

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Allard Faculty Publications

2016

Lawyers' Empire and The Great Transformation

Douglas C. Harris

Allard School of Law at the University of British Columbia, harris@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Legal Education Commons](#), [Legal History Commons](#), and the [Legal Profession Commons](#)

Citation Details

Douglas C Harris, "Lawyers' Empire and The Great Transformation" ([forthcoming in 2016]) 24:1 Int'l J Legal Prof 65.

This Working Paper is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Lawyers' Empire and The Great Transformation

Douglas C. Harris*

Writing through the years of World War II and attempting to understand its horrors, the carnage of World War I, the great depression, and the rise of communist and fascist regimes, Karl Polanyi posited that Western Europe had undergone *The Great Transformation* through the nineteenth century.¹ Built around policies of economic liberalism and the gospel of the self-regulating market, this transformation had produced a century of unparalleled peace and material wealth in Europe, but the unmooring of the market from other social forces, and the remaking of land and labour as commodities, would unleash, when the buttressing pillars faltered, the calamities of the twentieth century. Those pillars—the balance-of-powers system among European nations, the liberal state, and the gold standard—had functioned to preserve the peace, extend democracy, and facilitate international trade, but they played supporting roles. According to Polanyi, “the fount and matrix of the system was the self-regulating market.”²

Polanyi understood the self-regulating market as a utopian and dangerous vision: utopian because unachievable (markets always needed facilitating and sustaining structures), dangerous because untethering the market from other social institutions, and subordinating everything to it, particularly land and labour, would devastate nature and society. The political choices, made first in Britain, to disembody the market and elevate the principle of gain above all others, had released a creative and destructive power that produced extraordinary wealth, but also appalling working conditions and environmental desecration. These effects, in turn, produced countervailing struggle for social self-preservation by re-establishing the historical “embeddedness” of the market within society.³ Polanyi found what he labelled the “double movement” in ameliorative labour laws, in tariffs to protect certain industries, and in the efforts of many different actors to shield social life from the market.⁴

Polanyi's narrative of transformation spans the period of Wes Pue's *Lawyers' Empire*.⁵ This collection of essays, focussed on English lawyers in the nineteenth century and western Canadian lawyers in the first half of the twentieth, offers a

* Associate Professor and Nathan T. Nemetz Chair in Legal History, The University of British Columbia, Peter A. Allard School of Law. I thank Emma Cunliffe and Cole Harris for their comments on earlier drafts.

¹ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1944, 2001).

² Ibid at 3.

³ On “embeddedness”, see the Fred Bloc's “Introduction” to Polanyi, *The Great Transformation* at xxiii.

⁴ Polanyi, *The Great Transformation* at 79.

⁵ W. Wesley Pue, *Lawyers' Empire: Legal Professions and Cultural Authority, 1780-1950* (Vancouver: UBC Press, 2016).

fascinating window into the emergence of the modern legal profession. With close attention to individuals, some prominent, others unheralded, and to cultural context, Pue considers the construction of the profession's origin myths, the role of lawyers in the rise of the liberal state, the struggle over attempts to loosen the constraints of professional etiquette on the practice of law, the expanding role of governing bodies, the rise of the case method in legal education, the constitution of the profession in colonial settings, and more. The essays reveal much about the cultural authority of lawyers, about how they understood that authority, about how those views shaped their professional organization, and about the larger cultural milieu in which lawyers lived and worked. Pue's essays also provide an opportunity, using Polanyi's narrative of transformation, to consider the changing manner in which lawyers constituted themselves as a profession. Polanyi offers a narrative framework to explain unparalleled change; Pue provides nuanced detail of local struggles for and against change within one profession. The combination is revealing.

Lawyers have commonly understood their profession as having a "historic and unique responsibility" to protect the rights of individuals against the state,⁶ and therefore to have been integrally involved in the project of political liberalism. Polanyi writes little of lawyers, but does suggest it was lawyers, not economists, who first posited a "commodity theory of labour,"⁷ an essential and early step in subjecting human endeavour to the market. Moreover, one might expect, given Polanyi's account of the link between political liberalism and the self-regulating market, that Pue's collected essays would emphasize the contribution of the legal community in creating the conditions that gave rise to the market.

Several of Pue's essays make this connection, including his comparison of the roles of French *avocats* and English barristers in the projects of political liberalism on either side of the English Channel.⁸ Compared to their French counterparts, English barristers have been considered politically quiescent, and although Pue discusses some notable exceptions in which barristers "used their privileged positions within the courtroom to address a larger public, engaged in carefully chosen strategic rights-oriented test-cases, published pamphlets, addressed crowds, and invoked, explicitly or implicitly, the unpredictable power of the mob,"⁹ he largely concurs that, collectively, English lawyers were less visible participants in the push for a liberal state. Pue suggests that part of the explanation lies in the disciplining effect of the professional establishment and in a pattern of conduct whereby the independent bar "sought to exclude, silence, or expel a barrister whose politics—and particularly whose professional actions—exceeded the relatively

⁶ Pue, *Lawyers' Empire*, "The Use of History in the Development of Lawyers' Mythologies" at 17.

⁷ Polanyi, *The Great Transformation* at 190.

⁸ Pue, *Lawyers' Empire*, "How 'French' Was the English Bar? Barristers and Political Liberalism in the Eighteenth and Nineteenth Centuries".

⁹ *Ibid* at 54.

narrow bounds of acceptability that circumscribed the political, social and professional status quo.”¹⁰

The professional status quo for English barristers in the early nineteenth century was not defined in ethical codes, and certainly not in statutes, but, as Pue recounts, by the “etiquette” of gentleman advocates.¹¹ One prominent convention within the constellation of understanding about how to be a barrister was that they took instruction only from solicitors, never directly from the parties to an action. This convention impeded the capacity of junior barristers to find work, particularly those without family connections, and Pue provides compelling accounts of the lawyers who, in the mid nineteenth century, revolted against the prevailing and “starkly anti-commercial ideology of legal practice,” demanding that barristers be free of “anti-competitive restraints” and insisting upon “free trade” in the provision of legal services.¹² It was, Pue notes, a demand for limited free trade. The barristers in revolt deployed “contradictory claims of status and commitment to free market principles” as they attempted to break the power of an age-old guild to manage the supply of services, while preserving their status as men of standing and privilege.¹³

The revolt succeeded for a time, but a decade-long window in which barristers were relatively free to offer their services to whomever, and at whatever price, closed in the 1860s. Then, as Pue reveals through an analysis of the tribulations of several rebel barristers, the “(m)omentum, which seemed to be with the free traders, Liberal reformers, utilitarians, and rebel barristers, shifted abruptly in a different direction.”¹⁴ This struggle between junior and established barristers is one example among many of the nineteenth century conflict—engaged across numerous occupations and much of society—between those demanding freedom of contract in the self-regulating market and the power of guilds to define the terms of the trade. In this instance, rebel and establishment barristers were acting from self-interest, the first to expand their space in which to practice, the second to preserve their privilege. That the barristers’ guilds survived while many others fell beneath the onslaught of free trade is testament to the social standing of established barristers.

The concerted action to retain, even to strengthen the barristers’ guilds in the mid-nineteenth century, and thus to dispense with a nascent free trade in law, was one of myriad reactions to the drive for a self-regulated market. It is part of what Polanyi describes as the “double movement”: the effort to reassert a logic other than the market’s in social relations. Pue presents an even more compelling example in his chapters on legal education and the efforts of the legal profession, particularly in the Canadian west, to organize itself in the early twentieth century as part of a

¹⁰ Ibid at 56.

¹¹ Ibid, “Free Trade in Law: English Barristers, County Courts, and Provincial Practice in the 1850s”.

¹² Ibid, at 236.

¹³ Ibid at 239.

¹⁴ Ibid, “The End of Free Trade in Law: Discipline at the Inns in the 1860s”, at 319. See also “Liberal Entrepreneurship Thwarted: Charles Rann Kennedy and the Foundations of England’s Modern Bar”.

project in nation building. While one might expect the tenets of economic liberalism to play a significant role, and they do, one of the enduring contributions of Pue's essays is to remind us that the lawyers understood the modernizing of the legal profession as part of a much richer and fuller cultural project which, when viewed through Polanyi's narrative of transformation, was at least as much a reaction to the effects of economic liberalism as it was to establish the conditions for it.

Over several essays, Pue makes the case that lawyers in prairie Canada (the provinces of Manitoba, Saskatchewan, and Alberta) were innovators who, in the 1910s and 1920s, established many of the foundations of the modern legal profession in Canada.¹⁵ They created institutions devoted to full-time legal education, consolidated the location of a common law legal education in universities, introduced the case-method in the training of lawyers, lead the creation of a pan-Canadian professional body, and established an ethical code. Some of the innovations would not be sustained—in one essay, Pue chronicles the rise and fall of innovative legal education in Manitoba¹⁶—but many introduced novelties have since become familiar elements of the modern profession.

Pue carefully positions his studies within the prevailing culture of the legal profession and its social context, aspects of which the innovators were attempting to manage and mould. It is the colonial context that looms largest in his accounts. In one of the early essays in the collection, Pue argues the processes “of European imperialism, the spatial extension of both the United States and the Dominion of Canada, and the creation of modern professional structures occurred simultaneously,” and that (e)ach process affected the others.¹⁷ The connective tissue in these imperial, nation-building, and profession-forming processes was a self-ascribed civilizing mission to bring British culture to the colonies, and, as Pue and Chidi Oguamanam argue in their essay on the legal profession in Nigeria, the rule of law.¹⁸

In these different times and places, Pue argues that the legal profession understood itself less an agent of economic liberalism than as a vital purveyor of British culture. He frequently refers to the pervading sense through the first half of the twentieth century that “centrifugal forces”—war, industrialization, population growth, economic recession and dislocation, political radicalism, and ethnic, religious, and linguistic diversity—threatened to tear society apart.¹⁹ Manitoba was particularly heterogeneous in the early twentieth century as Canadian immigration policies brought discreet waves of eastern Europeans to farm, and an Anglo-elite attempted to assimilate these groups in a society already divided between British, Métis, and First Nations peoples. The haemorrhaging of young blood in the Great

¹⁵ Ibid, “Common Law Legal Education in the Dominion of Canada's Moral Project”.

¹⁶ Ibid, “British Empire Perspectives on the Case Method of Legal Innovation”.

¹⁷ Ibid, “Law and Colony: Making the Canadian Legal Profession” at 75.

¹⁸ Ibid, “Lawyers' Professionalism, Colonialism, State Formation, and National Life in Nigeria, 1900-60”.

¹⁹ Ibid, at 78, 91, 166, 168, 175, 205, 429, 443, 453.

War, and then the Winnipeg General Strike of 1919, compounded the profound sense of unease. The practising bar understood the modernization of the legal profession—from the educating of lawyers, through admission to the bar, to the regulation of legal practice—as an important and necessary response. This was the cultural context in which Manitoba lawyers believed that the reading of judicial decisions “*in their original* would make not just better scholars (or lawyers) but also better people, better gentlemen, better ‘souls.’”²⁰ It also helps to explain why establishing a code of professional conduct became a priority.²¹ Although the particular context was different, the exclusion of a communist from the practice of law in British Columbia in 1948 becomes more understandable, suggests Pue, when situating the lawyers between the World War and the Cold War, and the “then-prevalent notions of character and legal professionalism.”²²

Pairing Pue and Polanyi enables a fuller understanding of a turbulent time in human history. Polanyi’s narrative of transformation, built around an analysis of economic forces disembodied from social life, provides a framework in which to comprehend an era of unprecedented change; Pue offers a richly textured account of the cultural and professional context in which lawyers fostered change and grappled with its consequences. The remaking of the legal profession in the nineteenth and early twentieth centuries may be understood as one element in the rise of the market, but Pue’s emphasis on cultural context acts as an important reminder that, in particular times and places, this modernizing project was framed by its proponents primarily as a cultural corrective to social dislocation and instability. *The Great Transformation* reveals the unparalleled elevation of the market and suggests its consequences; some of the complexity of human endeavour in creating and sustaining this development, and then the responses to it, are to be found in *Lawyers' Empire*.

²⁰ Ibid, “Christ, Manhood, and Empire: The Case Method of Legal Education in Canada, 1885-1931” at 446 [emphasis in original].

²¹ Ibid, “Regulating Lawyers’ Ethics in Early Twentieth Century Canada”.

²² Ibid, “Gordon Martin, British Columbia Communist, 1948” at 363.