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SPECIAL ISSUE INTRODUCTION

Contextual legal pedagogy: still radical?

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Abstract
This is an introduction to the Special Issue on 'Contextual Legal Pedagogy'. It introduces the themes of the Special Issue and offers summaries of the papers in the collection. The introduction considers whether, and how, contextual legal pedagogy can still be radical, and how addressing pedagogical issues also necessarily involves addressing vital theoretical issues.

Keywords: context; pedagogy; law; scholarship; *Law in Context* series; law schools; teaching

1 Introduction

There was a time when to speak of 'contextualising law' was a radical move. The *Law in Context* series, of which we are editors, expressed a stance and an attitude at some remove from what was taken to be the orthodox and mainstream methods and approaches to legal education and legal scholarship. A large part of that radicality came from the American Legal Realist (ALR) movement, and its swashbuckling, anti-establishment, no-holds-barred, sometimes historically oriented and sometimes ironic pragmatism (see Twining, 2019). There was a normative sensitivity to ALR, but it was unfocused, remaining often unarticulated, which became, when translated across the Atlantic, self-consciously small 'l' liberalism: the politics of an observer, or of an exile from politics. Even when remembered in these simplistic terms, contextualism was still radical and pathbreaking in its own way. But is it any longer? If 'context' is wedded to realist intuitions and the realist tradition, has it had its day? Is there any point in flying the 'contextual' flag? Are we all contextualists now? Or, worse, is contextualism a retrograde move, bereft of any ethical or political orientation – an ineffective attempt at camouflage, hiding under some dubious cover of empirical neutrality?

This collection is part of an attempt to rethink 'context', to recover its radicality – normative as well as methodological. One way to do that recovery work is to unpack the concept – 'context' – and show how variegated, how complex, how contested it is and how many different scholarly traditions it can bring to the table. Another is to recall the other aspect of the *Law in Context* tradition that was radical: the close and mutually invigorating relationship, in the books published in the series, between scholarship and pedagogy. At its best, the series has always questioned that split – between textbooks and monographs – and shown that books written for students and accompanying courses, including compulsory ones in law schools, can dramatically re-imagine a field of scholarship and be of lasting scholarly value (e.g. Atiyah, 1970).

This Special Issue brings together papers that do both of the above: they interrogate the concept of 'context', digging into its ethical, political and methodological potential, and they also cross conventional boundaries between scholarship and pedagogy. Collectively, the papers show how thinking through pedagogical practices can raise profound questions not just about the individual topics or subject areas they relate to, but also about law in general and what is ultimately at stake in all legal scholarship, namely: the good of our communities, in law schools and more broadly, and the good of our lives as jurists, scholars and teachers. Simply put, to theorise pedagogy is also to theorise law. Whether

it be public or private international law, jurisprudence, feminist legal studies, family law, environmental and planning law, criminal law or EU law – all areas discussed by our contributors – the cross-cutting themes and stakes articulated by these papers take them far beyond their subject areas and into such issues as: What is the relationship between context and critique? Can contextual scholarship and pedagogy be critical, and yet generatively so – not dismissing or neglecting past theoretical traditions or the technical details of the law, but instead rereading them in new ways, enhancing our understanding of technicality (and its ethics and politics) and possibly even bringing hope? How can contextualism offer a different kind of critique, still retaining the best of scepticism and sensitivity to the varieties of legal power, exclusion and violence, but not beholden to debunking, demystifying and trashing – transforming instead into worldmaking, voice-recovering, voice-generating and voice-diversifying scholarship and pedagogy?

To think of context in this way, as each of these papers does, is to see how debating what 'context' is – including considering which of the possible contexts one might want to contextualise law with – is also to engage in reflecting on the ethics and politics of legal scholarship and legal pedagogy. Thus, for example, an important context in virtually all of the papers in this collection is the emotional dimension of the experience of law. Is there an emotional profile of private international law, criminal law or family law? Does that profile bring with it a certain kind of orientation to values – a particular way of understanding a certain realm of social life (the family, for example), that carries specific attitudes, tones, sensibilities and sentiments? And, if so, then what is the place of emotions in the law school classroom: what kind of emotions does one bring as a teacher and what kinds of emotional experience does one enable students to have? One might reflect, as one of our contributors does, on what happens when one brings humour into the classroom and starts to laugh at law: what kind of affective mirror does that provide to the experience of law – for instance, how (absurdly) distant its abstractions can be from the lives of ordinary persons, but then also how ordinary persons can creatively (cunningly, wittily) recycle it as part of the reclaiming of their agency?

Even the most seemingly pedestrian of pedagogical questions raises profound issues for what we take law to be. For instance, should international law be taught as an optional elective in the final years of one's legal education or should it, instead, infuse – contextualise – all the courses, including the seemingly more domestic ones, given how global all legal practice today is? Conversely, should EU law in the UK cease to be a compulsory course in its own right following 'Brexit' and become 'context' for other domestic law subjects? Should neoliberal economics be the focus of just one week in a course on, say, family law, interrogating how neoliberalism imagines the ideal family, or should awareness of and attention to the organising frames and dominant images of neoliberalism colour all the courses in a law school – as one of the contextual influences that shape both the details of legislation and the practices of adjudication? What about 'place': does attention to place and its imaginaries – whether of islands with strong borders, or borderless imperial dreams or of ocean currents upon which capitalism and colonialism travel – belong only to a course on environmental law, or ought they to inform our understanding of law from the first day of law school and be central, equally, to legal scholarship on all areas and topics? Is the fashioning of concepts of law in colonial contexts of relevance only to the teaching of jurisprudence, or is it also an important contextual reminder when teaching the details of, say, contract law, tort law and property law? To ask even – or perhaps especially when asking – the most practical of pedagogical questions is to very soon raise questions that turn the whole cart over, reframing, recasting, reconstituting the whole shebang.

Neither pedagogy nor context is but a servant or a medium through which already settled understandings of law are merely communicated or transmitted to others. To teach or to contextualise is to transform, to make, to constitute the object of understanding in a different and in a distinctive way by altering the point of reference or position of reflection. This is clear in all these papers. It appears, for instance, in the many papers in which the historical context is invoked. To think about how to historicise jurisprudence, when teaching it, is to do jurisprudence and thus to put into question what we might mean by the activity of 'jurisprudence'. It is to reflect on whether there are perennial questions about law, such that we should read past jurisprudential works as answers to them, or whether specific

kinds of questions about law arise in certain kinds of historical conditions, going on to reflect why those specific ones arise then and there, and not in other places and times. One might consider whether one really can read the Ancient Greeks without any awareness, say, of the complex ways 'nomos' resonated for them that are utterly different to the way 'law' resonates for persons in, say, twenty-first-century, pandemic London. How do the challenges and problems faced by Carl von Savigny compare to the challenges and problems faced by H.L.A. Hart? What lives did these jurisprudents lead as jurisprudents: what did they think was the value and importance of jurisprudence – as an ethical and political art? What forms of expression, including which genres, did they use when communicating their ideas – and did they sometimes do that for political reasons? Understandings of Hart change radically when one positions him as part of a social democratic movement, just as understandings of John Stuart Mill change when one recalls his day job in the East India Company and recognises just how deeply his partner, Harriet Taylor (neé Hardy), was involved in his work. But to ask these questions is not just to ask questions about how to teach jurisprudence: it is to ask difficult, general questions about law and about the possible shapes and values of leading the life of a jurist or a jurisprudent.

To reflect upon, and experiment with, 'contextual legal pedagogy' can be a deeply radical move – with implications that ripple out from the methodology of legal scholarship and questions about what law schools are for, right through to the most detailed issues in particular areas of law, and practical issues of what we should assess and how we should assess it. Although the papers in this collection focus on particular fields of legal enquiry, to think about contextual legal pedagogy is also to think about how and whether we should organise law into 'areas'; draw divisions between private and public, or international and domestic; and demarcate what are core foundational subjects and those that are elective. To think about which 'contexts' matter – to see how many options are possible and how contested the choices amongst contexts will be – is to take up positions of general importance for legal scholarship, and also for the place of legal scholarship amongst other disciplinary traditions and orientations. One can imagine more radical possibilities: universities not having law schools, but instead being a part of all university teaching. Law can be understood to be a literary art, a visual and material art, an emotional art or the imaginary of a culture, reflecting but also making the languages by which we are guided in ordinary life, as well as in specific technical professions. Or we can turn this around the other way: ought our courses in law schools on property law not involve collaborations with economists, architects, biologists, climate scientists – working together with legal scholars and students of the law, to understand how properly law is related to, and implicated in, a whole host of broader issues, rather than isolated from them? The more one thinks about them, the more seemingly exclusively pedagogical questions become the most difficult theoretical questions one could ask. As the papers in this collection show, there really is no end to the kinds of radical questions that reflection on contextual legal pedagogy can raise.

2 Chapter summaries

Our collection opens with three papers, each of which interrogates, in different ways, the place of history in contextualising law. Each of them taps into the currently very lively debate on the relations between law and history, including pedagogically, which are also sometimes thought of as 'method wars' or battles over the meaning of 'context' (see Brett *et al.*, 2021; Orford, 2021; and see also Sandberg, 2021). If these debates have shown one thing, it is that 'context' cannot be limited to some notion of a time-and-place-bound environment that carries no significance for later communities. The debate has revealed that to point to the importance of 'context' cannot really be confined to waiving one's finger at allegedly anachronistic lawyers who do not do 'proper history'; it is, instead, to raise questions about the different ways 'law' in general, as well as particular laws, may be framed and constituted, and given contestable and contested meaning, across time and space. The debate, in other words, is about how lawyers and historians can learn from each other about the worldmaking powers of law, as well as about the different powers that make law (see Wheatley, 2021). To point to 'context', then, is not to isolate, but to relate – and indeed to consider the many different kinds of relations that

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contribute in particular ways to making law distinctive, such as how law is shaped by, and shapes, different kinds of power structures, or different kinds of economic systems, or traditions of genre and forms of expression, or material realities (such as availability of print, for instance, or video surveillance), or certain architectural and other aesthetic practices, or the vocabularies and politics of bodies.

Coel Kirkby's contribution to this debate is to portray the relevance of Amia Srinivasan's account of 'worldmaking', as part of the practice of critical genealogy, for the teaching of jurisprudence, but also ultimately for re-imagining what jurisprudence might be about. This worldmaking dimension is given pedagogical shape in a number of ways: first, by the teacher, in designing the content of the course, paying attention to how past jurists acted in their particular worlds – affecting those worlds politically through crafting particular concepts of law; and second, by inviting a dialogue between teacher and students, in which students are given the opportunity to challenge the teacher's choices of context (e.g. colonial or imperial contexts in which a certain jurist acted politically by crafting a concept of law for colonial or imperial purposes). Students thereby learn the art of 'doing things with legal theory', learning not only to recognise the relationship between 'representational practices' (such as concepts of law) and possibilities of action in certain historical circumstances, but also to actively craft representational practices so as to create new ways of being and doing in a certain political community (initially, for instance, the political community of the classroom). Kirkby's take on teaching jurisprudence offers a riposte to the usual and dominant trend of teaching jurisprudence a-historically, as answers to the same perennial questions about the nature of law, as well as to certain non-genealogical ways of historicising jurisprudence. But to offer this critical genealogical approaching to teaching the history of jurisprudence is no mere curriculum swap; it is not a matter of painting colourful political scenes to make abstract concepts more easily understood and memorable. It is, instead, to usher in a radically different way of 'doing legal theory' and thus also of imagining the politics of law: a way that understands that one is always implicated, as a theorist, and as a teacher of theory, in the political worlds in which one lives and that one must confront, and justify to oneself and to one's students, the choices one is always making in the present. It is of great significance that Kirkby's way into these insights is through pedagogy, and in particular through changing the dynamics of the pedagogical relationship: offering himself up for challenge as a teacher, Kirkby seeks to transform the politics of the classroom, creating what he calls 'an atmosphere of amiable antagonism that cultivates a critical understanding of how to do things with legal theory'.

Like Kirkby, Roxana Banu is also very self-conscious and reflective of her choice of historical contexts for teaching – in her case, private international law. Banu's aim is to convey not the distance between law and reality (as in, arguably, older traditions of contextualising law), but instead to illuminate the intimacy between technical legal details and certain historical contexts (in her paper, colonial, intellectual and gender histories). To do this is especially important in the field of private international law, which, as Banu notes, has a reputation for being a 'technical and apolitical' subject – a paradox, as Banu notes, because private international law is 'contextual, by definition': e.g. the methods and techniques of private international law were all made and constructed through struggles over gender, race, slavery, rebellion and migration. The difficulty – both pedagogically, but also methodologically for scholarship in this field – is more to do with which of the many possible relevant contexts to foreground. As difficult as this may be, it is, Banu argues, best confronted head on, drawing on this multiplicity of contexts to help bring out, rather than hide, the richness and complexity of private international law's toolbox. Banu's suggestion for how to do this is to 'hold private international law accountable for its use of techniques' – to put, in other words, private international law on trial. When has private international law acted as a 'guillotine' – 'choosing a law or a jurisdiction in a random, unprincipled way' and what was at stake in making these choices – whose interests, for example, were furthered and whose lives were destroyed or demeaned? Banu is not afraid to take on the 'sacred cows' of private international law, sending context to work on the famous case of *Phillips v. Eyre* ((1869) L.R. 4, 225 (Q.B.)). By inquiring into, with the students, the consequential weight of the framing choices made in that case, Banu invites them to reflect on how contextualising, in the way that she does, puts into question the very identity, and thus also values and aims, of private international law,

especially with its self-avowed commitment to formality, technicality and neutrality. As with the other papers in this collection, what is at stake in Banu's paper is not just how to teach private international law: it is also just what private international law has been, is and might be. What kinds of worlds has private international law made? What ones is it making now? What ones might it still make? In her paper, Banu raises another aspect of contextual legal pedagogy: its temporality. Contextual teaching is slow teaching – it cannot be otherwise. Rushing through one topic after another may make the teacher, and the students, feel good about how much they are covering, providing an illusion of progress and mastery, but this quickly collapses the moment one puts a little pressure on knowledge acquired in this manner – hence the emphasis, too, in Kirkby's paper, on 'doing'. Indeed, in both Kirkby's and Banu's papers, there is a call for more reflection on the active political agency of law, including both of its general theories and its detailed technicalities – an active political agency that one cannot just study in the abstract, but that one must experience, as a teacher and as a student, to understand it, at least to a degree. And this, in turn, requires slowing down, instrumentalising knowledge less and dwelling more in the particular worlds being made by law in particular ways.

Megan Donaldson, in her paper, is especially sensitive to these issues, perhaps because they are especially pertinent to the teaching of public international law. Growing exponentially as a field, while at the same still largely marginalised in law school curricula, and thus gasping for curriculum breath, public international law teaching has been squeezed so much that courses attempting any breadth of coverage necessarily end up offering thin and anaemic accounts of incredibly complex topics. These difficulties, contributing yet further to the paradoxical isolation of public international law just when it is growing in importance, are exacerbated by continual divisions between domestic law and international law, which leave little scope for exploring the subtle interaction between different levels of government and power. Donaldson offers a variety of strategies for meeting these challenges: for instance, one might begin a course *in medias res* with a case, and ideally one that connects to the place of teaching, so as to resist the idea of 'law as produced in a placeless universal register'. But her principal contribution is to share her experience of designing a new master's-level module on 'Histories of International Law'. Here, Donaldson's approach advocates less focus on the specific knowledge relevant to any particular episode of international law and more on an appreciation of 'the uncertainty, and potential, of the textures of reasoning'. The course asks: What can an appreciation of law's technicalities offer our understanding of broader concepts, such as peace (as with Banu, contextualisation is envisaged here as a means of delving deeper into, rather than moving away from, a focus on technical legal detail)? Through what technical means has law shaped peace, e.g. when has it used constructive ambiguities or deferrals of resolution, and when has it deployed sharp delineations of rights and responsibilities? The focus is on the politics of law's techniques, zooming in on particular moments, but also zooming out to see how these techniques travel across times and places. Further, to capture that 'texture' of legal reasoning is also to range across both conventional and unconventional sources – from peace treaties to oral histories, from the writings of jurists through to literary works and press articles – thereby also inviting reflection on just what counts as a 'source' for public international law. Once again, as with the above two papers, what emerges is reflection on both the technicalities of this area of the law, as well as its very identity and soul.

Our collection continues with Debolina Dutta's critical reflections on an elective course that she offered during – and partly as a response to – the COVID-19 pandemic. For Dutta, following Upendra Baxi, teaching and learning are necessarily acts of social intervention, with the law teacher acting as 'a conduit for calling law into relation with lived experiences, including one's own, through the act of teaching'. Understood thus, learning law never happens in abstraction because 'one learns something always in context' (Baxi, 2014, p. 154). In the case of Dutta's module on 'A Politics of Frivolity? Feminism, Law and Humour', the dominant context for the module was that of the pandemic that was wreaking a catastrophic effect on her students' lives and those of their communities. Her response involved an approach that she describes as an 'incongruous' contextual legal pedagogy, rooted in a particular time and place and aiming to recognise shared vulnerabilities and to embed a sense of community. With the use of humour, Dutta hoped not merely to alleviate the gloom of the

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pandemic, but also to surprise and thereby to provoke new and unexpected ways of thinking about law. Specifically, she encouraged her students to question an unthinking assumption that sexual violence in India might be best addressed through punitive responses from a post-colonial state, the legitimacy of which they challenged robustly in other contexts.

Alongside focusing on the broader external contexts that informed her course, Dutta also speaks to the institutional contexts that impact what we teach and how we teach it, with potentially greater freedom to innovate in the context of a small, elective module unencumbered by the same weight of expectations regarding essential content or a received canon. However, it is also true that parts of the traditional law curriculum may also appear more readily amenable to a contextual approach. Jessica Mant points out that family law scholarship has long been keenly attuned to issues of context. She notes, for example, that responding to family breakdown will often also involve engaging with issues of social welfare and immigration. Moreover, both courts and legislatures frequently draw from other disciplines, including sociology and psychology, in formulating legal principles.

Mant also speaks to the wider influence of institutional factors, highlighting the important role played by a neoliberal political context in framing both legal education, and family law and policy. Law teachers face the challenge of inspiring and developing interests, skills and aptitudes in students where these do not obviously translate into visible gains in employability, with the perceived value of a legal education often determined by the competitiveness of a qualification within the employment market, rather than how well it equips students with the critical skills necessary to serve those who engage with the legal system. Mant argues that an attentiveness to how this wider political context has also shaped family law and policy is important for two reasons: first, to develop the analytical tools needed to trace and critique the moral and political values that underpin policy decisions; and second, to ensure that the future development of family law is centred on the needs and lived experiences of the families who need it. In very concrete terms, she aims to train students to question the positionality of the primary sources, academic writing and professional accounts that they are expected to engage with during their family law studies.

That a contextual approach to legal pedagogy concerns the point of reference or place of reflection on a subject is dramatised starkly in Charlotte O'Brien's paper on the study of EU law. As she observes, for students in the UK – following the UK's departure from the EU in 2020 – 'EU law *is* context'. The challenge for UK law schools is how to teach EU law *as* context – a point given added force by the decision of the Bar Standards Board in May 2022 to update its statement on the 'academic component of Bar training' to acknowledge:

> 'The UK has now left the European Union, but EU Law still has significant relevance to the laws of England and Wales and therefore practise as a barrister. Knowledge of current and developing EU Law may be used to assist in the interpretation and evolution of retained EU Law and as a result, for the purposes of the academic component of Bar training, the Law of the European Union will continue to be a required academic element of a barrister's training.' (Bar Standards Board, https://www.barstandardsboard.org.uk/training-qualification/becoming-a-barrister/academic-component.html (accessed 31 August 2022)

As a result, 'EU Law in Context' is a required subject of study for entry to the profession as a barrister in England and Wales.

O'Brien's contribution is, therefore, timely in urging a reflection on the curriculum to offer contextual teaching that is Grounded, Relevant, Applied, Newsworthy and Dynamic – 'GRAND'. Brexit has certainly made EU law newsworthy and relevant. But the very dynamism of the subject also complicates how any particular aspect is taught and for how long.

O'Brien critiques the doctrinal, positivistic, abstract and black-letter tendencies of the European legal academy. Yet, the point is also made that this is not necessarily an agenda imposed by the legal profession. Similar trends can be found across the multiple jurisdictions of the EU. For O'Brien, the opportunity of a contextual approach is the capacity to be ruthlessly selective about what is taught and

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why. It facilitates experimentation with case-studies, methodologies and materials. Importantly, the resources are out there should we be bold enough to become radical editors of the EU legal curriculum.

O'Brien concludes that a process of re-imagining the curriculum may not be wholly comfortable for either teachers or students. In their contribution, Bronwen Morgan and Amelia Thorpe pick up from where O'Brien ends. Their point of departure is a desire to direct pedagogy towards the agency of students and to facilitate a learning process that is also concerned with strategies of engagements with the places and localities we inhabit socially, economically and legally. Concerned that too often critical approaches can leave students with senses of despair and disillusionment, Morgan and Thorpe's 'pedagogy of hope' builds on their involvement with the Utopian Legalities, Prefigurative Politics, and Radical Governance research network. Their focus in their contribution to this issue is on 'place-based' courses. For the authors, it is by thinking about what law does (or does not) do in particular locations – especially cities and urban environments – that students are invited to consider how and why the law orders their physical environment. By taking students out of the classroom and being physically present in particular places, the effects of planning laws and other regulatory environments are brought to life. More directly, through an elective course on Law and the New Economy and on Food Law, the relationship between global supply chains and local consumer communities can be illustrated. As the authors note, the intention is to expand on the type of problem-based learning with which O'Brien is familiar at York Law School by starting with the lived experiences of people in particular places and then analysing the interrelationships between (1) local knowledge (and the processes for its generation and communication); (2) professional advice and advocacy; and (3) the design of multilevel regulatory frameworks. Their interest lies in how economic, social and environmental conditions are produced and sustained through these interactions. Although not the subject of their piece, this also holds open the question of what differently located communities can and do learn from one another.

This attention to how law hits the road (or neighbourhood) is about seeing law's relational orientation in a double sense. First, it is about the relationship between legal frameworks and how lives are lived and shaped in particular locations. Second, and underpinning the pedagogy of hope, it is about placing law students 'as citizens, as lawyers, as community members' in relation to their local environments, opening up avenues for agency and engagement with our surroundings. This is a contextual legal pedagogy that invites scholars and students to shift from observation to participation.

Ben Pontin and Elen Stokes draw their inspiration from a different but related intuition towards agency and engagement, in thinking about how 'futures literacy' might inform the study of environmental law. That 'we were all the future, once' (UK Prime Minister David Cameron, Prime Minister's Questions, 13 July 2016, *Hansard* Vol. 613, Col. 294) is a political slogan that highlights the way in which the future also has a past. And in their conversation, Pontin and Stokes articulate the ways in which the future can be explored both as a topic of environmental legal history ('historic futures') – how was the future imagined in past legal interventions and to what ends – and as the object of contemporary concerns of environmental lawyers in the face of climate change ('future futures').

Recognising that it is easy to place the past and the future in an oppositional relationship, their paper confronts the pedagogical issues raised by trying to bridge this temporal 'gulf'. Importantly, what is common to their different approaches to the study and teaching of environmental law is a concern with another gap: the space between imagined and actual futures. It is in this space that students are invited to think about how law is mobilised towards environmental ends. Narratives and fictions (including science fiction) provide resources beyond the traditional legal texts not just to build and expand the picture, but also in recognition that students' own futures are not necessarily defined by a career in the legal profession. An understanding of these diverse professional futures is an important context for legal pedagogy.

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