherent understanding of fundamental legal principles rather than simply teaching the logic of a single system of law. This approach has the practical effect of permitting a reduction of the number of credits required to graduate with both degrees, from 125 to 105. Students are thus able to complete their studies in three very heavy years of study rather than the four years required until 1998. That said, some students choose instead to pursue their studies for a further term or even another full year in order to participate in exchange programmes, to pursue further research work or even simply to proceed towards their degree at a slower pace.

The new program fits in the movement toward a more intellectual model of legal education. While a transsystemic legal education is without a doubt “an open door on the world”,<sup>22</sup> its architects thought of it, first and foremost, as “an invitation to students and scholars to think of law in a new way, in terms other than those of the jurisdictional or geographical representations of law that have dominated North American legal education in the past.”<sup>23</sup> McGill has always been committed to a liberal education, but with the new programme, the liberal endeavour is raised a notch by challenging the temporality and territoriality of legal normativity: “[I]f the study of law can be conceived as an end in itself, as an academic discipline, as an inquiry into one dimension of culture and social organization, why should it be confined to the norms and culture of the positive law of the jurisdiction in which a given faculty happens to be located?”<sup>24</sup> It is believed that transsystemic teaching has a potential for sharpening, deepening and expanding the lenses through which one perceives law.<sup>25</sup>

22. Kasirer, *supra* note 19 at 31.

23. Ibid.

24. Jutras, *supra* note 18 at p. 83.

25. Bédard, *supra* note 7 at 279.

## 5. Advantages of the McGill Programme

*Qui bono* some readers may ask. In Europe we have the Erasmus Programme which allows students to study in more than one legal system. There exist<sup>26</sup> excellent programmes in which students can study for two years in France and two years in England, or another EU country, thereby acquiring a solid grounding in both the civil and the common law. Why go this extra very complex mile? What is gained? The answer from the Canadian experience is: “a great deal”.

A first result of the McGill Programme is that students cease to be “branded” as common or civil lawyers and as a result can be said to have a more complex legal identity, arguably one better suited to the complexities of the world. Secondly and equally important from the pedagogical perspective, students cease to carry the sole burden of comparative analysis. They are no longer taught by professors whose perspective is unisystemic but rather by professors who are engaged in the same complex enterprise that they have embarked upon. Thirdly, comparative analysis ceases to be an addition and becomes central to their work as law students. Finally, law teaching from a multisystemic perspective is much more easily aligned with the broader social sciences and the humanities; the search for general principles becomes more necessary and the study of law is less likely to be dominated by the professionalist ethic.

Broadly, the result is that students cease to think in terms of a single national legal paradigm and are instinctively prepared to cope with several jurisdictions in any given situation. Law ceases to be seen from a single national perspective. Surely this is a message that is relevant to the European Union. EU law scholars above all others should understand this. The true framework within which modern law is developing has ceased to be the single jurisdiction: the sources of legal rules are increasingly multinational and multisystemic. Jurists, whether academics, judges, lawyers, legal counsel employed by governments, corporations or NGOs, must have a broader frame of reference within which to work. In this respect, the EU is the exemplar of what is happening in the broader world.

Whether they are engaged in drafting or analysis of contracts, litigation, advocacy, policy-making in government service or work for NGOs, jurists need to be sensitive to the influence of different systems. Within the EU, a lawyer called upon to apply Article 288 EC will surely benefit from a training that calls for the ability to think of legal rules outside a single jurisdiction. A jurist called upon to work with a common code governing commercial contracts will understand the principles of the code far more readily if they

26. Cf. Blanc-Jouvan op. cit. *supra* note 2.



come at it from a perspective which is not tainted by the instinctive belief that there is only one genuine legal system – that in which they were first trained. Administrative lawyers working with the EC concept of general principles of law can do so much more readily if their judgment is not clouded by instinctive fidelity to their system of origin. Complex commercial contracts no longer can be understood in function of a single legal system, yet most law students are not taught this fact or trained to deal with it. A multisystemic training is designed to meet this need.

EU law has already embarked on the journey of search for common principles of law and already draws heavily upon a number of legal systems. The EU has also embarked upon the search for constitutional legal principles to govern a multi-polar and multisystemic political system. What it has yet to undertake is the development of a system of legal education adapted to the training of jurists for this new reality.

## 6. Conclusions

What is happening at McGill is not simply a utilitarian effort to alert students to the complexities of life that await them as jurists and lawyers in the future. Much more is at stake. Once one begins to approach the teaching of law from a transsystemic or multisystemic perspective it is quickly apparent that the very nature of law is at stake. The teaching of law at McGill reflects both the coexistence of two legal cultures that meet with particular intensity in Québec but also reflects the sense that single jurisdictions no longer, if they ever did, contain within themselves a true understanding of the meaning of law. Surely something similar and even more complex is occurring in the EU. As this process accelerates, it is important that the process be understood as one of the central features of the development of the EU, not only as a legal undertaking but also as a human and political community.

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