

Anxieties and Aspirations: A Schematic Note on the Toronto Group for the Study of International, Transnational, and Comparative Law

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“But I had the strong conviction that I *could* do it – born... of the necessary combination of confidence and ignorance that only a graduate student could have possessed”.

- Robert Heilbroner¹

“We know that the more a place is *set apart for free play*, the more it influences people’s behavior and the greater is its force of attraction”.

- Ivan Chitchevlov²

I. Introduction

This note concerns the first two conferences of graduate students – in law as well as a number of other disciplines – which took place at the University of Toronto Faculty of Law during January 2008 and January 2009. As the first of their kind convened by the newly established Toronto Group for the Study of International, Transnational, and Comparative Law, the conferences were held with the aim of furthering ties between students with an interest in these fields of scholarship.³ Determining the “achievements” of any such conferences, particularly ones as heterogeneous and multi-faceted as these, is never a straightforward task. Nor ought it to be, for if it aims to “accomplish” anything at all, the Toronto Group seeks to create a *space* within which people may develop

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¹ *The Worldly Philosophers: The Lives, Times and Ideas of the Great Economic Thinkers* (New York: Touchstone, 1995) at 8 [emphasis in original].

² “Formulary for a New Urbanism” in Ken Knabb, ed. and trans., *Situationist International Anthology* (Berkeley: Bureau of Public Secrets, 1989) 1 at 4 [emphasis in original].

³ The Toronto Group consists of an informal network of graduate students from the Faculty of Law, University of Toronto and Osgoode Hall Law School, York University. For details of the first conference, see: http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/7/0/0/0&contentId=1591. For details of the second conference, see: <http://torontogroup.wordpress.com/>.

a more nuanced understanding of themselves and their research within the context of something resembling a *community*.

The purpose of this article is provide the context of the Toronto Group's first move, which was to identify the graduate program in law schools and the city as sites of contestation; we intend to bring notice that debates about and within these spaces of the law school and the city form concepts of law that have global, international, and transnational effects. Much like others in different locations examining the role of legal education in constructing a particular global legal system,⁴ the Toronto Group ended the inaugural conference asking what is to be done with this heightened sense of the role of the law school and the city – a question which we continue to engage with in our daily conversations and upcoming activities. Our second conference was the initial attempt to respond to this crucial query and outline what issues we felt were important by bringing together graduate students and scholars in a way that generated more focused debates and conversations.

By examining some of the ideational and geographical context of the Toronto Group, this note brings to bear a better understanding of questions of polycentricity, fragmentation, and pluralism in international, transnational, and comparative legal scholarship. That is, this note identifies a particular political and intellectual landscape in which the Toronto Group has chosen to engage with in order to further sharpen our purposes. Of course, I cannot individually answer the questions presented in this paper. Instead, drawing from conversations in the Toronto Group, I construe the international, transnational, and comparative debate in ways that I suggest are the most promising. And by presenting our experiences in Toronto, I hope others also bring to the forefront their experiences of international, transnational, and comparative law from their own locales and law schools.

II. Mapping Emerging Terrains

The first step is to identify clearly what needs to be overcome on a global level – we are still recovering from the globalization hang-over of the 1990s, during which the constant message was that, whether we liked it or not, the world had come to be interconnected via novel communication and transportation technologies in unprecedented ways. Many of us initially felt overwhelmed and disempowered by this image of abstract interconnection, which seemed to have been brought upon us like a force of nature. We were told that international institutions are necessary, economic integration inevitable, and the market paramount. The chief question, however, is not *whether* we are interconnected, but *how* we are interconnected and *how* we want to co-exist socially, economically, politically, and ecologically. Moreover, historical inquiries into the

⁴ See for e.g. Fleur Johns & Steven Freeland, "Teaching International Law Across an Urban Divide: Reflections on an Improvisation" (2007) 57 J. of Legal Education 539.

mechanisms with which institutions have connected us in the past help us to understand *why* we are in the sort of world we live in today. How do ideas diffuse through legal practice, pedagogy, and institutions? Who are the actors generating norms that have a global effect? What systems of political economy are being constructed and conjoined? Which legal institutions are being transformed and by whom and how?

These questions also allow us to move past simple phrases such as “post-nationalism” or “post-Westphalian”. Everyday and theoretical accounts of states and international institutions have always been flexible, though not infinitely so, and we should therefore aim to construct a world informed with the experience of the transient nature of such entities. We have lived this transience. We are all born into a nation-state different in character or geography than that of our parents. Increasing numbers of individuals find themselves in the position of being immigrants, expatriates, or refugees, and have accepted the responsibility of contributing to the construction of states different from those in which their childhoods were spent. Moreover, many of us have found that the nation-state of one’s childhood has disintegrated or been enlarged during the course of our lives. By the time international legal scholarship came to recognize that the classical notion of the nation-state was no longer the paramount unit of international law and began to express its anxieties with respect to the proliferation of international institutions, many had already started to feel a certain frustration with traditional accounts of nationalism, statehood, and the international sphere. This sense of dissatisfaction does not necessarily require that emerging forms of scholarship need ignore states and institutions. What it *does* mean, however, is that we, as scholars, ought to view ourselves as free to examine international, comparative and transnational law and their sources with a less preconceived sense of whether we need to dispense with, co-opt, or perhaps even support the subjects of our analyses. In other words, such frustration, coupled with the realization that traditional conceptions of the state and international institutions no longer command broad-based support, force us and other legal scholars to explain, clearly and sincerely, why it is that we fashion or subscribe to particular research agendas. Despite – or, perhaps, precisely because of – this ambivalence with respect to preconceptions of our subjects of analysis (whether these be institutions, doctrines, or fields of study), we have little reason not to be aware of the moral responsibility inherent in our descriptions, critiques, and choices of subject. Such descriptions, critiques, and choices always legitimize and delegitimize certain ideas, and always empower and silence certain voices.

There remains, however, a dearth of analytical tools and discursive frameworks to express this dissatisfaction. Much of international, transnational, and comparative legal scholarship has, in the last two decades, generally been thinned out by flippant idealism, fatalistic apology, tepid pragmatism, or naïve hopefulness. Nevertheless, new work is emerging that, like previous critical scholarship, unpacks dogma and provides the analytical tools to facilitate the

task of making the difficult choices of constructing alternatives through negotiating conflicting political interests.

In order to understand the sensitivities and predispositions of the Toronto Group, it is necessary to understand our particular circumstances as graduate students resident within the city of Toronto. The city shapes our questions and provides us with the physical, intellectual, and cultural space to explore these questions further and on a global scale. Through our subjective experiences, we feel that Toronto exemplifies the fragmentation and pluralism discussed below and the interconnectedness mentioned above.

Toronto is being built by those accustomed to being out of place. “Toronto is the most multi-cultural city in the world!” is the unofficial slogan of this sentiment, capturing the multitude of ethnic groups that continuously stream into the city. Alongside this frequently referenced sentiment is the fact that half of its inhabitants were born outside of Canada.⁵ What is important is not whether or not Toronto is the “most” diverse city in the world, but the *context* of this particular form of diversity.

This is a relatively young city compared to other cities of its economic and demographic size. Until the 1970s, Toronto was known as “Toronto the Good” due to its conservative moral conviction, which was felt in its laws and public institutions. Starting in the 1970s and well into the 1980s, it became a centre of global finance, manifested in the construction of a concentrated financial district downtown. Professional (including legal) and technical services became Toronto’s financial centrepiece in the 1990s.⁶

For at least a decade, Toronto has been emerging from a cultural insecurity that vexed its self-identity.⁷ Toronto often looked to non-Canadian cities for cultural cues, and it still tends to look beyond its own borders. What the world thinks of Toronto, what Toronto thinks of the world, how the world affects Toronto – such concerns are often felt by its inhabitants. Toronto, however, is in a unique moment in which it has begun to look inward before it looks outward. This self-confidence is evidenced by more than just the recent prevalence of large, public architectural projects which have dotted the downtown area;⁸ we feel it in the city’s poems,⁹ films,¹⁰ writings,¹¹ displays of art,¹² and cultural and communicative networks.¹³

⁵ See Francine Kopun and Nicholas Keung, “A city of unmatched diversity” *The Toronto Star* (5 December 2007), online: <http://www.thestar.com/News/GTA/article/282694>. See also Jonathan Spicer, “Toronto takes on London, New York in diversity game” *Reuters* (27 December 2007), online: <http://www.reuters.com/articlePrint?articleId=USN2151421720071227>. Spicer outlines problems associated with the claim that one is “the most diverse”.

⁶ Saskia Sassen, *Cities in a World Economy*, 3rd ed. (London: SAGE Publications, 2006) at 122-125.

⁷ Of course, this is not to say that Toronto’s cultural landscape before this last decade was not worthwhile, see, e.g., Lynn Crosbie, “Alphabet City” in John Knechtel, ed., *Open City* (Toronto: Anansi Press, 1998) 44. Crosbie, a Toronto poet and critic, explores the city’s cultural geography of the 1980s and 1990s.

⁸ At the time of writing, however, it remains to be seen how the recent financial crisis will affect the city’s moment of confidence.

This is why we find studying international, comparative, and transnational law so rewarding in Toronto. Acutely aware of the rest of the world, this is a city in the midst of a defining moment.

“The hucksters and tourism skills tell us that Toronto is an intellectual city, a city of ideas.... The question for Toronto now is not whether ideas can flourish in this place, because demonstrably they do, but what consequences *in justice* that flourishing will entail. On the edge of new identities and possibilities, what is our idea of justice?”¹⁴

Similarly, the question that arises in Toronto is not “does the ‘international’ truly exist” or “is international law relevant?”, but rather “what idea of international law do we want?” Confronted with these questions, Toronto cannot take for granted that it must always question what the “we” in this question actually amounts to. This is reflected in scholarship associated with Toronto, which regularly produces and engages with approaches to international law distinct from those commonly defined as “Western” and/or “liberal” or is critically aware of its own Western/liberal premise. This is also reflected in the large number of professors at the city’s two law schools who incorporate international, comparative, and transnational law into their work or make it the subject of their research.

This cultural moment of self-confidence within an internationalist milieu reflected in Toronto’s legal scholarship may manifest itself in two ways. The first, and naively confident, way would involve an attempt to universalize the particular experience of Toronto beyond its borders as seamlessly and convincingly as possible. This would likely entail a celebration of Toronto’s success with managing diversity and a concomitant attempt to employ this as a model for export and comparison. This would take the diversity of the city as an institutionalized, fully crystallized fact rather than as a constantly negotiated dynamic, embracing “multiculturalism” without acknowledging the dominant

⁹ See, e.g., Pier Giorgio Di Cicco, *Municipal Mind: Manifestos for the Creative City* (Toronto: Mansfield Press, 2007)

¹⁰ See e.g. Atom Egoyan, film: *Chloe* (2009).

¹¹ See, e.g., Jason McBride and Alana Wilcox, eds., *uTOpia: Towards a New Toronto* (Toronto: Coach House Books, 2005); David McFarlane, *Toronto: A City Becoming* (Toronto: Key Porter Books, 2008); and *spacing*, a magazine that began in 2004 and is dedicated “to studying Toronto’s urban landscape”, online: <http://spacing.ca>

¹² Here I am thinking of examples such as *AlleyJaunt*, which converted the city’s alleys into open galleries, the recent experiment with the all-night art festival *Nuit Blanche*, and the relocation of the Museum of Contemporary Canadian Art to 952 Queen Street West in downtown Toronto.

¹³ See, e.g., the Collaborative Urban Research Laboratory, an interdisciplinary research facility at York University for interdisciplinary and multimedia research on social and material urban infrastructure, online: www.criticalresearch.lab. See also the *Arts & Crafts* record label, online: <http://www.arts-crafts.ca>.

¹⁴ Mark Kingwell, “Toronto: Justice Denied” *The Walrus* 5:1 (January/February 2008) 58 at 59.

European/Christian framework that constitutes much of the city's cultural background.¹⁵ Alternatively, we could highlight the particular experience of Toronto as a way of understanding how interaction between different groups and interests – again, understood in the broadest possible sense – ought to take place on the global plane. The former suggests a buried sense of power and privilege.¹⁶ The latter emphasizes an ongoing examination of interconnectedness.

The other particularity that we experience and that influences the Toronto Group's scholarship relates to the fact that we are graduate students of law in Canada. The notion of rigorous graduate legal studies at the doctoral level as a *de facto* prerequisite to the Canadian legal academy is a recent phenomenon. In the past, the majority of law professors had an LL.M. (often from the US or UK) at most. In the last ten years, however, a doctorate in law has become increasingly common; and in the last five years, a doctorate in law has established itself as the norm. This has coincided with significant increases in the number of doctoral programs in law, the number of students completing their doctorates in law in Canada, and government funding for doctoral programs in law.¹⁷ Doctoral programs of these sizes are new, and students and faculty are both having to define what it means to do doctoral studies in law as they go along – which is an exhausting luxury. Moreover, as graduate students question their role as international jurists in the world, both of Toronto's law schools look to securing their status as "Global Law Schools" in the coming years.¹⁸

The educational path of the legal scholar in Canada will, then, often be as follows: undergraduate degree in any discipline; first law degree; year of articles, which may include clerking for a judge; master of laws; and a doctorate of law. Many have work experience sprinkled throughout as well as non-law graduate

¹⁵ Mariana Valverde, "Toronto: A 'Multicultural' Urban Order" in Andreas Philippopoulos-Mihalopoulos, ed., *Law and the City* (London: Routledge, 2007) 191.

¹⁶ Deborah Cowen, "Hipster Urbanism" 13 *Relay* 22 (September/October 2006), online: http://www.socialistproject.ca/relay/relay13_hipster.pdf.

¹⁷ Notes from the "Dean's Panel" at the Osgoode Hall Law School's Graduate Law Students Association Annual Conference 2007 (4 May 2007) (on file with the author). Members of the panel included Dean Patrick J. Monahan (Osgoode Hall Law School), Associate Dean J. Anthony VanDuzer (University of Ottawa Faculty of Law), Associate Dean Arthur Cockfield (Queen's University Faculty of Law), Dean Hannah R. Arterian (Syracuse University College of Law). At the time of writing, however, the federal government and Ontario universities are significantly changing (often reducing) their financial support for graduate programs and it remains to be seen how this will affect graduate studies in law.

¹⁸ Recently, two prominent deans of US law schools provided an external review of the University of Toronto Faculty of Law. They drew upon their US experiences as reference points and advanced the claim that the school has the potential of being one of the few non-US "Global Law Schools" that are likely to emerge in the coming decades. See online: <<http://www.law.utoronto.ca/documents/general/ExternalReview2006.pdf>>. Osgoode Hall Law School has similar aims of being a "Global Law School". See "Plan for the Law School 2006 – 2010", online: <http://www.osgoode.yorku.ca/about/documents/plan_for_the_law_school_2006-2010.pdf>.

degrees. The master of laws usually involves coursework and a mandatory research paper which is regarded as a significant part of the degree. The doctorate will only have one or two required courses, which usually concern research methodology. Of course, this is a generalization in which particular exceptions do arise.

This recent trend has created a particular set of anxieties and aspirations for graduate students. We now have a set of questions in which the past provides little guidance as to how to answer questions such as: what is the doctorate of law and what does it achieve? what is the purpose of a legal scholar? is graduate legal education a fundamentally philosophical, humanities-based, or social scientific matter? what do I, as a legal scholar, have to say that is different than those in other disciplines? what is the purpose of legal theory? These anxieties are magnified in international law, which has usually been relegated to the margins in the Anglo-American legal tradition, episodically being dogged by the question as to whether it is even law “properly so-called”.

We cannot ignore Toronto’s relationship to the US and the effect that this has had on legal academia. Toronto is the third largest financial centre and boasts the third largest concentration of private information communication technology facilities in North America.¹⁹ The US and Canada are each other’s largest trading partners (US trade contributing a significantly larger percentage of income to the Canadian economy than Canadian trade does to the US). All this occurs within the context of the North American Free Trade Agreement linking elements of the political economy of Canada and the US. The Canadian legal academy has, of course, been influenced by the political economy and legal academy of the US from the very inception of Canadian legal education.²⁰ Arthurs identifies four narrative strands in this complex relationship, noting that (1) touring a set of elite American law schools has been the virtual pre-requisite for newly-appointed deans; (2) Canadian law has, for at least 150 years, borrowed extensively from US law; (3) the Canadian legal profession has been influenced profoundly by developments in US legal practice; and (4) there has been a pervasive fear among Canada’s business, media, professional, and academic elites that Canadian talent will be lost to the US.²¹

¹⁹ See online: <http://www.toronto.ca/toronto_facts/business_econdev.htm>.

²⁰ Harry Arthurs, “Poor Canadian Legal Education: So Near to Wall Street, So Far From God” (2000) 38 Osgoode Hall L. J. 381. Arthurs has examined this complex relationship in several articles: “The World Turned Upside Down: Are Changes in Political Economy and Legal Practice Transforming Legal Education and Scholarship, or Vice Versa?” (2001) 8 Int’l J. of the Legal Profession 11; “The State We’re In: Legal Education in Canada’s New Political Economy” (2001) 20 Windsor Y.B. Access Just. 35; “The Political Economy of Canadian Legal Education” (1998) 25 J. L. Soc’y 14; “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields” (1997) 12 Can. J. L. & Soc. 219. For a history of legal education in Ontario see Clifford Ian Kyer & Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario, 1923-1957* (Toronto: University of Toronto Press for the Osgoode Society, 1987).

²¹ Arthurs, “The World Turned Upside Down”, *ibid.* at 12.

This trend continues today. Especially relevant for our purposes is that Toronto's first "international" reference-point is the United States, which has the effect of filtering all things "international" through the prism of US debates and disputes. Negotiation with the US is part of Toronto's daily life. In 2001, the University of Toronto was the first Canadian law school to re-designate its general law degree from the historically British LL.B. (Bachelor of Laws) to the US-style J.D. (*Juris Doctor*).²² Osgoode Hall Law School awarded a J.D. to its graduates for the first time in June 2009.²³ The University of Toronto website explains that this change was undertaken as part of a move to reflect the fact that most students enter law school with at least one undergraduate degree. "This is particularly important for the increasing numbers of U of T students and graduates who choose to work or study outside Canada."²⁴ At least 15% of the Class of 2008 is expected to spend their first year after law school in the United States, with numbers expected to rise over the following years.²⁵ Similarly, Osgoode Hall Law School explains the move to the J.D. is a result the US-style designation garnering "greater international recognition than an LLB, which some audiences may incorrectly think is a first-entry degree."²⁶

Despite this relationship with the US, being a graduate student of law in Canada is a unique experience. This came to the fore while we were organizing this conference. We had trouble determining how to send the call to US law schools where the J.D. is considered satisfactory for gaining entry into the legal academy. If we were to target US J.D.s, did we also have to target Canadian LL.B./J.D.s? The two programs, their profiles and compositions, clearly share a significant number of similarities. Would it be best to send the call only to LL.M. and doctoral students when dealing with US schools? The problem with that approach was that it was unlikely to get US nationals, since these programs are composed largely of non-US students. In the end, we decided to leave it open and allow self-selection to determine participation at the conference.

The receptivity to themes of polycentricity, fragmentation, and pluralism in Toronto is by no means accidental. Indeed the ambiguities and tensions of the city correspond to the like in legal literature. The proliferation of regimes wielding varying levels of self-sufficiency in relation to matters arising within such fields as trade, environmental, and human rights law has been a source of both grief and enthusiasm.

Koskenniemi and Leino have argued that extreme discomfort and concern, which this development has generated within circles of "classical

²² Joseph Berkovits, "U. of T. to get J.D. Degree: opinions divided over whether new degree is forward thinking or a sign of Americanization" *Ultra Vires* (October 2000).

²³ See: <<http://www.osgoode.yorku.ca/jd/documents/JD-FAQs.pdf>>.

²⁴ See:

<[²⁵ Robert Wakulat, "Articling results are in" *Ultra Vires* \(16 October 2007\).](http://www.law.utoronto.ca/prosp_stdn_content.asp?itemPath=3/6/15/6/0&contentId=983#J.D.>.</p></div><div data-bbox=)

²⁶ *Supra* note 23.

international law”, stems from the prospect of an already fragile and unconfident international legal order splintering beneath the weight of “proliferating tribunals, overlapping jurisdictions and ‘fragmenting’ normative orders.”²⁷ This fragmentation, they argue, is unintelligible in the absence of an appreciation for the hegemonic struggle being waged between rival juridico-political bodies seeking to translate its own professional language “into a global Esperanto, to have its special interests appear as the natural interests of everybody.”²⁸ Teubner and Fischer-Lescano argue that global legal pluralism is not the result of conflicting political or legal norms, but “rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a new legal approach to colliding norms.”²⁹ “Accelerated differentiation of society into autonomous social systems” is what has generated this fragmentation (and not the global economy) and it is the “expansionist” fervor of these systems that cause global problems.³⁰ Both these perspectives do not seek some unifying element yet distinctions between Koskenniemi and Teubner arise from their differing perspectives regarding the definition of “political” and the role the individual has to play in generating law.³¹ Still others have presented fragmentation as a fundamentally “healthy phenomenon”,³² arguing that it accords with the basic parameters of the international order and cannot therefore be regarded as a genuine threat,³³ put forth proposals for a model of international legal order in which unity and fragmentation would “go hand in hand”,³⁴ and refrained from passing judgment on the phenomenon so as to offer a general taxonomy of the various forms of fragmentation thrown up by international law’s expansion.³⁵

This debate has coincided with the renewed attention to the claim, long popular among socio-legal researchers, that “law” is not restricted to formal

²⁷ Martti Koskenniemi and Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties” (2002) 15 *Leiden J. Int’l L.* 553 at 561.

²⁸ *Ibid* at 578.

²⁹ Andreas Fischer-Lescano and Gunther Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2003-2004) 25 *Mich. J. of Int’l L.* 999 at 1004

³⁰ *Ibid.* at 1006-1007.

³¹ Contrast Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise of Fall of International Law 1870 – 1960* (Cambridge: Cambridge University Press, 2001) with Gunther Teubner, “How the Law Thinks: Toward a Constructivist Epistemology of Law” (1989) 23 *Law & Society Review* 727.

³² Georges Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks” (1998-1999) 31 *N.Y.U. J. Int’l L. & Pol.* 919 at 925.

³³ Mario Prost and Paul Kingsley Clark, “Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?” (2006) 5 *Chinese J. Int’l L.* 341 at 348 and 368.

³⁴ Joost Pauwelyn, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands” (2003-2004) 25 *Mich. J. of Int’l L.* 903 at 904.

³⁵ Matthew Craven, “Unity, Diversity and the Fragmentation of International Law” (2003) 14 *Finnish Yearbook of International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2005) 3 at 6 and 15.

rules derived from the state or official institutions. Recently, legal pluralist literature has taken a turn towards the international/global. In the past, legal pluralist literature debated whether legal pluralism scholarship should examine law as a socio-legal phenomenon or whether to adopt pluralism as a methodology. Now the tension emerges in terms of treating “globalization” as either an irrefutable phenomenon generating law or as a series of processes that are formed by and generate law. For example, Berman is not concerned with how empirically interconnected the world is, rather he argues that what matters is that people are acting as if globalization were a real phenomenon. Globalization, he suggests, particularly with regard to trade liberalization and open markets, is a new form of hegemony leaving little possibility for a rival ideology to survive.³⁶ Similarly, Tamanaha argues that globalization, which he defines as the fact that “the world is being linked together in a variety of different ways”, is a dominant a factor chipping away at traditional concepts of sovereignty and autonomy with regards to the nation state.³⁷ Tamanaha is unsatisfied with the under-theorized and covertly essentialist accounts of law, which he sees as underlying a great deal of legal pluralist literature, arguing that “law is a thoroughly cultural construct” and that it cannot therefore “be captured in any single concept, or by any single definition”³⁸; he leaves “globalization” as a given phenomenon separate from law.³⁹

Others are unsatisfied to take pluralism and globalization for granted and look to how law and legal research contributes to generating *both* pluralism and interconnectedness. For example, Boaventura de Sousa Santos considers the “discrepancy between social experience and social expectation” and the tension between regulation and emancipation as the defining feature of modernity.⁴⁰ Santos and others examine how law is formed through continuing struggles of social practice from all sorts of communities and social actors from subaltern spaces and not necessarily from preexisting normative hierarchies.⁴¹ Twining’s research agenda uses a multiplicity of methodologies in order to address the question of global patterns of legal concepts emphasizing that the methodology will depend on the scholar’s purpose.⁴² Twining considers “generalizations across

³⁶ Paul Schiff Berman, “From International Law to Law and Globalization”, (2005) 43 *Columbia J. of Transnat’l L.* 485 at 552-553.

³⁷ Brian Tamanaha, *General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 121-123.

³⁸ Brian Tamanaha, “A Non-Essentialist Concept of Legal Pluralism” (2000) 27 *J. L. Soc’y* 296 at 313.

³⁹ *Supra* note 37 at 129-139.

⁴⁰ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* 2d ed. (London: Butterworths, 2002) at 2. See also Jeremy Weber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall L. J.* 167 (2006).

⁴¹ Boaventura de Sousa Santos and César A. Rodríguez-Garavito eds., *Law and Globalization From Below: Towards a Cosmopolitan Legality* (New York: Cambridge University Press, 2005).

⁴² William Twining, “Have Concepts: Will Travel: Analytical Jurisprudence in a Global Perspective” (2005) 1 *Int’l J. of L. in Context* 5 at 12.

legal families, traditions and cultures as problematic” and his agenda is to take stock as to how equipped we are “to make meaningful generalizations and comparisons about legal issues and phenomena”.⁴³ Twining considers law and lawyers to be bound to their specific cultural background, but argues that legal orders are not isolated from other legal orders, cultures and systems. As such, he explores how a concept or group of concepts or models or frames travel and “diffuse”.⁴⁴ This is similar to recent work by comparative legal scholars who seeks to uncover the universalized extension of a particular legal tradition or consciousness that is universalized through the processes of global interconnectedness.⁴⁵ Kleinhans and Macdonald’s critical legal pluralist project is an effort to cast aside the essentialism characteristic of traditional forms of legal pluralism in favor of an account of identity formation sophisticated enough to illuminate subjectivity’s role in the formation and reformation of law. By providing legal subjects with “access to and responsibility toward law”, Kleinhans and Macdonald contend, critical legal pluralism “presumes that subjects control law as much as law controls subjects within its normative sphere”.⁴⁶ “Polycentricity” is a term used by some to describe an approach that seeks to investigate co-existing, sometimes competing values, underlying law. This approach does not regard law as an external object to be studied, rather it considers law as a practice produced from within actors inside a particular context.⁴⁷

Our fascination with fragmentation and pluralism need not commit us to a facile celebration of multiculturalism and plurality for its own sake. Indeed, Toronto in this moment can provide a space for scholarship that situates itself in the blurred area between revealing paradoxical tensions and unraveling powerful dogma. Toronto is sufficiently confident in its cultural power and proximate to the political economy of the US to offer a vantage point for explicating the tensions, paradoxes, and dark sides of international law and its centres of power. This same power and proximity also offers a potential space for counter-hegemonic action. The increasingly developed graduate studies in

⁴³ *Id.* at 6.

⁴⁴ William Twining, “Diffusion of Law: A Global Perspective” (2004) 1 *J. Legal Pluralism & Unofficial L.* 1 at 4-5. Twining prefers the term “diffusion” rather than “transplant” to overcome certain implicit assumptions and omissions in the concept of “transplant”.

⁴⁵ See for e.g. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 50; and Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000”, in David Trubek and Alvaro Santos eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 95.

⁴⁶ Martha-Marie Kleinhans and Roderick Macdonald, “What is Critical Legal Pluralism?” (1997) 12 *Can. J. L. & Soc.* 25 at 38-39 and 40. For an application of this approach in international trade law see Robert Wolfe, “See You In Geneva? Legal (Mis)Representations Of The Trading System” (2005) 11 *Eur. J. Int’l Relations* 339.

⁴⁷ Ari Hirvonen, ed., *Polycentricity: The Multiple Scenes of Law* (London: Pluto Press, 1998); and Hanne Petersen and Henrik Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995).

law can take hold of this moment and actually create these emerging vantage spaces against law's ideological functions, which Robert Cover described as "much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims."⁴⁸

II. Towards Critical Mass

The principal aim of the Group's inaugural conference was to provide a forum for critical inquiry and collaborative discussion. Building upon its closing panel, in which we posed the question "what is to be done?", our second annual conference was intended to drive this newly created forum towards a more systematic understanding of how legal norms and institutions influence – and are, in turn, influenced by – entrenched or emerging political and economic structures. Each conference committee member, after discussion and debate with the others, drafted their own call for papers within a particular stream. These "streams", though derived from personal interest and idiosyncrasy, intersected in enough respects that submitted papers could often be categorized into several streams. It is worth reproducing our call for papers (see Appendix A), which shows early visions of what we considered important questions for international, transnational, and comparative law.

After projecting out our desire in the form of a call for papers, the plethora of received submissions challenged our own preconceptions and categorizations. As we anticipated and as with most other conference organizing, we then had to collect the remaining pieces from our initial conceptions combined with the actual submissions and put them together in order to construct panels. We had to imagine what conversations we wanted to hear at the conference. The program (see Appendix B) was now an even sharper vision of the Toronto Group's agenda.

Conversations were had both on the panels and in the informal gatherings among people that, because of geographic, institutional, or disciplinary divide, would usually not engage or understand each other. Of course, there is no empirical metric in social gatherings of this sort to determine "success". Instead, looking to my notes from the final strategic session, I offer how I experienced the conference.

From the presentations we heard various conceptions of law. We heard about law as a stabilizing force, destabilizing force, institutional force, and law as exemplifying historical and cultural elements. The commonality of this ambiguity is a dynamic conception of law. We should not underestimate how unique it is that the majority of us are using law as a way of studying change. In discussing law this way, we are imagining different futures, determining who is involved, and arguing what is at stake.

⁴⁸ Robert Cover, "Violence and the Word" (1986) 95 Yale L. J. 1601 at 1608.

This dynamism is a way that questions concepts that are taken for granted. It challenges what is taken as an empirical fact. We heard fluid conceptions of identities and interests, which interestingly, is where the role of violence and history was most explicit. The role of the state has been questioned not in a way that necessarily privileges the state as a source of power and law, but rather in way that understands the idea of the state as contingent on so many forces at play.

My perspective on constitutional discourse was challenged. It is peculiar that we had so many constitutionalists at an international/transnational/comparative conference. We were more cautious than those touting emerging ideas of the “constitutionalization of international law”. Similarly, I noticed the issue of legitimacy arose in a way that indicates the difficulty of discussing legitimacy in international/transnational/comparative contexts. This emphasizes that we cannot simply transpose existing ideas of legitimacy.

None of us talked about law as a separate field from the economic, geographic, political, moral, and social. All these other fields were embedded within our discussions. We did not fall into ghettoized versions of “law and X”. We bumped up against, but did not fully engage with law as a discourse of resistance. This could be a critique of the conference. Or it can be an indication that we take law with all its ambiguities and paradoxes seriously.

All these elements have appeared here and there in previous legal thinking. What is unique is that we took these dynamic conceptions not as conclusions but as an entry point informing our research, debates, and conversations – our expectations of law and of ourselves.

Appendix A – Call for Papers (2009)

Toward Critical Mass:

The Second Annual Graduate Student Conference of

The Toronto Group for the Study of International, Transnational, and Comparative Law

9-11 January 2009

Streams

1) Is There a Progressive Constitutionalism?

What do constitutions offer to those seeking progressive societal change? Constitutions that hold themselves out as the guarantee and embodiment of freedom, equality, and self-government have always been subject to criticism that they in fact entrench the problematic status quo. Constitutions have been used to prevent progressive social reform, from the striking down of New Deal labour laws in the 1920s through to the stifling of campaign finance restrictions, affirmative action and school integration programmes in the last few years. Many highly contested political decisions have been taken out of the hands of ordinary people, and placed in the hands of judges, who are seen as the guarantors of the constitutional order. The nature and content of fundamental human rights is, it seems, something that the ordinary political energy of the people cannot be trusted with. From another perspective, constitutional protection of human rights allows judges to act as a vanguard of social change, which can be seen in progressive decisions in relation to sexual freedom and same-sex marriage. Further, recently in Latin America, social movements, indigenous peoples, and other groups traditionally excluded from constitutional affairs have been playing varying roles in the constitution-making enterprise. These types of “participatory” endeavour challenge the traditional Western approach to constitution-making - a constitution drafted by experts whose legitimacy rests not in the process that resulted in its adoption but on the kind of rights and institutions that it establishes. What is the critical legal response to constitutionalism? Are constitutions a “hollow hope” in the search for progressive goals, as Rosenberg proposed? Should we be seeking to take our constitutions away from the courts and letting popular constitutional sentiment determine their meaning, as suggested by Tushnet and Waldron? Should we be empowering ordinary political energy to flow through the use of referenda or popular initiatives? Is “weak form” judicial review the appropriate balance between judicial oversight and democratic legitimacy?

2) The Future of Critical Legal Studies

The future of critical legal studies (CLS) is supposedly gloomy: “Like a meteor the Crits appeared, shone brightly for a short time and have gone” (M.D.A. Freeman, Lloyd’s Introduction to Jurisprudence, 7th ed. (London: Sweet & Maxwell, 2001) at 1055). Yet legal articles and books that take a critical perspective on law abound, drawing on a wide array of social theorists, philosophers, and political thinkers. This shows that the CLS movement may have fragmented, but critical legal analysis is still going strong. But does this diversity of critical approaches prevent such approaches from achieving a critical mass that might rival the dominant legal approaches, exemplified by Posner’s economic analysis and Dworkin’s liberalism? This stream seeks contributions that attempt to show the way forward for critical legal analysis. Is there a need for a “movement”, and do the disparate approaches in use today contain enough common ground to base such movement on? Which concepts and which thinkers provide fruitful and relevant philosophical and social theoretical springboards? Is mainstream jurisprudence of any use to critical legal analysis, or vice-versa? Is a reconstructive “legal liberalism” the new CLS in increasingly neo-liberal states, or are Leftist approaches still theoretically and politically viable?

3) Law, Empire, Imperialism

Public international law has come under increasing fire for its inability to effectively intervene against, or resist co-optation by, the proponents of the so-called “War on Terror”. Whether characterized as “Empire’s Law” (Bartholomew) or negated by the apparent rise of a “Lawless World” (Sands), the future of cosmopolitan international law appears to hinge on its continued resilience in the context of a global order shaped by the US imperial project. At the same time, domestic economies and legal systems, particularly those of developing and transitional states, continue to be the subjects of intervention by a transnational Rule of Law promotion industry, reviving the legal imperialism accounts attached to previous law and development movements. Papers and panels addressing these themes will seek to illuminate the often-hidden role of law and lawyers in current conceptions of imperialism, Empire and/or hegemony. How is law implicated in on-going debates about the US as an imperial power? What are the links between critical approaches to international law (e.g. post-colonial legal theory, NAIL, TWAIL) and historical and emerging conceptions of legal imperialism? Can lawyers and legal scholars engage in legal anti-imperialism?

4) After Globalization and Its Discontents

To date, international economic law has struggled to establish frameworks that incorporate the complexity and interconnectedness of international life. This is exemplified in the trouble scholars have in linking fields (e.g. “trade and environment” or “finance and human rights”). Many proceed with assumptions

of what a particular field of law constitutes and aim to balance or reconcile different fields; others' starting assumption is that the world is interconnected and consider law only as a response to this phenomenon. This stream is intended to explore how legal analysis in international economic law can be developed to better understand how the world is interconnected. How might we establish ways of thinking of connecting fields of study? What are the blind-spots and limitations of the "linkage" debate? Which laws and institutions are often taken for granted as being necessary and which laws and institutions are we ignoring that might be affecting international economics? How and to what effect are laws and institutions characterizing a particular type of global market?

5) Fragmentation and Pluralism

Since the mid-twentieth century, public international law has increasingly been fragmented into specialized regimes such as those dealing with trade, labour, the sea, human rights or war crimes. These multilateral treaties and international organizations are sometimes inclined to play by their own rules. This fragmentation of international law is accompanied by the proliferation of informal or non-state regulatory processes - from transgovernmental networking to commercial arbitration (developing a new *lex mercatoria*) to invocations of a "global civil society". What is the significance of this legal fragmentation? Is it a problem, and if so, can law solve it? Is constitutionalism an answer? Is there hope of developing a new "international law of conflicts"? Can theories of legal pluralism, developed at the societal level, help us to understand law at a global level? If so, how should such theories conceive of "law" (as distinct from normativity in general) or the idea of a "legal system"? What are the politics of such a global legal pluralism? Does the battle against state legal centralism have any relevance once our perspective has shifted to the global scale? Is legal pluralism a first step toward radical democracy, or does it mean abandoning law in favour of functionalist, technocratic domination?

6) Performativity and Programme: International Legal Theory between Post-Structuralism and Neo-Marxism

International legal theorists working within the Leftist and critical traditions frequently confess to being at a loss when confronted with the tension between discourse analysis and political economy. On the one hand, the post-structuralist assault on "binary regimes" continues unabated, with its advocates routinely insisting that class-based analyses of international legal structures are incapable of capturing the multifariousness of a world in which self-standing identities have given way to rhizomatic flows and commercial and communicative networks taken up the mantle of internationalism. On the other hand, neo-Marxist critiques of late modern capitalism consistently target the tongue-in-cheek smugness of the putatively emancipatory repudiation of "grand

narratives”, dismissing calls for an international law that would respond to the “interstitial” demands of a decentered “multitude” as symptoms of self-deception or collaborationism. Papers and panels in this stream will grapple with the roots and ramifications of this tension, canvassing proposals for its overcoming and exploring the mechanisms through which it compounds many of international legal theory’s most deeply entrenched antinomies. Is it possible to conceive of a mode of theorizing international law that would allow us to engage with questions of distribution without leaving us open to charges of determinism? Might we be able to shed light upon the elaboration, dissemination, and transfiguration of international legal norms without stripping ourselves of our appreciation of the force of ideology? How are we to marry Marx to Foucault (or Foucault to Marx) without falling prey to the kinds of platitudes that have recently found a new home in Hardt and Negri? And where is the place of the legal form - and legal formalism - in all of this?

7) Transitional Justice: Justice on Whose Terms?

Transitional justice is now an established field of legal study. The “truth v. justice” debates (Rotberg & Thompson) have generally moved toward “peace v. justice” debates, for example with respect to the International Criminal Court’s warrants for the leaders of the Lord’s Resistance Army in northern Uganda. The ICC’s focus is on African nations, while the US, China and other major perpetrators of mass human rights violations are not signatories to the Rome Statute. Calls for retributive justice and calls for restorative justice are not equitably made. Meanwhile, constitutional drafting by Western consultants in places such as Iraq forms part of a veritable industry that has arisen to “assist” in achieving and maintaining the rule of law in transitional justice contexts. But do transitional justice scholars produce practical solutions to the very real problems faced by countries emerging from periods of mass human rights violations? In particular, how can peace and justice be achieved without some trade-offs? What is the connection, if any, between transitional justice and constitutionalism? Can transitional justice mechanisms avoid playing a neo-colonial role in emerging democracies? What can law legitimately offer to those seeking transitional justice?

Appendix B – Conference Program (2009)

Opening Plenary

Prof. Jean Cohen (Columbia University Department of Political Science) – “A Global State of Emergency or the Further Constitutionalisation of International Law: A Pluralist Approach”

Discussant: Prof. Patrick Macklem (University of Toronto Faculty of Law)

After Globalization and its Discontents

Chair: Michael Fakhri (University of Toronto Faculty of Law)

Discussant: Prof. Sara Slinn (Osgoode Hall Law School)

Cristian Dimitriu (University of Toronto Department of Philosophy) – “Free Trade and Exploitation”

Iain Frame (Harvard Law School) – “Rules of Prohibition and Rules of Permission in the International Law of Money”

Alexandra Harrington (McGill University Faculty of Law) – “Law without Links: Re-Locating International Economic Law within the Sphere of Law and Society”

Irfan Sungkar (University of Malaya Faculty of Economy and Administration) – “Do Countries Expect Only Legal Foreign Workers? Abuses and Injustices for the Illegal Indonesians in Malaysia”

Constitutionalism and the International

Chair: Claire Mumme (Osgoode Hall Law School)

Discussant: Prof. Jutta Brunnée (University of Toronto Faculty of Law)

Martin Hevia (Torcuato di Tella University School of Law) – “On the Side of Dignity in the Latin American Constitutional Landscape”

Caroline Hodes (York University School of Women’s Studies) – “Just Say the Magic Words: Making Intelligible Citizens at the US and Canadian Supreme Courts”

Carl Lebeck (Stockholm University Faculty of Law) – “Delegation and National Constitutionalism in Europe”

Pedro Lomba (European University Institute Department of Law) – “International Constitutional Domains: In Search of a Social Approach to Global and International Constitutionalism”

Law and Power in an Unequal World

Chair: Irina Ceric (Osgoode Hall Law School)

Discussant: Prof. Ruth Buchanan (Osgoode Hall Law School)

Maria Grahn-Farley (Harvard Law School / Albany Law School) – “Neutral Law and Eurocentric Law-Making”

Craig Martin (University of Pennsylvania Law School) – “Sheathing the Sword of War: Law and the Constraints on the Use of Armed Force”

Dinesha Samararatne (Harvard Law School) – “Medellin and Singarasa Compared: What’s Sauce for the Goose is not Sauce for the Gander”

Vijayashri Sripati (Osgoode Hall Law School) - “The Evolution of the UN’s Constitutional Assistance: A Historical and Analytical Perspective”

Transitional Justice: Justice on Whose Terms?

Chair: Kim Stanton (University of Toronto Faculty of Law)

Discussant: Prof. David Dyzenhaus (University of Toronto Faculty of Law)

Samantha Jones (McGill University Faculty of Law) – “Head in the Clouds: The International Criminal Court’s Approach to the Northern Uganda Conflict”

Heidi Matthews (Harvard Law School) – “The Other Side of COIN: The Civilian/Combatant Distinction, Terrorism and the Structure of War Law”

Geneviève Renard Painter (McGill University Faculty of Law) – “Towards Feminist Critiques of Reparations”

Emily Rosser (York University School of Women’s Studies) – “Re-Reading ‘Participation’ Rhetoric: Women, Sexual Violence, and Neoliberalism in Truth Commissions”

Fragmentation and Pluralism

Chair: Derek McKee (University of Toronto Faculty of Law)

Discussant: Prof. Sean Rehaag (Osgoode Hall Law School)

Edouard Fromageau (University of Geneva Faculty of Law) – “Constitutionalist and Administrative Approaches in International Law: The Dialectic of Order and Disorder in a Changing Structure”

Brendan Naef (University of British Columbia Faculty of Law) - “To and Fro: The Fluctuating Power of the State as Described Through a Foucauldian Approach to International Law”

Hamed Shafia (University of British Columbia Faculty of Law) - “Disintegration of International Law: The Emergence of International (Quasi-)Judicial Bodies and its Implications for the ICJ and International Law”

Jennifer Shkabatur (Harvard Law School) - “International Standard Setting: The Quest for Institutional Design”

Constitutions and Citizens in the Global Context

Chair: Amaya Alvez (Osgoode Hall Law School)

Discussant: Prof. Jennifer Nedelsky (University of Toronto Faculty of Law and Department of Political Science)

Joel I. Colón-Ríos (Osgoode Hall Law School) – “The End of the Constitutionalism-Democracy Debate”

Constanza Pauchulo (York University Graduate Programme in Social and Political Thought) – “‘Beyond Citizenship’: Reconsidering Citizenship and its Relation to Global Justice”

Hicham Safieddine (University of Toronto Department of Near and Middle Eastern Studies) – “A Critique of New Constitutionalism: The Fallacy of Outcome as Process”

Rayner Thwaites (University of Toronto Faculty of Law) – “Troubling Invocations of the Common Good: Finnis and ‘Nationally Differentiated Risk Acceptability’”

Plenary

Prof. Andrew Arato (New School for Social Research Departments of Sociology and Political Science) – “Amendment and Legitimacy: From Carl Schmitt to the Turkish Constitutional Court and Beyond”

Discussant: Prof. Nehal Bhuta (University of Toronto Faculty of Law / New York University School of Law)

Law, Exclusion, Sovereignty

Chair: Umut Özsü (University of Toronto Faculty of Law)

Discussant: Prof. Karen Knop (University of Toronto Faculty of Law)

Graham Hudson (Osgoode Hall Law School) – “Canadian National Security, International Human Rights and the Role of Domestic Legal Institutions”

Asha Kaushal (University of British Columbia Faculty of Law) – “Linking Blind Spots to Bias: The Distributive Legacy of Critical Legal Studies”

Zoran Oklopčić (Carleton University Department of Law) – “Against Popular Sovereignty: In Praise of Meekness as a Political Virtue”

Sujith Xavier (Osgoode Hall Law School) – “Prohibited Grounds: Categories of Protection or Categories of Exclusion?”

Interpretation and Mobilization: Constitutions in the Court of Public Opinion

Chair: Mazen Masri (Osgoode Hall Law School)

Discussant: Prof. Lorne Sossin (University of Toronto Faculty of Law and Department of Political Science)

Peter Atupare (Queen’s University Faculty of Law) – “Legitimacy, Judicial Review, and Human Rights Enforcement in Ghana”

Edin Hodzic and Nelcy Lopez Cuellar (McGill University Faculty of Law) – “Popular Constitutionalism within the Courts: The Case of Divided Societies”

Ilana Lifshitz (University of Texas at Austin Department of Political Science) – “Courts, the Public, and Progressive Constitutionalism”

Adam Shinar (Harvard Law School) – “Progressive Constitutionalism, Progressive Constitutionalists, and the Accommodation of Social Change”

Identity and Law's Selective Memory

Chair: Alex Livingston (University of Toronto Department of Political Science)

Discussant: Prof. Nergis Canefe (York University Department of Political Science / Osgoode Hall Law School)

Alicia Breck (Carleton University Department of Law) – “Space, Identity, and Reconciliation: How Transitional Justice Can Result in Fractured Socio-Spatialities”

Luis Campos (University of Toronto Faculty of Law) – “Archival Fantasy: 19th Century Explorer Journals as Evidence in Contemporary Aboriginal Rights Litigation”

Ireh Iyioha (University of British Columbia Faculty of Law) – “The Gender of Medicine: From Monolithism to Paternalism to the International Patent Regime – Making Horizontal Laws from Vertical Treaties”

Harloleen Kaur (Osgoode Hall Law School) – “The Punjab Conflict: Justice Awaited for Twenty-Five Years”

Nationhood and the Meaning of Constitutional Rights

Chair: Ladan Mehranvar (University of Toronto Faculty of Law)

Discussant: Prof. Zoran Oklopcic (Carleton University Department of Law)

Diane Desierto (Yale Law School) – “Freedom and Constraint: Universalism in the Philippine Constitutional System and the Limits to Executive Particularist Power”

Miriam Polman (University of Victoria Department of Political Science) – “Proportionality Review and the Depoliticization of Religion: ‘Freedom of Religion’ as a Case-Study in the Possibility of Progressive Constitutionalism”

Ana Paula Ackerman Sheps (Osgoode Hall Law School) – “The Paradox of Indigenous Constitutional Rights and the Sovereignty of Brazil: A Case Study over the Demarcation of the Raposa Serra do Sol Indigenous Reservation”