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978-1-107-11640-5 - Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining

Edited by Upendra Baxi, Christopher McCrudden and Abdul Paliwala

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Law's Ethical, Global and Theoretical Contexts

Law's Ethical, Global and Theoretical Contexts examines William Twining's principal contributions to law and jurisprudence in the context of three issues which will receive significant scholarly attention over the coming decades. Part I explores human rights (including torture), the role of evidence in human rights cases, the emerging discourse on 'traditional values', the relevance of 'Southern voices' to human rights debates, and the relationship between human rights and peace agreements. Part II assesses the impact of globalization through the lenses of sociology and comparative constitutionalism, and features an analysis of the development of pluralistic ideas of law in the context of privatization. Finally, Part III addresses issues of legal theory, including whether global legal pluralism needs a concept of law, the importance of context in legal interpretation, the effect of increasing digitalization on legal theory, and the utility of feminist and postmodern approaches to globalization and legal theory.

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William Twining, photographed by Karen Twining Fooks

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UPENDRA BAXI, CHRISTOPHER MCCRUDDEN
AND ABDUL PALIWALA



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Preface

My personal political views have been reasonably 'progressive' throughout my adult life, but, unlike many colleagues, I have normally tried to distance these views when writing about academic matters, partly because my academic ideology gives primacy to values of tolerance and open-mindedness in this context, partly because the kind of approach I favour can itself accommodate a wide spectrum of political views, and partly because most of my working life has been spent as an expatriate in situations in which one has been expected to exhibit diplomatic restraint.¹

At the celebration of William Twining's eightieth birthday at the Institute of Advanced Legal Studies in London, we offered William an IOU: a Festschrift as his birthday present. The original plan was to present the book itself, but due to circumstances beyond our control it was a promise of pleasures yet to come! In the event, we are delighted that this volume is seeing the light of day. We very much hope that William will see it as a promise suitably fulfilled. This collection of essays for William Twining is a happy confluence of two tributaries: a critical jurisprudential project of Christopher McCrudden and a more global South-focused project of Upen Baxi and Abdul Paliwala.

We are delighted that this tribute to William Twining is being published in his eighty-first year. It is traditional in such a celebration for the editors to attempt to provide a biography of the person whose work is being celebrated – a task that in William's case would be a complex one indeed. Fortunately, William has provided us with an intellectual autobiography in his perceptive interview with Manuel Atienza and Raymundo Gama, published here in English for the first time. The picture that emerges from reading the interview, together with the scholarly contributions to this book, is of an intellectual who is a pre-eminent Renaissance man among legal scholars: a bricoleur whose breadth of engagement and vision can be best described as principled eclecticism.

His legal theory combines Hartian positivism, Llewellynite realism and Benthamite utilitarianism with contemporary ideas about globalisation and

¹ William Twining, 'Introduction: Wandering Jurist' in *Law in Context: Enlarging a Discipline* (Cambridge University Press, 1997) 2.

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social justice that are derived from scholars such as Boaventura de Sousa Santos, Amartya Sen and his *Southern Voices* (Abdullahi An-Na'im, Upendra Baxi, Francis Deng and Yash Ghai).² Underlying his transformation of the way we look at evidence and legal rules is American Realism, but a Realism linked to ideas derived from Bentham and Wigmore, neither of whom can be considered part of the Realist tradition as we know it, at least today. His engagement with legal pluralism is inspired by Llewellyn's anthropological *Cheyenne Way*, but enhanced by direct engagement with social anthropology and his experiences in Tanzania and the Sudan. It is this experienced engagement which inspired him to debunk the approach to customary law in which an expert sat with a group of male elders, asked ethnocentric questions based on Anglo-Saxon concepts and wrote down the answers, which then became Restatements of Customary Law.³ Twining's ethnographic pluralism is combined with an understanding of globalisation and social justice in order to generate ideas about global legal pluralism. All these aspects of William's work are reflected in the chapters included in this volume.

It is a particular pleasure that the book is appearing in the *Law in Context* Series, which William founded with Robert Stevens in the late 1960s.⁴ The invention of Law in Context was rooted in disenchantment with Salmond's *Law of Torts*, an engagement with American Legal Realism in Chicago and direct experience of the Sudan and Tanzania – ideas subsequently honed at Queen's University, Belfast and Warwick Law School. Twining tells the story of how the *Law in Context* Series was invented.⁵ The idea for the book series was initiated in conversations with Stevens in Dar es Salaam in 1965. However, it was Patrick Atiyah, his friend and colleague in his previous academic engagement in the Sudan, who asked the most pertinent contextual question: 'How can I find out whether English businessmen take consideration seriously when I am isolated in this place? . . . How can one make sense of *Felthouse v Brindley* in Khartoum?' Years later, in 1970, Atiyah, who became a Warwick professor, was to publish the remarkable volume on *Accidents Compensation and the Law*, the first of this transformative book series.⁶

We believe that this volume captures the range of Twining's ideas on law, justice, human rights and globalisation, and we shall leave further consideration of these themes to our contributors. But we do wish in this Preface to engage a little more than the other contributions do with William's outstanding contribution to legal education as a pedagogist, an innovative educational practitioner and an activist reformer. Twining has discussed his engagement with legal education especially in two volumes: *Blackstone's Tower* published in

² William Twining, *Human Rights: Southern Voices* (Cambridge University Press, 2009).

³ William Twining, 'The Restatement of African Customary Law: A Comment' (1963), 1 *Jo. Modern African Studies* 221.

⁴ William Twining, 'Reflection on Law in Context' in Twining, *Law in Context* (n 1) ch. 3.

⁵ *Ibid.* ⁶ Patrick Atiyah, *Accidents, Compensation and the Law* (Weidenfeld, 1970).

1994 and *Law in Context: Enlarging a Discipline* published in 1997.⁷ His intellectual eclecticism is closely linked to his pedagogical eclecticism. Twining's critique of the University of Oxford, where he received his legal education, was that 'there was little sustained discussion of legal education by law teachers, let alone by law students.'⁸ Nevertheless, he recognized the value of the Oxford system in promoting intellectual engagement and freedom. Thus H. L. A. Hart's linking of analytical philosophy to jurisprudence introduced 'vigorous intellectualism in the study of law'.⁹ Moreover, the Oxford system of tutorials and self-education gave him a sense of intellectual freedom and enabled him to read widely in and beyond the law. This notion of intellectual freedom continues to be central to Twining's pedagogy.

The University of Chicago Law School was another formative influence. His experience there, he says, both exposed and provided for some key missing ingredients in my legal education up to then: the linking of law to the social sciences; a dialectical approach to every issue; a highly intellectualized but nevertheless realistic approach to legal practice and the law in action; a demonstration of the interdependence of theory and practice; and a concern for justice. This combined experience formed the intellectual basis for his approach to legal education in Khartoum and Dar es Salaam.¹⁰ In Khartoum his attempt to make the course more interesting by using apparently 'relevant' English cases with stories of camels in the zoo such as *M'Quaker v Goddard*¹¹ led to his realization that the issue of context required more than superficial engagement. He describes how he 'threw down a challenge: is that how Sudanese feel about camels? A hand went up. "Aha," I thought, "at last I have got a response." But instead it was a question: "Please, sir, why was the camel in a zoo?" At that moment some scales fell away from my eyes. What had a camel in a zoo to do with the Sudan? Or circus elephants or performing fleas or slanderous parrots or carbolic smoke balls or the rule against perpetuities? What was I doing teaching all this artificial and irrelevant frippery to Sudanese students?'

It was in Dar es Salaam, however, that the idea of an intellectually and politically relevant law in context was given an impetus by the then President, Julius Nyerere. Twining writes that Nyerere's expectation of the University of Dar es Salaam, and of the Law School, 'was clear'. He continues: 'we should teach East African Law in context – and context here meant the historic break with colonialism, local circumstances and problems, and the ideology of the first Independence Government. The University should aspire to international standards of excellence, to traditional (western) academic values, but it must

⁷ William Twining, *Law in Context* (n 1); William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell, 1994).

⁸ Twining, 'Introduction: Wandering Jurist' (n 1) 3. ⁹ Ibid. 4. ¹⁰ Ibid. 7.

¹¹ [1940] 1 KB 687; 'The Camel in the Zoo' in Twining, *Law in Context* (n 1) 27.

contribute to nation building, focus on African problems and conditions, and study law in its local context.¹²

Even while in Dar es Salaam he continued his engagement with Karl Llewellyn, with whom he studied in Chicago and whose papers he was organizing after Llewellyn's death. This engagement with American Realists continued during his brief stint at Yale Law School, followed by professorships at Belfast and Warwick, and culminated in the publication in 1973 of *Karl Llewellyn and the Realist Movement* in the *Law in Context* Series.¹³ This period provided both an intellectual and practical engagement with legal education in the United States and the United Kingdom. The Llewellyn book provides a considered analysis of United States legal education from Langdell through the Realist and Dewey-inspired Columbia Curriculum Reform movement to Lasswell and MacDougall's policy approach at Yale.

Twining's *Law in Context* Series provides key insights into William's own approach to teaching and legal education. His overall perspective reflects, firstly, his general commitment to a pedagogy that promotes intellectual freedom. Secondly, he suggests the need for a sociology of legal education which also explores it in terms of what its graduates are going to be doing, whether acting as pericleans or plumbers in the law, or even working outside the legal professions.¹⁴ Thirdly, there is the promotion of the study of law in context. This involves rethinking the traditional classification of law subjects to introduce new ideas such as international commercial transactions, broadening the focus of attention so that legal doctrines are rarely studied without reference to the social situations, the problems, the policies, and the processes that constitute the context of their operation. It involved, too, reconsideration of the techniques of teaching and examination to enable students to have room for independent exploration, and a switch from emphasis on knowledge of rules of law to emphasis on the acquisition of skills including both intellectual and clinical skills.¹⁵

At the Queen's University, Belfast, then at Warwick Law School, and subsequently at University College London, together with his many international engagements, he put these ideas into his own educational practice and supported educational developments in each of these law schools, in the United Kingdom and globally. At Queen's, his teaching of jurisprudence and courses on 'Juristic Technique' emphasised new approaches to rule handling, subsequently to become the innovative book, co-written with David Miers, then at

¹² William Twining, 'McAuslan in Context: Early Days in Dar and Warwick [Later Days in 43 countries]' in Valerie Kelley and Thanos Zartaloudis (eds), *Essays in Honour of Patrick McAuslan* (forthcoming, 2015).
¹³ William Twining, *Karl-Llewellyn and the Realist Movement* (Weidenfeld, 1973).
¹⁴ See William Twining, 'Pericles and the Plumber' in *Law in Context* (n 1) ch. 4.
¹⁵ William Twining, Katherine O'Donovan and Abdul Paliwala, 'Ernie and the Centipede' in J. A. Jolowicz, ed., *Division and Classification of Law* (Butterworths, 1970), 10; William Twining, 'Pericles and the Plumber' and 'Legal Skills and Legal Education' in *Law in Context* (n 1) ch. 4 and ch. 9.

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Queen's, *How to Do Things with Rules*.¹⁶ A further innovation at Queen's was his encouragement of Abdul Paliwala to teach 'Computers and Law' as a segment of the jurisprudence course. Twining also supported the establishment of the Ballymurphy and Springfield Social Action Centres as early examples of law clinics in the United Kingdom. His membership of the Armitage Committee, which established the Northern Ireland Institute for Professional Legal Studies, enabled him to implement his belief that legal professionals required training in skills that could not just be absorbed by osmosis during an apprenticeship.¹⁷

At Warwick, under the leadership of Geoffrey Wilson, *Law in Context* came into its own. Every member of the Law School was required to develop their own interpretation of a contextual approach to law.¹⁸ William had already been involved in discussions with Wilson about the establishment of a different type of Law School before arriving there in 1972.¹⁹ For William, it meant refashioning the jurisprudence and legal methods courses, but his most significant contribution was a reinvention of an evidence course, using Bentham and Wigmore, to develop what he terms a 'modified Wigmorean analysis'.²⁰ The initial intellectual results of these pedagogical endeavours were the innovative books *Rethinking Evidence* and *Analysis of Evidence*²¹ but the real innovation was in the nature of experiential teaching, involving sociological and psychological experiments to take students beyond traditional rule-based approaches.

Such innovative approaches were combined with the twin Realist notions of 'context' and 'skills' in legal education. They permeated the School's clinical programmes, as part of the 'skills' revolution in legal education. In *Legal Skills and Legal Education*, William set out his skills thesis.²² 'The time is ripe,' he wrote, 'for academic lawyers to take the lead in making direct learning of "skills" a central component of every stage of legal education and training.' He continued: 'Such a change will involve not only shifts of emphasis in curriculum but, more importantly, changes in attitudes and competencies of law teachers, as well as new institutional and collective arrangements.'²³

The law in context and skills approaches to legal education, of which he was an important advocate, have had a significant influence throughout legal education in the United Kingdom and beyond, without replacing the dominant

¹⁶ William Twining and David Miers, *How to Do Things with Rules* (Weidenfeld, 1976).

¹⁷ Twining, 'Introduction: Wandering Jurist' (n 1) 13. ¹⁸ Ibid. 14. ¹⁹ Ibid. 13.

²⁰ William Twining, 'Taking Facts Seriously' in *Law in Context* (n 1) ch. 5.

²¹ William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, 1994); Terence Andersen, David Schum and William Twining, *Analysis of Evidence* (Little Brown, 1991).

²² Twining in *Law in Context* (n 1) ch. 9; see also Rajeev Dhavan, Neil Kibble and William Twining, *Access to Legal Education and the Legal Profession* (Butterworths, 1989).

²³ Ibid. 181.

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doctrinal approaches to law teaching.²⁴ The *Law in Context* Series, in particular, provides a vehicle for contextual legal education everywhere, and helps to promote more contextual cases and materials books in the United Kingdom. Also of considerable significance was the diasporic effect of law teachers and students moving from Warwick and influencing other law schools in the United Kingdom and abroad, with William himself subsequently moving to University College, London.²⁵ He became even more convinced of the need for law teachers to develop more innovative approaches to teaching and learning, and while at University College, London he developed an innovative Law Teachers' Programme. Subsequently, Warwick took the lead in promoting innovation in legal education with the establishment of national centres, including the Law Technology Centre and the UK Centre for Legal Education. The underlying ethos of the centres was informed by William's ideas on the combination of context and skills, and Twining remained an active member of the Advisory Board of the UK Centre for Legal Education.

Twining's approach to legal education has always encompassed the importance of reform and reorganization at both the academic and professional stages. In particular, he perceived very early that it was not just the academic stage that needed a skills revolution, but also the professional stage. The latter had no tradition of research and development, so that, as he wrote, 'almost nothing is known about how effective, efficient or worthwhile such teaching is.'²⁶ Twining's Hamlyn Lectures, entitled *Blackstone's Tower*, were a strong plea for the integrated reform of both the academic and professional stages of legal education.²⁷ His active consultative engagement with the Lord Chancellor's Advisory Committee on Legal Education resulted in the Committee's first report reflecting much of Twining's educational principles as the basis for a comprehensive approach to legal education and training at both stages.²⁸ These included the need for intellectual integrity and independence of mind, core legal knowledge (including general principles, nature and development of law, analytical and conceptual skills), contextual knowledge (including law's social, economic political, philosophical, moral and cultural contexts), legal values (encompassing ethical and social justice values) and professional skills (including acting like a lawyer and appropriate engagement with practice situations).

²⁴ His many international contributions to legal education include India. See e.g. Marc Galanter, Savitri Goonesekera and William Twining, *Report of the Expert Panel on the Running of the National Law School University of India* (Bangalore: National Law School University, 1996).

²⁵ Among the movers were Patrick Atiyah to Oxford, Patrick McAuslan to LSE and Birkbeck, Martin Partington to Bristol, Francis Snyder to University College, London, Avrom Sherr to Liverpool and to the Institute of Advanced Legal Studies, Sol Picciotto to Lancaster, David Farrier and Mike Chesterman to New South Wales and Yash Ghai and Jill Cottrell to Hong Kong.

²⁶ Twining, 'Legal Skills and Legal Education' in Twining (n 1) ch. 9 180.

²⁷ Twining, *Blackstone's Tower* (n 7).

²⁸ Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (HMSO, 1996) 78.158.56.101/archive/law/files/downloads/407/165.c7e69e8a.aclec.pdf accessed 15 February 2015.

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Unfortunately, the report had a mixed impact, especially in relation to the professional stage, and William himself remained sceptical of its achievements, as he has been of the most recent Legal Education and Training Review.²⁹ His clarion call has been consistent throughout his career, and it retains its clarity and importance: the need for a thorough intellectual engagement with the multiple needs of, and the factors affecting, all stages of legal education. Paul Maharg suggests, and we agree, that 'Twining has set us a challenge, no less difficult now than it was in 1967. Taken seriously, the challenge may well lead to a remarkable transformation, a sea-change: the lawyer as Periclean plumber.'³⁰

In putting this celebration together we have incurred many debts. We would like to thank, in particular, Penelope Twining for her encouragement and for allowing us to publish her Bibliography of William's published work. We are also most grateful to Karen Twining Fooks for providing the photograph of William which faces the title page. The editors would like to thank the authors for their contributions and our respective institutions for enabling us to work on this project: for Upendra Baxi, the University of Warwick and the University of Delhi; for Christopher McCrudden, the Queen's University of Belfast, the Leverhulme Trust for a three-year Major Research Fellowship for 2011–14, the Straus Institute, New York University for a Fellowship for the year 2013–14, and the *Wissenschaftskolleg zu Berlin* (Institute for Advanced Studies) for a Fellowship for the year 2014–15; for Abdul Paliwala, the University of Warwick and Birkbeck University of London, where he has been a visiting Professor. We express our gratitude to Cambridge University Press, in particular Finola O'Sullivan, who supported the project, and Jonathan Ratcliffe and Richard Woodham as well as Sri Hari Kumar Sugumaran of Integra Software Services, who saw it through to the end. Finally, we would like to thank William himself: without his inspiration and friendship over the years, this work would not have been possible; and equally, for his assistance to the editors and authors once the secret of the Festschrift was out!

Upendra Baxi
Christopher McCrudden
Abdul Paliwala
March 2015

²⁹ Twining, 'Thinking about law schools: Rutland Reviewed' (1998), 25 *Jo. Law and Society* 1; Legal Education and Training Review Independent Research Team, *Final Report: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR, June 2013) www.lettr.org.uk/the-report/ accessed 15 February 2015; Pete Smith, 'LETR: the role of academics in legal education and training: 10 theses' (2014), 48: 1 *The Law Teacher* 94–113; and 'IALS Event: The Role of Academics in Legal Education and Training' *Lawsync* 2013 www.lawsync.com/2013/11/11/ials-event-the-role-of-academics-in-legal-education-and-training/ accessed 15 February 2015.

³⁰ Paul Maharg, 'Sea-Change' (2011), 18 (1–2) *International Journal of the Legal Profession* 139 at 156.

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