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REVIEWS SYMPOSIUM: A SYMPOSIUM ON WILLIAM TWINING'S JURIST IN CONTEXT: CELEBRATING 50 YEARS OF THE LAW IN CONTEXT SERIES (GUEST EDITOR MAKSYMILIAN DEL MAR)

Context, context everywhere

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Any and every phenomenon that human beings can experience or observe or invent or imagine, except the aggregated sum total of all such phenomena, has context(s). In a current way of thinking, interaction between entity, organism or phenomenon and its 'context' or 'environment' (I will use these last two terms interchangeably) is the engine of evolution by natural selection, and of social change by language and communication, teaching and learning, remembering and recording. Identifying and understanding the aggregate, total context of any phenomenon is beyond human, physical and mental capacities. When we set out to understand the interaction between any particular phenomenon and its environment, we necessarily select a set of features of the total, aggregated context. The choice of a particular set of features will reflect our reasons for, and our interests and aims in, studying phenomenon/context interactions. To the extent that context is understood negatively as everything other than the phenomenon being studied, the choice of that phenomenon will also reflect the observer's reasons, interests and aims.

There are various methods of studying interactions between phenomena and environments. One – and in some sense, the paradigm – method is the controlled, scientific experiment. The strength of this method is that it involves and depends on precise delineation of a phenomenon and precise specification of one or more features of its environment, in such a way as to allow the phenomenon to be effectively isolated from other contemporaneously existing phenomena, and the environmental features to be effectively isolated from other contemporaneous environmental features. This procedure enables the observer, of past and present interactions between the chosen phenomenon and its specified environment, to describe and explain those interactions in a way that others will find convincing and to make predictions about future interactions that others will accept as reliable. The price of the great power of controlled scientific experimentation to generate 'knowledge' is that such knowledge is always conditional in the sense that it remains forever, in theory at least, open to being falsified.

Very many interactions between phenomena (including 'natural' phenomena) and contexts are not amenable to investigation by controlled scientific experimentation; and here, by an all-too fast route, we have arrived at the topic of this symposium: law in context. William Twining (amongst others) doubts that 'law has an essence or nature or core' (*Jurist in Context* (2019, hereafter '*JiC*'), p. 276). Whatever meaning is given to this statement, it cannot be attributing, to those against whom it is directed, the view that law can be understood independently of context. Law is sometimes contrasted with 'water', which some would say does have an 'essence' – in the philosophical jargon, water is a 'natural kind' as opposed, for instance, to a 'functional kind': something defined in terms of what it does, not what it is. This cannot mean that water can be explained or described without reference to interactions between phenomena identified independently of surroundings. Water involves an interaction between hydrogen and oxygen molecules; and water exists in certain environments, but not others. Perhaps an 'uncaused cause' may be conceptualised as an entirely acontextual phenomenon; but anything and everything that has a cause has a context. If this view is convincing, we may understand 'essentialism' as the attempt to isolate a phenomenon from as much of its context as is possible, to make the phenomenon as 'small' as we possibly can relative to the total universe

of phenomena. In that light, the disagreement between the legal essentialists and the legal contextualists concerns how small law can be made, how 'pure' (to adopt Kelsen's term). Legal essentialists seek to understand law by isolating it from as many other phenomena as possible so as to uncover its 'necessary and sufficient existence-conditions'.

Legal contextualists see this as a desiccated project. For them, the quest more worth pursuing is to understand how 'law' forms part of a larger phenomenological picture and how it interacts with 'extra-legal' phenomena. At the limit, law may be seen merely as a function of its context. Marx conceptualised law as part of the social 'superstructure'. Economists and political scientists who study law often treat legal rules and principles as epiphenomenal – an ideological proxy for efficiency concerns or political convictions. In doing so, they strip law of its normativity – the message it conveys that, independently of needs and desires, something may, ought or ought not to be done. In recent years, philosophers and evolutionary theorists have developed accounts of how normativity may have emerged, as a peculiarly human behavioural form, from non-normative patterns of behaviour (e.g. Tomasello, 2014; Pettit, 2019). Very crudely summarised, the story goes that, as a result of significant climate change around 12,000 years ago, in many parts of the world, humans were able to abandon subsistence hunting and gathering in favour of surplus-generating agriculture and animal husbandry. This enabled and encouraged people to live together in significantly larger groups than previously and for longer periods of time in the one place. It is speculated that these new conditions of life were associated with a shift from what might be called social 'co-ordination' to social 'co-operation'. The crucial difference between the two is that co-ordination of one's behaviour with that of others may be motivated purely by self-interest and may be abandoned as soon as its benefits cease to outweigh its costs to the self. By contrast, co-operation involves and requires calculation of costs and benefits not from a purely self-regarding perspective, but from a broader point of view that also takes account of the interests of others in one's group. The result may be a willingness to act against one's own self-interest for the sake of promoting the interests of others and of the group as a whole. This, it is argued, gives rise to an interpersonal sense of 'ought', prima facie distinct from the wants, needs and interests of the individuals who variously feel the weight of the 'ought'.

According to such accounts, the very concept of normativity, of which law is one manifestation, is explicable in terms of interactions between individual human beings possessed of a set of physical and mental capacities and propensities under a particular set of environmental conditions. Such accounts show how normativity can itself explain and motivate human behaviour. Its 'invention' added to the catalogue of explanatory human motivations, including wants and desires. Normativity is a feature of all accounts of law of which I am aware and may, in that sense, be called an aspect of law's nature or essence. We can now see, however, that the contrast between essentialism and contextualism about law is a false dichotomy because normativity is itself a product of natural and social evolution 'in real time and space'.

William Twining is not (*JiC*, p. 169) (or, at least, not 'strongly' (*JiC*, p. 139)) sceptical about law's normativity. By filling in some of the context of his own juristic life (in the form of a 'succinct, accessible and assertive restatement of a position' (*JiC*, p. xv)), he reveals much about his understanding of both 'law' and 'context'. Two incidents seem particularly illuminating. One is William's feeling of having been 'misled, let down, even betrayed' (*JiC*, p. 24) when he first discovered the limitations and silences of the tort text that was his favourite when he was an undergraduate lawyer at Oxford in the 1950s: *Salmond on Torts*. For Twining, from that moment, *Salmond* was paradigmatic of acontextual doctrinalism: legal rules, principles and norms *without* context. So, why had Twining once so valued *Salmond*? William's own answer might, perhaps, be that, as a student, he was taught to think that what could not be learned about tort law from *Salmond* was not worth knowing. This answer itself locates Salmond's doctrinalism within the context of university legal education in 1950s England and suggests the origins of William's lifelong and deeply committed concern with the 'health of the discipline of Law' (*JiC*, p. xiv). For him, getting law into context is important, first and foremost, for the sake of high-quality legal education and scholarship.

As we learn from Mark Lunney's intriguing tribute to Salmond (Lunney, 2019), Sir John himself had a clear view of the intended audiences and functions of his book and of the 'real-world' context in which it would be used; and this view is reflected in the contents and tone of the book. Salmond, we

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might say, presented tort law not *without* context, but *for* a context. Salmond (reasonably) assumed that he and his audience inhabited the same thought-world. After all, what stranger to that world would read such a book? The illuminating story of Twining's life and career as a jurist helps to explain his dismay at discovering that his emperor was, as he thought, unclothed. Twining's own insistence that he is not a (strong) rule-sceptic suggests that his difficulty with *Salmond* was not that it presented 'the view from nowhere', but rather that he found the context in which Salmond operated (that of the practising lawyer, whether student, tyro or master) uncongenial, limiting and damaging to 'the health of the discipline of law'. I venture to suggest that William's greatest contributions to legal scholarship in the UK, both in his own work and in founding (with Robert Stevens) the *Law in Context* book series (*JiC*, pp. 91–92), have been to alert us to the variety of contexts in which law exists, functions and is used, and to insist that there is no law without context, no legal view from nowhere. It is good to know that William himself considers the *Law in Context Series* to be 'the scholarly activity which has given [him] most satisfaction' (*JiC*, p. 92).

The second part of Twining's story that I want to highlight is less an incident and more a long and fruitful association – with Karl Llewellyn and the American Legal Realists. Llewellyn and his wife, Soia Mentschikoff, were 'the two most important people in [William's] professional life' (*JiC*, p. 38). William had gone to Chicago Law School as a graduate student to work with Llewellyn. When Llewellyn died, Soia suggested that Twining 'come to Chicago to consult "one or two unpublished manuscripts"' (*JiC*, p. 79). This request ultimately led to William's 'intellectual biography' (*JiC*, p. 38) of Llewellyn. William tells us that, although his own

> 'conception of Jurisprudence developed away from Llewellyn's … [his] general approach was based on Llewellyn: keeping theory in touch with … social reality; seeing the field as being concerned with beliefs and working assumptions about law related to other beliefs about the world, politics, morality and society; viewing "realism" as ranging from empirical science to making one's own judgements as well informed as one can … keeping in touch with the viewpoints, understandings and practices of providers of legal services … and other actors, users and victims; and maintaining continuity between conceptual, normative, doctrinal and empirical approaches.' (*JiC*, p. 88)

This essentially methodological account of realism fits neatly with Twining's repeated insistence that he does 'not have a general theory of law', but uses 'several concepts of law, depending on context' (*JiC*, pp. 277–278), including not only 'doctrine but…also…institutions, processes, structures, practices, personnel and craft traditions' (*JiC*, p. 173).

Personally, I am inclined to think that a distinctively 'realist-inspired' or 'contextualist' 'theory' of law can fruitfully be identified. An attractive formulation might go something like this: law is a set of rules and principles ('doctrines', 'norms'), institutions, structures, personnel, processes, practices and so on that publicly manage tensions between, and disagreements about, the irreducibly plural values that characterise the human condition. In his 'reinterpretation' of American legal realism (ALR), Hanoch Dagan focuses on three such tensions: those between 'power and reason, tradition and progress, and science and craft' (Dagan, 2013). I would phrase these dualisms somewhat differently, but Dagan's basic argument strikes me as valuable. As I read *Jurist in Context*, Twining's main jurisprudential concern has been with the third of Dagan's tensions – between law as 'science' ('doctrinalism' or 'formalism') and law as social practice. And, as my formulation suggests, I would extend Dagan's insight further and conceptualise law as a public mechanism for promoting the goods of social life in the face of genuine, reasonable and intractable disagreement about how irreducibly plural values are best accommodated amongst themselves. This is obviously not a 'general' theory or a 'theory for all seasons'. For instance, for some purposes (in some 'contexts'), a parsimonious theory cast in terms of necessary and sufficient existence conditions may yield real insight. However, it seems to me that, if the impossibility of a view from nowhere is taken seriously, 'law' in the phrase 'law in context' must itself be understood contextually. As I have already suggested, the much-maligned 'mechanical

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jurisprudence', 'formalism' and 'doctrinalism' can themselves only be understood and appreciated contextually, just as William's infectious enthusiasm for studying law in context is itself informed by his passionate belief in liberalism as an educational ideal (*JiC*, pp. 24, 126–127).

Patrick Atiyah's *Accidents, Compensation and the Law* (*ACL*), first published in 1970, launched the *Law in Context Series*. *ACL*, Twining tells us,

> 'met all [his] complaints about *Salmond* … [Atiyah] dealt with insurance, settlement out of court, the unpredictability of damages awards … in short, all the major omissions from *Salmond* …. This marvellous book did not replace the doctrinal texts but placed them in a radically different framework and most later books have since acknowledged the relevance at least of these other factors.' (*JiC*, pp. 154–155)

I must declare an interest here, having been solely responsible for five editions of *ACL* (the fourth to the eighth)[1] and for a sixth (the ninth) jointly with James Goudkamp. Twining identifies various aspects of Atiyah's 'method' that he thinks differed from that of the writers of 'traditional Tort textbooks' (*JiC*, p. 155). One was his basic decision to organise his material not according to the traditional taxonomy of 'areas of law', but in terms of the social phenomenon of 'personal-injury accidents'. In the spirit of William Twining, it is worth putting this choice in historical context. (The past is, of course, one of law's most significant contexts.)

The original organisational framework of English law was 'procedural', under the so-called 'formulary system'. When, in the nineteenth century, formulary pleading was replaced by fact pleading, jurists needed to reorganise the law for expository and pedagogical purposes. Because of the paramount social importance of real property in the early centuries of the English legal system, the substantive law of property was distinguished from the procedural law quite early on. The first 'textbooks', in something like the modern sense, were about property law. The English contract lawyers could look to highly sophisticated civilian jurisprudence for inspiration. Substantive Roman law, inherited by the civilians in the Middle Ages, was not constrained by procedural considerations; and the codification movement of the nineteenth century provided civilians with the opportunity to revamp the centuries-old mishmash of Roman law and local custom that prevailed in many European jurisdictions. Tort law was a different matter. After the subtraction of contract (and leaving aside what we now call 'the law of unjust enrichment', which escaped the attention of English jurists until the mid-twentieth century), what was left was a diverse set of causes of action that had previously been filtered through the old writs of trespass and trespass on the case. This included actions for interference with rights and actions for infliction of damage; actions to protect interests as diverse as real property, reputation, financial wealth and bodily safety; and actions based on intention and negligence as well as actions that required proof of neither.

One strategy for dealing with such diversity, which has greatly influenced US law, was that of Oliver Wendell Holmes. He identified tort law with fault-based liability for the 'accidental' infliction of harm. His theory had no room for the rest of the 'trespassory' causes of action. By contrast, English theorists such as Pollock, Salmond and Winfield made more or less unsuccessful attempts to find non-procedural organisational principles – one or more – that could justify dealing with the whole trespassory inheritance between the covers of a single volume called 'Tort Law' or 'The Law of Torts' (the choice was itself a subject of theoretical contention). In this regard, Atiyah was a follower of the Holmesian tradition. Now, English private law (along with the private law of other systems derived from it) is a ramshackle affair organised on two different, intersecting planes, the one tracking 'fundamental legal concepts' such as contract, tort and property and the other tracking 'factual' phenomena such as families, corporations, employment, the environment and so on. Unsurprisingly, perhaps, the organisation of the diverse substantive material in *ACL* reflects this organisational variety. The doctrinal focus is on the tort of negligence, which Atiyah analysed with his arresting iconoclasm and his gimlet eye for the absurd. However,

[1]Patrick never interfered: 'It's your book now,' he said. 'If people want to know what I think, they need only go to the library shelf.' Patrick died, after a long illness, in 2018.

contract law and property law also make cameo appearances and criminal law lurks in the wings. On the other hand, social-security law must take the Oscar for Best Supporting Actor, and the whole show would collapse without insurance law.

One result of the abolition of the forms of action in the nineteenth century and the consequently frantic juristic search for substantive principles was that the practical operation of the substantive law – its use to do things that people wanted to achieve – did not appear on the scholarly radar until much later, and even then as a specialism focused, like the old, formulary learning, on procedure in and around court. A major legacy of ALR is its concern with what the law – tort law, for instance – does and what it is for, how it is used and how well it performs, where it came from and where it might be going. It is a measure of the impact of the ALR-inspired Law in Context 'Movement' (more diffuse than a 'school' but more concrete than a 'trend': *JiC*, p. 162) that such concerns have lost the 'shock of the new' they could deliver fifty years ago and now strike many as being as much about the entity, law, itself as about its environment. From this perspective, contrasting and competitive views such as those of economic analysts of law, on the one hand, who reduce the entity to its effects, and latter-day philosophical formalists, on the other, who insist that the entity be hermetically sealed from its environment, all seem partial and obstructed. But, of course, those approaches are themselves social practices in interaction with their respective contexts; and, as William Twining himself says: 'What is significant as context itself depends on context' (*JiC*, p. 163)!

Despite William's own (somewhat puzzling) wariness of and modesty about his contribution to 'normative' jurisprudence ('that aspect that deals with values' (*JiC*, p. 104)), *Jurist in Context* is a passionate book and at the core of that passion (as already noted) is a powerful, 'liberal' concern for 'the health of the discipline of law'. One target of this concern is the quality of the education that students receive in university law schools. Another possible target, perhaps less prominent in *Jurist in Context*, is the standing of legal scholarship in the academy. As we have seen, William's *bête noir*, Sir John Salmond, wrote for students, jurists and practitioners who (he assumed) would understood the basic moves of his intellectual dance routine. Like many a (perhaps the typical) jurist today, he does not attempt to explain to the reader what he is doing, or why and how he is doing it. In my experience, scholars in other disciplines – those outside the humanities, anyway – can easily find the to-ing and fro-ing between fact and value in traditional, 'doctrinal', 'analytical' legal scholarship (at least) methodologically suspect, imbued as they are with the Enlightenment horror of derivation of values from facts. However, as Herbert Hart pointed out sixty years ago, in order to understand law, it is necessary to understand its inherent quality of normativity – its value-rootedness. The normativity of law *is* a fact and it cannot be reduced to (although it is certainly emergent from) phenomena that lack inherent normativity. Normativity is one of the most distinctive products of human natural and social evolution. The risk, as I see it, in certain strands of legal realism and certain approaches to 'law in context' is that the baby will be thrown out with the bathwater. In my view, there can be no law *in context*, no realism *about law*, without law *in itself* to be realistic and contextual about.

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