SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Law and Learning in an Era of Globalization

*By Harry W. Arthurs**

A. Introduction

overcome my nature, so I will

The optimists amongst us assume that human hands — our hands — shape legal education, that legal education shapes the law, and that law shapes the world. The pessimists contend that the process works in reverse, that the forces of political economy ultimately have their way with law as a system of social ordering, as a cultural phenomenon and an intellectual enterprise, and as the subject or object of study in law schools. I am a pessimist by nature, so I will begin on a pessimistic note. 97i7c

end on what, for me, is an optimistic one.[1]

B. Legal Education, Political Economy and Globalization

Governments pass laws, enter into treaties, appoint judges, establish tribunals, overseena, me, p p

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institutions.[2] Others have begun to offer courses on globalization and the law, on global

This brings me to a third sense in which "globalization" is having a profound effect on the way in which law is perceived, produced and consumed, with knock-on consequences for legal scholarship and education. According to William Scheuerman, "the process of space-time compression" associated with globalization "raises many fundamental questions for legal scholarship".[8] Scheuerman argues that globalization, together with technological change, has reshaped the constitutional matrix within which the three branches of government perform their functions.[9] It has disabled the legislature which cannot legislate in derogation of free trade, let alone debate in any serious way the detailed regimes by which foreign and domestic economic activity is to be regulated. This in turn has enhanced the power of the executive branch, which typically enjoys an open-ended parliamentary mandate to negotiate trade regimes, and to make critical decisions concerning fiscal and economic policies. And, he argues, it has enlarged the role of the judicial branch, which referees boundary disputes between the other two.

In a parallel development, established relations between central and regional governments have been upset by powerful tendencies set in motion by globalization. The survival of local cultures is threatened by transnational cultural flows; resource-based local economies are destabilized by the uncontrolled fluctuations of global commodity prices; subventions and supports provided by national governments to stimulate local industries and economies are vulnerable to attack as illicit trade subsidies. The result, understandably, is often local resentment, sometimes accompanied by calls for local autonomy or even secession and, at the least, for a veto by regional governments over decisions concerning culture, immigration, industrial policy and foreign trade. To the extent that states like Canada and the UK respond to these calls by shifting powers from the centre to the regions, globalization will have brought about a very substantial change in the structures of governance.

But not only is globalization effectively amending the constitutions of states by triggering the redistribution of powers amongst the different branches and levels of government, it is also subjecting national governments to entirely new constitutional constraints. Institutions of the European Union (EU) have acquired power to strike down, rewrite or mandate the enactment of national legislation, while non-governmental tribunals have acquired power under global economic treaties such as the World Trade Organization (WTO) or North American Free Trade Agreement (NAFTA) to neutralize or invalidate the laws of member states. International agencies such as Interpol, the World Bank and the

[8] William Scheuerman, *Reflexive Law and the Challenge of Globalization*, 9 JOURNAL OF POLITICAL PHILOSOPHY 81, 91 (2001).

[9] WILLIAM SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (2004).

World Health Organization (WHO) now share responsibility with national governments for forestalling or responding to terrorism, economic perturbations, pandemics and environmental catastrophes. So too do private security firms, airlines, banks, hedge funds and drug companies.

Fourth and finally, globalization has effectively de-coupled the idea of law from the idea of the state. Of course, for some time now the assumption that state and law are intrinsically and invariably linked has been questioned by legal pluralists and other socio-legal scholars. However, their work has been largely driven by case studies of law in pre-modern communities, and in modern or post-modern businesses, neighbourpe

D. The De-coupling of Law and State: The Rise of Trans-systemia

You may be disconcerted by this description of the likely future of legal education following the advent of the "new normal" and the decentering of the state. If so, you will be even more disconcerted by

What then do they think they are doing? Clearly, McGill is attempting first and foremost to problematize the very notion of law itself. One former dean argues that the McGill law curriculum treats law as simply "a way of being alive".[11] Another claims that it is designed to bring students into "a sustained and humble dialog [sic] with otherness".[12] The present dean insists that the curriculum requires students to explore "what explains law as a social phenomenon, what is the nature of legal knowledge, what does it mean to think like a lawyer, [and] what it means to think like a citizen alive to law's symbolic and persuasive attributes".[13]

Of course, McGill's deans are not the only ones to articulate their faculty's ambitions in such expansive, if Delphic, terms. Most legal academics would say that they want to take their distance from conventional understandings of law. However, McGill deserves special mention because it has so directly and explicitly taken up the challenge of thinking about legal education "without the state". This is not to say that McGill's curriculum is perfect, that it succeeds in its own terms, or even that the curriculum on McGill's books resembles the curriculum in practice.[14] Nor would I argue that other faculties of law can or should imitate McGill. Indeed, I am not going to talk about the actual experience of legal education at McGill, but rather about the McGill curriculum understood as an ideal-type, as a thought experiment in what might happen to legal education in this era of globalization, neo liberalism and "law without the state".

Because the McGill curriculum is trans-systemic, it challenges the notion that law's logic is bounded, its values fixed, its processes ascertainable, and its outcomes predictable. Law in the McGill curriculum does not arrive on students' laptops neatly encoded according to juridical family or conceptual category. Instead, legal systems and categories collide with and penetrate each other, reinforce and refute each other, in unpredictable ways. Civil or common law, religious or secular law, domestic or international law, state law or some other kind, all form part of the open-textured, complex, he7(D-0004Tc(or)Tj/TTj/TT101Tf.58680TD.001Tc(the)Tj/T

A second approach is somewhat more edifying. Law schools like McGill are able to engage in "niche marketing". That is, they try to ensure that the students they attract are those most likely to feel at home in the pedagogic environment they offer. There is much to recommend this approach. It is honest; it ensures that students and faculty share a sense of common purpose; and it helps to more closely align pedagogic philosophy and pedagogic practice. On the other hand, niche marketing has its drawbacks. It assumes that prospective students have adequate knowledge and can make meaningful choices; it represents an attempt to impose closure on an approach to law whose distinguishing characteristic is supposed to be its openness; and it smacks a bit of incest.

A third approach — far more difficult, but far more satisfying — is to engage students in serious conversations which will free them from the tyranny of rules. This requires that we adopt a certain posture in the classroom. First, we must give students confidence that their experiences of family and school, and their encounters with people, culture and work is somehow relevant to their legal studies. This will provide them with a vantage point from which to begin to question the wisdom dispensed by judges, legal texts and ourselves. Second, we have to convince them that despite our own comprehensive knowledge of law, sociology, philosophy, politics, economics, history, astrology, sport and sex, we still value questions more than answers. Third, we must show them how to use their newfound confidence not just to challenge the instructor and interrogate the materials being taught, but to dare to ask questions of themselves. And finally, we must help them get used to the fact that they are embarking on a course of study, and ultimately on a career, that will require them to live at ease with multiple truths, irresolvable conflicts, abundant ambiguities and ironies galore.

Whatever its other merits, it seems to me that the McGill curriculum is admirably designed for this last approach to teaching. It is - you will conclude and I will confess — my kind of curriculum and my kind of teaching. Does this - I ask you — make me an optimist after all?