

DELOCALIZING LAW AND LEARNING: CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL COOPERATION IN THE TIME OF PANDEMIC

Joao Velloso¹ & Vinícius da Silva²

International cooperation, or internationalization more broadly, is a key aspect of fundamental research and graduate studies in law, being present more and more in strategic plans of law schools across Canada. There is no doubt COVID-19 will influence internationalization, in fact it is already affecting ongoing projects and the recruitment of graduate students. As most scholars, we had to alter our immediate plans for international conferences, summer schools and research collaborations with colleagues abroad. Last February, when borders started to close in Europe and the effects of the COVID-19 reached Canada, we were both celebrating grants for two South American visiting professors and putting on hold the planning of their visits next year. We put in applications for international mobility grants to help financing the fieldworks of graduate students in the Summer 2021, but we were a bit sceptical on how this would unfold in practice. After the universities closed in Canada, we received positive news on all grants without celebrating them. Our priority in March was to figure out how to end the term and how to help another visiting professor get out of the country before the shutdown of flights and borders. Today, most borders across the globe are still closed, there are no flights to/from South America before late August and who knows what is going to happen next. However, as Brian [the “Messiah”] put at the end scene about his life: “Some things in life are bad/ They can really make you mad/ (...) Don't grumble, give a whistle/ And/ Always look on the bright side of life”³.

Our objective in this chapter is to look on the bright side of life in the time of pandemic by discussing opportunities and the acceleration of processes already in play before COVID-19. We will argue that law schools will become more and more international and that methodologies related

¹ Assistant Professor, Faculty of Law Common Law Section, University of Ottawa

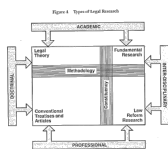
² Ph.D. student in Law, Faculty of Law Common Law Section, University of Ottawa

³ Terry Jones et al. *Monty Python's Life of Brian*. 1979; Culver City, California: Sony Pictures Home Entertainment, 2007.

to fundamental research⁴ will become even more hegemonic in a context of distance learning. Indeed, we will show how internationalization is linked to the development of fundamental research. The pandemic will close borders, but also local spaces, opening both settings to cyber interactions. Legal research and education will not become more localized; quite the contrary, they will become more delocalized, plural and transsystemic.

The origins of Western legal science and legal education at the University of Bologna in the 11th century was essentially an international enterprise⁵, both in terms of students and professors. The early stages of legal education were not about being local or learning the prevailing law as we are used to see in professional programs in law (JD, LLB or LLL). It was about the (re)invention of (Modern) Law by reinterpreting the ancient manuscript that later became known as the Justinian Code (*Corpus Iuris Civilis*) and developing methodologies to study, solve contradictions and systematize legal knowledge.⁶ Such methodologies were based on the science of the time (scholastic method) and the legal reasoning developed in Bologna is still very present today in both Common Law and Civil Law traditions, especially regarding the doctrinal and professional dimensions of law.⁷ The scientific method changed drastically over the centuries but legal reasoning changed less (some would say it did not change at all). This was one of the core reasons for the creation of the *Consultative Group on Research and Education in Law*. Back in 1978, Canadian legal research was not very scientific according to the *Social Sciences and Humanities Research Council* criteria or as the Consultative Group put it “we conclude that law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum”⁸. It is interesting to note two elements regarding this digression to Bologna. First, what was exported, then has

4 Consultative Group on Research and Education in Law. *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply & Services, 1983). We are going to mobilize throughout this chapter the same categories used in the famous “Figure 4. Types of Legal Research” from the *Law and Learning* report (p. 67), see on the right:



5 Harold J. Berman, “The Origins of Western Legal Science,” (1977) 90:5 *Harvard Law Review* 894.

6 *Ibid.*

7 *Supra*, note 2.

8 *Ibid.*, p. 70.

reached the West, was the legal reasoning (methodologies) and not the prevailing (local) law, which was not even part of the curriculum.⁹ Secondly, as Harold Berman also pointed out, the Western Legal Tradition anchored to the pair doctrinal and professional dimensions of law survived major revolutions¹⁰ and multiple plagues by the way, but it was facing a major threat in the 70s and 80s due to the rise of critical legal studies and interdisciplinary approaches to law.¹¹ The debate was not that different from *Law and Learning*, but Berman's conclusions were. The Consultative Group suggested that the "major threat" was not a threat, but part of the solution.

Internationalization was not really discussed in *Law and Learning*, but it appears here and there when discussing more academic and scholarly legal research (e.g. when recommending refereed, nationally and internationally recognized scholarly journals in law).¹² It was a different time with different priorities; the focus was to make law schools more academic and scholarly, which was already very radical at the time. In Ontario, for instance, legal education was not university-based until very recently. The *Law Society of Upper Canada*¹³ literally owned the only accredited law school in the province until 1957 (Osgoode Hall). The University of Toronto had a law school since 1949, but the degree was not recognized by the *Law Society*.¹⁴ The Faculty of Law of the University of Ottawa was created in 1953, but only offered a Civil Law program at the time, which was recognized by the *Barreau du Québec*. All other law schools in Ontario were created after 1957. Their priority was the quest for increasing academic autonomy and the right to develop their own programs. The Consultative Group did not advocate for internationalization, but for fundamental research, interdisciplinary, full time scholars, graduate studies. Retrospectively, however, we can argue that the level of internationalization we experience today in Canadian law

9 In fact, the prevailing law became part of the equation centuries later due to the rise of nation states, differentiation of specific legal traditions (Common Law and Civil Law) and local associations of legal practitioners.

10 Berman, Harold J. *Law and Revolution*. (Cambridge, Mass: Harvard University Press, 1984).

11 *Ibid*, p 33-41; 164.

12 *Supra*, note 2, p. 158.

13 It changed its name to Law Society of Ontario only in 2017, becoming official in 2018 after legislative amendments to the *Law Society Act*.

14 Harry Arthurs, "Valour Rather than Prudence: Hard Times and Hard Choices for Canada's Legal Academy," (2013) 76.1 *Saskatchewan Law Review* 73. Arthurs, chairman of the Consultative Group, did his LLB at the University of Toronto during the final years of the Law Society monopoly over legal education in Ontario and in the 1960s, as a professor at Osgoode Hall, he actively participated in the transition of the law school from the Law Society to York University. These are recurrent topics in his writings and is quite developed in his autobiography: Harry Arthurs, *Connecting the dots: The Life of an Academic Lawyer*, (Montreal-Kingston: McGill-Queen's University Press, 2019).

schools is, at best, a collateral consequence of the *Law and Learning* report and, as Arthurs himself later suggested, such processes cannot be dissociated from structural changes in the world economic system (globalization).¹⁵ Law schools are typically less international than many other disciplines and programs at any Canadian university. This is explained by the local character of the professional degree in law and the regulation of the legal profession. However, law schools are quite international regarding fundamental research, interdisciplinary and graduate studies. It is no coincidence that internationalization thrived especially in the aspects more aligned with the *Law and Learning* core proposals.

In “Law and Learning in the era of Globalization”¹⁶, Arthurs updates his analysis about the future of law schools by linking it to the adoption of globalized standards and ideology (“neo-liberal globalization of the mind”, wondering if the adoption of globalization agenda was a “conscious choice” or a necessity to adapt under the “new realities of a global political economy”)¹⁷. His pessimism towards globalization is explained by the assumption that regulatory values were becoming more and more market-centred, which would rapidly undermine the role of the state – and state law. Such a scenario presents deep implications for *Law and Learning*, as it enhances the role of global legal institutions, accelerates “the process of space-time compression” and de-couples “the idea of law from the idea of the state”¹⁸. Thus, globalization increases the potential of non-state law and changes the priorities of legal teaching.¹⁹ Arthurs has it all in mind when he assessed McGill’s transsystemic curriculum as one very well suited due to the stress of “law’s radical indeterminacy” and its detachment from boundaries.²⁰ Here his optimism takes shape. McGill seems to offer a model that compensates the pressure of the neo-liberal

15 Harry Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields,” (1997) 12:2 *Canadian Journal of Law and Society* 219. Harry Arthurs, “The Political Economy of Canadian Legal Education,” (1998) 25 *Journal of Law and Society* 14.

16 Harry Arthurs, “Law and Learning in the Era of Globalization,” (2009) 10:7 *German Law Journal* 629.

17 *Ibid*, p. 632-3.

18 *Ibid*, p. 633-5.

19 “After all, by whatever means we have traditionally taught students to “think like lawyers”, we will have to do something different to teach them not to think like lawyers – or at least not like the lawyers we’ve been training up to this point. Instead of parsing judicial decisions, for example, they may have to peruse arbitration awards or observe mediators at work; instead of reading legislation, they may be asked to scrutinize corporate codes of conduct or consult ethnographic studies; and instead of being taught to fetishize fairness, rationality, predictability and clarity as law’s contribution to social ordering, they may find themselves learning to value pragmatism, imagination, flexibility and ambiguity.” (*Ibid*, p. 635).

20 *Ibid*, p. 638.

political economy with the strengthening of the value of academic or interdisciplinary fundamental legal research that he once pointed out as the basis for a more autonomous project of legal education and research.

Although Arthurs does not address internationalization in his article, there are clear connections. The first one is related to students' expectations. Arthurs stresses the increasing relevance of student fees for the financial wellbeing of law schools²¹ and we know that internationalization works to a great extent to accomplish this task, especially regarding graduate studies. The need to attract international students compels law schools to compete in the global legal education market and respond to the expectations of a very diversified profile of students. The second connection is that fundamental research methodologies (related to the pair "academic"/ "interdisciplinary")²² are more suitable to fulfill the multiple expectations in this market than those of traditional approaches to law (the pair "doctrinal"/ "professional")²³, at least concerning graduate studies and research, since the first is not exclusively rooted in the local and prevailing state law. In this sense, internationalization seems to reinforce law schools' autonomy in two ways: as competitive actors in the global markets and, more importantly, as knowledge validation criteria that are established and recognized primarily by the academic field, regardless of determinations from the professional field.

Research on internationalization conducted at the same time Arthurs wrote his article has supported a tendency towards the prevalence of fundamental research methodologies over traditional approaches in all levels of legal education. Gail Hupper's study²⁴ about international students in doctorate programs in the United States shows that the most prestigious law schools stimulate the engagement with theoretical and interdisciplinary approaches ("theoretical/ interdisciplinary model") that foster the use of abstract thinking to mobilize fundamental concepts in law, contextual methodologies that connect law to other aspects of

²¹ *Ibid.*, p. 638.

²² *Supra*, note 2.

²³ *Ibid.*

²⁴ Gail J. Hupper, "The Academic Doctorate in Law: A Vehicle for Legal Transplants?" (2008) 38:3 *Journal of Legal Education* 413.

modern social life, and policy-driven analysis.²⁵ Catá Backer & Stancil²⁶ argue that the most successful internationalization model is the one that aims at producing generalists capable of interacting with different realms of law. This is also the most difficult model to implement due to the “large commitment in terms of resources and a willingness to change their [law schools’] approach to teaching and perhaps even to research”²⁷. When assessing McGill’s transsystemic model, Dedek & de Mestral²⁸ opposed it to the “Europeanization” model that seeks to train law students in different national state laws and in the European law by using traditional approaches. For them, the transsystemic model will dissociate legal education “from its ties to a positivistic training in the law in force in a certain jurisdiction”²⁹. Therefore, as professor Kasirer (as he then was) suggested, the transsystemic model gives more importance to the role played by the university because of the increasing centrality of the ideas instead of the centrality of geography.³⁰

Before returning to *Law and Learning*, it is crucial to consider that, among the innumerable effects of COVID-19 on modern life, the consolidation of the cyberspace as the new geographic centre of social interaction might accelerate the restructuration of the entire legal field, with side effects on international cooperation and the global legal education market. Definitely, it is a new *chronotope*³¹ (spatiotemporal setting) grounded in *genres* (ways of communicating) and worldviews where the local is less relevant. This movement has the potential of eliminating our physical presence in many activities related to law, including lawyering and judging, teaching and learning, and legal research. This is something already very concrete for the next academic year. For instance, scheduling a graduate student seminar has to take in consideration that students will be in different places and time zones. We are not talking about a three hour continuum related to one physical space anymore. The same thing is

²⁵ *Ibid*, p. 433.

²⁶ Larry Catá Backer & Bret Stancil, “Global Law Schools on US Models: Emerging Models of Consensus-Based Internationalization or Markets-Based Americanization Models of Global Legal Education,” (2011) 3 *Revista de Educación y Derecho/ Education and Law Review* 2 102.

²⁷ *Ibid*, p. 119.

²⁸ Helge Dedek & Armand de Mestral, “Born to be Wild: The “Trans-Systemic” Programme at McGill and the De-Nationalization of Legal Education,” (2009) 10:7 *German Law Journal* 889.

²⁹ *Ibid*, p. 898.

³⁰ Nicholas Kasirer, “Bijuralism in Law’s Empire and Law’s Cosmos,” (2002) 52 *Journal of Legal Education* 29.

³¹ Mikhail Bakhtin, *The dialogic imagination: four essays*. (Austin: University of Texas Press, 1981). Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance*. (New York: Routledge, 2015).

happening with visiting graduate students. Universities are adjusting to this new reality and, at the University of Ottawa, it is now possible to host international students virtually, which means conducting research and supervision in different countries and possibly time zones. There are important logistical challenges, but those who are more used to internationalization will probably agree that these new internationalization strategies are way simpler to handle than dealing with international trips, airports, borders, jet lags, etc. Also, it is very productive to collaborate in different time zones, as there is always someone in the team working while others are literally sleeping. Indeed, the way we are coping with the pandemic seems to accelerate the process of enhancing the role of global legal institutions, disrupting and compressing space-time, delocalizing relationships and de-coupling even more law from the state as a consequence of a more virtually integrated world.

In a plausible scenario where lawyers become capable of working on cases anywhere and students are able to attend classes anywhere on the globe without having to travel abroad, internationalization cannot be seen any more as a mere alternative for the financial wellbeing of law schools or as a marginal program within legal education, confined in graduate studies and fundamental research. It may become the *raison-d'être* of law schools, and universities, in a process that can be traced back to its origins in Bologna. The fundamental research methodologies are, possibly, the best product law schools have to trade in a very competitive global legal education market. They offer a flexible platform to deal with the diversity of legal problems in a plurality of legal orders, including state law or the prevailing local law of their clients. They have become more and more mainstream while traditional approaches to law usually remain attached to the local professional components of legal education, which will still be relevant for the undergraduate degree. However, while Arthurs would possibly express optimism about this orthodoxy of fundamental research and transsystemic approaches in post-pandemic legal education, his pessimism about the effects of neo-liberalism on *Law and Learning* would still be valid. As such methodologies are appropriated by the global legal education market and become mainstream, they may lose the critical, law reform and social justice potential that have historically characterized them. As Arthurs feared, without our attention, they may be very well neutralized and retooled to sustain legal hierarchies or even to

promote the abuses of private power.³² More than ever, we need to look at the consequences of the pandemic and be proactive in the face of the changes in internationalization, legal research, and education. If we do not, we will leave it all to the market.

³² "My pessimist's conclusion, to reiterate, is that political economy does much to determine the ends and means of legal education and research. And because globalization is a dominant influence on political economy, it becomes the 800-pound gorilla whose presence in our deliberations we can hardly avoid." *Supra*, note 14, p. 630.