Book Reviews / Comptes-Rendus

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Jean-François Gaudreault-DesBiens et Diane Labrèche
Le contexte social du droit dans le Québec contemporain : l'intelligence culturelle dans la pratique des juristes. Cowansville, Québec: Éditions Yvon Blais, 2009. 299 p.

This important book advocates a social context approach to law that is particularly attentive to the concerns and realities of historically disadvantaged groups and diverse sociocultural communities. The ideas of the book are situated within an increasingly diverse contemporary Quebec. Over the past fifty years, Quebec has been transformed from a society where the major divisions were religious (Catholic versus Protestant) and linguistic (French and English), to a much more heterogeneous and culturally pluralistic society.[1] The effects of the Quiet Revolution in nurturing the empowerment of social movements (including the women's movement, gay and lesbian rights, and the disability rights movements) have also brought new issues of diversity to the public domain. Though available only in French and explicitly directed at jurists in Quebec, the book addresses themes that are relevant to the practice of law in many jurisdictions and is deserving of a wide readership.[2]

What is perhaps most striking about this book is the commitment of Jean-François Gauldreault-DesBiens and Diane Labrèche to bridging legal theory and practice. Complex and highly theoretical themes are carefully linked to the concrete exigencies of the practice of law. The theoretical ideas and insights draw on diverse and interdisciplinary scholarship. These ideas are then connected to equality principles and illustrated using a number of actual cases and judicial decisions. In a profession that tends to distinguish between theory and practice, this book provides a powerful rebuttal to the coherence of that dichotomy. Both authors are full-time law professors with a history of participating in continuing educational initiatives for lawyers and judges on the significance of social context, cultural diversity, and equality in law. Their experience working with the National Judicial Council in its Social Context Initiative for judges and with the Quebec Bar Association in its educational program for future lawyers prompted their engagement with a key idea at the heart of the book—the importance of advancing equality and access to justice through a humanized practice of law.[3]

The book begins with a brief discussion of the importance of understanding the social context of law and its integral connection to the ethical and equitable practice of law in modern and socially diverse societies. Chapter one presents the major theoretical themes that sustain the authors' commitment to promoting the social context of law. The need to enhance attentiveness to social context by confronting and resisting the weight of pedagogies and analytical traditions that

1 Gaudreault-DesBiens and Labrèche, *Le contexte social du droit dans le Québec contemporain,* 11–13.
2 To ensure a wider readership, given the continuing limits of bilingualism in Canada, it is good news that an English translation is being published.
3 Ibid., x.

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privilege legal positivism is examined in chapter two, followed by an analysis in chapter three of how the legal principle of equality provides a framework for both expanding and setting limits on the social context of law. Chapter four then connects the theoretical ideas back to the concrete challenges lawyers face in representing clients whose backgrounds and life circumstances are very different from their own, and in seeking to increase diversity within law firms. To further illustrate the relevance of attentiveness to social context in law, the book includes an appendix with five fascinating testimonials from individuals engaged in applying a social context methodology to their professional work in the legal system.

Two of the central concepts developed in the book include the "social context of law" and "cultural intelligence." Social context is defined to include: myriad social facts and practices, implicit and explicit ideological presuppositions, "extra-legal" norms, opinions, attitudes, beliefs, and perceptions.[4] Factors such as race, religion, physical and intellectual capacities, sexual orientation, and socio-economic status are also enumerated as important dimensions of social context. Cultural intelligence is defined with reference to the work of David Thomas and Kerr Inkson, who write:

> Cultural intelligence means being skilled and flexible about understanding a culture, learning more about it from your ongoing interaction with it, and gradually reshaping your thinking to be more sympathetic to the culture and your behaviour to be more skilled and appropriate when interacting with others from the culture.[5]

For the practice of law, developing cultural intelligence requires a particular attentiveness to how one's own culture and that of others affects our understandings and decisions.[6] It also entails a rejection of a mechanical or technocratic understanding of law and an engagement with a critical approach that is reflective, relational, cooperative, and rooted in experiential learning.[7] A social context approach to law is an important way to enhance cultural intelligence.

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4 Ibid., 9–10. By "extra-legal" the authors are referring to legal regimes and norms (such as canon law) that are not a part of the formal state-based legal system, but understood as law by scholars of legal pluralism. In this regard, they cite Guy Rocher, "Pour une sociologie des ordres juridiques" 29 C. de D. 91 (1988); Jean-Guy Belley, "L'État et la régulation juridique des sociétés globales. Pour une problématique du pluralisme juridique," *Sociologie et sociétés* 18, no. 1 (1986) : 11; and Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism," *Social & Legal Studies* 13 (2004): 57.

5 Gaudreault-DesBiens and Labrèche, ibid., 33, citing David C. Thomas and Kerr Inkson, *Cultural Intelligence, People Skills for Global Business* (San Francisco: Berrett-Koehler Publishers, 2004), 14–15.

6 Seven key competencies for the development of cultural intelligence are identified in the book, including: adaptability, curiosity, observation, creativity, emotional intelligence, knowledge of one's own culture, and a decentering of one's own culture (44). Two key obstacles to the development of cultural intelligence in the Quebec legal profession are highlighted in the book. One obstacle is the lack of diversity within the profession itself: ". . . Un jurist œuvrant dans un milieu homogène a inévitablement moins de possibilités qu'un autre qui évolue dans un environnement plus hétérogène de développer, par le truchement d'expériences vécues au quotidien, des mécanismes d'adaptation à la diversité" (29–30) The second obstacle is linked to the failure of legal education to confront issues of social diversity, exclusion, and inequality. The authors suggest that legal education in Quebec has historically been overwhelmingly focused on positive law, and as a result, its "contextes d'élaboration, d'interprétation et de mise en application étaient plus ou moins occultés" (31).

7 Ibid., 33–34.

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These concepts, moreover, are shaped by a third critical concept—equality. The concept of equality provides the normative and legal justification for a contextual approach that focuses on power inequities and social diversity. Not all social facts are to be included in a contextual approach to law. Rather, it is predominantly those social facts that risk being overlooked due to inequality and exclusion.[8] A contextual approach, therefore, requires attentiveness to the lived realities of those who have not had a voice—to minority communities, vulnerable individuals, and marginalized social groups. The articulation of a substantive understanding of equality in Canadian law reinforces the importance of focusing on socially and historically disadvantaged groups. As a general interpretive aid, moreover, a commitment to equality and inclusion need not be constrained by the specific juridical categories and limits of grounds-based anti-discrimination law or Charter equality jurisprudence.[9] Rather, equality as a general principle provides the normative framework for a contextual approach to legal advocacy, adjudication, and interpretation.

The concept of equality, however, also limits how a contextual approach is to be applied in specific legal cases and controversies. Two significant difficulties with equality theory are identified. The first is identity-based determinism, or the risk that an individual's membership in a particular group will be used to make assumptions about his or her attitudes, behaviors, or opinions.[10] The authors are careful to admonish any legal approach that presumes that all individuals from a particular group share the same attitudes and opinions or act in particular ways due to their group-based identity. To do so risks relying on and perpetuating group-based stereotypes. The second is essentialism, or the theory that groups have a homogenous and fixed essence.[11] Such a theory does not recognize the complex and myriad differences and power inequities within social groups. It also risks relying on cultural diversity as a justification for undermining the fundamental rights of more vulnerable members within particular sociocultural groups.

While the concept of equality provides a compelling justification for a contextual approach to law by jurists equipped with cultural intelligence, the concerns about identity-based determinism, essentialism, and stereotyping present a central conundrum addressed in the book. On the one hand, attentiveness to social context and diversity requires an appreciation of group-based realities and differences in society. On the other hand, we do not want to presume that individuals are defined exclusively in relation to their membership in a particular social group(s) or that group-based identities are somehow clearly identifiable and homogenous rather than complex and heterogeneous. Indeed, equality rights emerged historically to secure individualized treatment, free of negative and inaccurate group-based

8 Ibid., 10. For a similar articulation of the limits on contextualism, see Martha Minow & Elizabeth V. Spelman, "In Context," *Southern California Law Review* 63 (1990): 1597 at 1605; Colleen Sheppard, *Inclusive Equality–The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010), chapter 3.

9 Gaudreault-DesBiens and Labrèche, ibid., 25. For example, consideration of economic marginalization, addiction, single-parent status need not be linked to specific grounds of discrimination. Furthermore, the doctrinal tests developed to ascertain violations of s 15 of the *Canadian Charter of Rights and Freedoms* need not be applied. The equality principles that govern a contextual approach provide a normative framework for legal advocacy, adjudication, and interpretation.

10 Gaudreault-DesBiens and Labrèche, ibid., 107

11 Ibid., 115.

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stereotypes. At the same time, a central purpose of protecting equality in law has been to recognize and redress historical and continuing group-based social disadvantages and exclusion. How, then, do we navigate this conundrum?

The response provided in the book is to insist on robust and comprehensive proof that connects the lives of individual litigants to the broader realities facing the group(s) to which they belong. Evidence is the linchpin—the essential mechanism for linking individual circumstances to group-based phenomena. Ideally, therefore, lawyers (equipped with cultural intelligence and a contextual methodology) will bring the much-needed evidence that connects individual and group realities into the courtroom. The failure to do so, moreover, may mean that judges are justified in not taking group-based contexts into account. While judicial notice may be relied on to a certain extent with respect to contextual realities of vulnerable groups in society, according to Gaudreault-DesBiens and Labrèche, specific evidence is often needed to make a link to the individuals whose lives are impacted by the litigation.[12] The refusal of judges to address complex issues of social diversity in some cases is therefore viewed as justifiable in the absence of proof. Judges are constrained in what they can do when lawyers fail to provide robust individualized and social context evidence.

It is this insistence on evidence and proof that I find troubling. It is certainly important to insist that lawyers work diligently to bring extensive and convincing evidence to the courtroom. And in a book designed to promote social context lawyering, it makes sense to emphasize the critical role of lawyers in this regard. However, what happens when lawyers do not adduce sufficient evidence? My concern is that individuals from vulnerable, marginalized, poor, socially and historically disadvantaged communities are precisely those who do not have the legal resources to ensure that extensive evidence is raised in courts and tribunals. In many cases, they are represented by legal aid lawyers, whose caseloads and limited resources make extensive trial preparation very difficult. In other cases, they are not represented by a lawyer at all. What happens in these cases? Indeed, some of the cases raised in the book to highlight the importance of actual proof also illustrate the risk that evidence will be inadequate, due to the failure of lawyers to adduce it or a lack of resources or legal counsel. In the book's appendix, the powerful stories and experiences outlined in the five accounts of those working in the justice system on a daily basis also attest to the complexities and depth of inequities in access to justice. Thus, although Gaudrealt-DesBiens and Labrèche emphasize proof as the critical pathway for reconciling the conundrum of individual versus group-based realities, I was left wondering whether they have constructed too high an evidentiary barrier for the incorporation of group-based contextual realities into the adjudicative process.[13]

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12 Gaudreault-DesBiens and Labrèche, ibid., 130.

13 Two cases discussed in the book that left me questioning whether the authors had gone too far in insisting on individualized proof include: *R. v Hamilton*, (2004) 72 OR (3d) 1 (Ont CA), where the authors endorse the Ontario Court of Appeal decision, and *Van de Perre v Edwards*, [2001] 2 SCR 1014, where they agree with the Supreme Court of Canada's approach in that case to the race issue. For a critique of the *Hamilton* decision, see Richard Devlin and Matthew Sherrard, "The big chill? Contextual judgment after *R. v. Hamilton and Mason*," *Dalhousie Law Journal* 28 (2005): 409. For a critique of the failure of the Supreme Court of Canada to examine more fully the issues of race and racism in the *Van de Perre* case, see Lawrence Hill, *Black Berry Sweet Juice–On Being Black and White in Canada* (Toronto: HarperCollins, 2001), 150–72.

Given the central role Gaudreault-DesBiens and Labrèche accord to lawyers in ensuring adequate individual-based evidence, it is reassuring that the book includes comprehensive and compelling guidelines for how to foster strong client-lawyer relationships across divides of power and cultural diversity.[14] Indeed, it challenges lawyers to appreciate the vast disparities in individual lives linked to historical and institutionalized patterns of inequality from the moment of their first encounter with a client, to listen to stories of social disadvantage and exclusion, and to engage actively in seeking to ensure that our justice system is humanized by such knowledge. Furthermore, the authors address the need to take the lessons of social context into account in the internal management of law firms. The authors encourage law firms to hire lawyers from diverse social backgrounds and to accommodate those who are different to ensure their successful integration into the firm. By engaging seriously with questions about how to bring social context into the law office and the courtroom, while respecting individualized justice and resisting group-based stereotyping, this book provides important insights into the continuing challenges of enhancing an equitable, ethical, and just practice of law.

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Véronique Strimelle et (dir.) Françoise Vanhamme
Droits et voix. La criminologie à l'Université d'Ottawa. Ottawa : Les Presses de l'Université d'Ottawa, 2010. 284 p.

Le 14 mars 2012, soit à la toute fin du mandat de Nicolas Sarkozy, le ministère français de l'Enseignement supérieur et de la Recherche a annoncé la création d'une nouvelle section disciplinaire au sein du Conseil National des Universités. Cette nouvelle section est sobrement intitulée « criminologie ». Si l'on aurait pu se réjouir de la reconnaissance institutionnelle d'un espace de recherche aussi riche qu'hétérogène, les porteurs de ce projet de sa création représentent en réalité ce que la criminologie compte de plus conservateur. La création de cette section a alors suscité une mobilisation critique des chercheurs spécialisés dans les sciences sociales consacrées à la police, à la délinquance, ou aux questions de sécurité, mais aussi de l'ensemble du monde universitaire français. En vain, dans un premier temps, puisque la section a été créée et qu'elle ne semblait guère encline à faire une place aux travaux de criminologies critiques ou alternatives ; mais dans un deuxième temps, avec une issue heureuse : le nombre de titulaires s'étant finalement présentés pour constituer la section s'est finalement avéré trop faible, sa création devrait être purement et simplement annulée. Il faut y lire ici

[14] Gaudreault-DesBiens and Labrèche, ibid., 174–80.

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