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SPECIAL ISSUE ARTICLE

Teaching by historicising private international law

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Abstract
This paper proposes a historical contextual pedagogy for private international, which helps students reflect on the impact of the field's legal techniques in different historical contexts. To emphasise the richness of a historical lens, the paper reflects on the development and use of private international law tort rules in a colonial, intellectual and gender historical context. By taking *Phillips v. Eyre* as a reference, the goal is to illustrate how the canonical cases in private international law can serve as entry points towards a broader historical contextualisation of private international law, beyond the doctrine, though inspired by it.

Keywords: conflict of laws; private international law; colonial history; historical pedagogy

1 Private international law as a response to the legal pluralist context

At its most dogmatic, private international law teaching unfolds, as one of my students once confessed, as an LSAT preparation course.[1] We divide the course neatly into a 'general' and a 'special' part and then dive into a long series of legal techniques – often bearing esoteric names like renvoi, incidental questions, characterisation, etc. – which are supposed to settle, through a well-ironed matrix, three main questions raised by any interpersonal interaction spanning across multiple legal systems: (1) Which court has jurisdiction to hear the dispute? (2) Which law (not necessarily that of the forum) settles any rights and liabilities of the parties? (3) Where else in the world and under what circumstances might one be able to recognise and enforce the judgment?

As a usual private international law course runs through this technical matrix for the whole gamut of private law relations (contracts, torts, family law, property), students experience a variety of reactions. Many of them might feel like this is a 'guillotine' (Jitta, 1890, p. 44), a 'chess game' or a 'crossword puzzle' (Lepaulle, 1939, p. 77) or, even worse, a 'dismal swamp' (Prosser, 1953, p. 971).[2] If they cannot express their intuitions in quite these colourful terms, we will comfort them that venerable private international law scholars have come up with them decades or centuries ago. This reaction is entirely understandable. Grappling simultaneously with the multi-faceted cross-border interactions that private international law applies to and with the field's own technical arsenal meant to address these cases' legal implications is no small task. It is often hard enough to appreciate private international law's mere starting point – the fact that a court may end up applying the law of an entirely foreign jurisdiction. As we discuss which law should apply and on what grounds, who should prove the law and what should be the limits of the application of a foreign law that is fundamentally at odds with that of the forum, the picture becomes overwhelming quite quickly.

In part to make this learning process more manageable, textbooks will contain excerpts of a range of cases that state as simply as possible the choice-of-law rules and their exceptions. In the area of cross-border torts for example, the selection might at first include some of the most mundane

[1] LSAT is the exam that students in Canada and the US sit in order to gain admission to law school.

[2] These terms are meant to describe an a priori system of choosing an applicable law, without much consideration for the consequences of the choice.

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exchanges, such as traffic accidents occurring on a trip abroad, but then shift quickly to torts committed by multinational corporations – possibly with the help of local state authorities – in the course of investment operations in developing countries. Because often times the same rules will apply in all sorts of cases under a broad private law category (i.e. all kinds of torts occurring between any parties in any jurisdiction), it is easy to lose track of what is at stake. By the time we start inventing hypothetical cases occurring in Ruritania between A and B, domiciled in X and Y respectively, we have lost all context.

Teaching in this way arguably drains what is most exciting about private international law: the way its techniques purport to organise context. In fact, private international law runs through many fascinating corners of transnational life and raises some of the most perplexing and intriguing questions of philosophy, identity and legal technique in a legal pluriverse that most philosophers have not yet explored (Michaels, 2019).[3]

Almost every private international law case raises questions regarding the boundaries of a legal system, the nature of rights and autonomy across borders, one's belonging to a community or one's allegiance to a law, the legitimate bases of legal and political authority, and many other perplexing questions of jurisprudence (Banu *et al.*, forthcoming 2023). Much of the methodological repertoire of private international law was constructed through encounters with questions of gender – a history that is yet to be written and understood. Private international law questions were raised in cases of emancipation of enslaved people (Horowitz, 1970; Weinberg, 1997), in cases on the extra-territorial application of Nazi laws (Schmitt, 1936; Feist, 1938), in cases on the application of martial law to violently suppress rebellions throughout the British Empire (Kostal, 2005, Epilogue),[4] in interwar and post-World War II work with displaced persons (Banu, forthcoming 2022) and the list could go on.

Although it is possible to criticise private international law for being heavily technical and apolitical (Muir Watt, 2011), in a sense one would be hard-pressed to think of private international law a-contextually. The field is meant precisely to grapple with extremely complicated legal questions set in a legal pluralist context. In a way, private international is contextual, by definition. Because it deals with cross-border relationships that are connected to multiple jurisdictions simultaneously, it assumes the existence of a complex mix of competing values and interests.

2 Searching for the power of private international law's techniques historically

Against this rich legal pluralist context, private international law's techniques are both a peril and an opportunity. They could either mask or expose and problematise the legal pluralist context. In my view, one of the best ways to help students reflect on both sides of private international law's methodology is to teach by historicising the field. Students could gain an understanding of how private international law techniques help produce, reproduce or challenge broader structures of law and power globally. When done well, teaching by historicising private international law could help students practise what Coel Kirkby calls 'wordmaking' in his contribution to this issue. This pedagogical exercise in private international law would offer students a way of thinking about legal methodology that could be transferred to other legal subjects. Investigating the power of legal technique in/through history is a helpful lesson that students could learn precisely in one of the most technical legal courses they are exposed to in their legal education.

If private international law's techniques are meant to help a decision-maker to navigate slowly and thoughtfully through the complexity of the legal pluralist scene, they would have to take seriously – as Bronwen Morgan and Amelia Thorpe illustrate in their own contribution to this issue – laws' 'peopled and place-based specificity'. Therefore, a course in private international law should provide students with the tools to hold private international law accountable for its use of techniques. Students should

[3]Anecdotally Ronald Dworkin was once very interested in conflict of laws. See Dworkin (1968).

[4]For a wonderful account of the history of violence and criminal conduct by a group of Europeans in British India, see Kolsky (2010).

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be empowered to investigate when and why private international law's methodology served as 'a guillotine', cutting ruthlessly through the complex legal pluralist matrix by choosing a law or a jurisdiction in a random, unprincipled way and when it served, by contrast, to organise this complexity in a way that better reveals what is at stake when making a choice.

This type of teaching would move away from private international law's long history of apology (for its techniques) without utopia. Instead, it would move back and forth between utopia and critique (Knop *et al.*, 2012) precisely by revealing multiple historical contexts for any particular transnational legal problem. This is the best that teaching contextually with legal history can offer. Legal history familiarises students not just with the tools of legal reasoning in private international law, but with a myriad of toolmakers arranging those tools in different tool boxes for different purposes.

And because legal history itself is set in a variety of different contexts, it allows us to constantly peer through different windows of law and life and therefore access both utopia and critique – contexts in which private international law's methodology served as a long lens for multiple reflections on the same legal issue or as a curtain to hide all complexity away. To showcase the richness of this lens, I propose that we dip into a whole range of legal historical contexts, from colonial history, to intellectual history, social history generally and women's history in particular, in order to get different perspectives on the value of private international law's methodology for transnational tort matters.

3 Historicising private international law rules for transnational torts

The trajectory of a typical class on private international law rules for transnational torts will depend on the geographic location. But wherever taught, such classes will generally describe conflict of laws rules in this area as a mix of something old, something new and something borrowed, but with an impatience to focus as quickly as possible on the current rules. In some common law jurisdictions (primarily the UK and Canada), we explain that the current conflict of laws rules were written as an attempt to do away with an old tort rule put forward in *Phillips v. Eyre*, known as the 'double actionability rule' (*Phillips v. Eyre, 1869*). With the help of some quotes from more recent cases, we may describe this change as a cosmopolitan triumph. Because of the interpretation of the double actionability rule offered in subsequent cases (*Machado v. Fontes, 1897*), the double actionability rule was allegedly nationalistic, leading more often to the application of the law of the forum, whereas the new rule, leading to the application of the law of the tort, accepts that a jurisdiction has the legitimate authority to regulate whatever tortious activity occurs in its territory (*Tolofson v. Jensen, 1994*). In a civil law jurisdiction, we celebrate the fact that we never had such an old nationalistic rule to discard (though continental Europe had its own, different, variations[5]). In the US, the story is almost the reverse. From the 1960s onwards (*Babcock v. Jackson, 1963*) one could celebrate that the old rule mandating the application of the law of the place of injury gave way to a flexible determination of the applicable law based on the state that had the highest interest in regulating the cross-border dispute.

Students will recite this triumph from the respective old to the new rules having little appreciation for how this change came about and no background context for critical reflection on whether or not this should be viewed as a change for the better. But a focus on the historical development of the rules themselves sets this story into a whole other context. In the following pages I focus on only a small excerpt of that historical background and travel quite quickly from one jurisdiction and one context to another only to illustrate in the limited space available the potential of private international law rules to reveal or mask important dimensions of the context in which they apply. This historical story would of course have to be adjusted to different courses offered in different jurisdictions.

Let us start with *Phillips v. Eyre*. Most students will never find out in a course on private international law who the parties were or what the context of the real-life dispute was. They will however be told that in this case the court ruled that two conditions must be met in order for the plaintiff to be

[5]Carl von Savigny for example argued for the application of the law of the forum for cross-border torts. See von Savigny (1880).

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allowed to bring a suit in England for a wrong alleged to be committed abroad: the wrong must be actionable according to English law and it must not be justifiable according to the law where it occurred (*Phillips v. Eyre, 1870*, pp. 28–29). Subsequent cases interpreted this ruling in a way that did not fully clarify how much this rule leans towards the application of the law of the forum or the law of the place where the tort occurred (*Machado v. Fontes, 1897*). Stated in these a-contextual terms, it is hard to praise or criticise the rule, just as it is hard to know whether it is preferable, according to contemporary law,[6] to apply the law of the place of the tort. *Phillips v. Eyre* was no ordinary case. Edward Eyre was the governor of Jamaica who sanctioned the use of martial law to suppress the Morant Bay rebellion against British colonial rule. He also passed an Indemnity Act to absolve all colonial rulers of responsibility for the atrocities committed against the inhabitants of Jamaica during the violent suppression of the rebellion (Kostal, 2005). Two British subjects resident in Jamaica, Alexander Phillips and Dr Robert Bruce, filed a lawsuit against Eyre demanding compensation for a number of offences committed against them, including assault, battery and false imprisonment. In applying the double actionability rule the court ruled that the Indemnity Act, as the 'local' law of Jamaica, made the tort 'justifiable', even if this tort would have been actionable according to English law.

Against this context it is hard to see how the rule was overly nationalistic or parochial, leaning too much in favour of the law of the forum. The court in effect rejected the application of the law of the forum (i.e. English law) on seemingly cosmopolitan grounds: not recognising the application of the local law in Jamaica would be an 'unprecedented and mischievous violation of the comity of nations' (*Phillips v. Eyre, 1870*, p. 31). As it was bluntly put in the press at the time, even if it were possible to ignore a local law in a colony like Jamaica, 'a colony like New South Wales or the Canadian Confederation would ill bear to find its Legislature treated with less courtesy than those of foreign states' (Pall Mall Gazette, 30 January 1869, p. 2). Indeed, comity motivated the Supreme Court of Canada to depart from *Phillips v. Eyre* in 1994 and ensure that the law of the place of the tort always applies, subject to a very narrow exception when the foreign law contravenes the forum's fundamental values (*Tolofson v. Jensen, 1994*). Unless this exception would have been considered implicated in *Phillips v. Eyre* (and given the reasoning of the court, there is no reason to assume that this would have been the case) both the old private international law rules in *Phillips v. Eyre* and the modern ones would have exonerated Eyre from responsibility.

In fact, just as the double actionability rule, as historian Rande Kostal brilliantly put it, ensured a colonial 'jurisprudence of power' (Kostal, 2005), the modern private international law rules sometimes ensure the post-colonial side of it. Multinational corporations are held responsible to a lower standard of care and for a lower damage quantum according to the law of the place in which they operate, even when committing atrocious violations while depleting the natural resources of developing countries (Banu, 2013). A colonial history lens therefore breaks the mirage. From this vantage point there is more of a continuum between the old and the new law, rather than a miraculous legal reform provoked by a sudden rise in cosmopolitan consciousness.

Maybe we can look elsewhere for hope. After all, we often tell students that private international law was made by scholars, not by judges. Surely the late nineteenth-century scholarly community in private international law must have debated both the political and the legal context of *Phillips v. Eyre* in earnest. But Kostal rightly noted that while *Phillips v. Eyre* was repeatedly cited as a 'leading case' in private international law, 'the treatise writers have not been concerned with its historical antecedents or context' (Kostal, 2005, p. 438, n. 45). Even A.V. Dicey followed suit, although he provided legal advice to the Jamaica Committee organised by John Stuart Mill to demand the prosecution of Eyre (Lino, 2018).

[6]The double actionability rule was prospectively abolished by the Private International Law (Miscellaneous Provisions) Act 1995 for all torts except for defamation. The 1995 Act has been largely superseded by the provisions of the Rome II Convention. However, both the 1995 Act and the Rome II Convention only apply to events occurring after their entry into force.

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In other words, just like the case itself might have masked the political colonial context in which private international law rules applied, the textbooks of the time might have perpetuated this erasure of context and carried it forward into the future. An intellectual historical lens in private international law therefore is not always a good indirect window into the socio-economic and political context (Banu, 2018). But an intellectual historical lens brings a sense of magical abstraction. It allows us to capture a utopian view of private international law's techniques on how they may be used to empower and redress injuries in the transnational realm. It is a counter-post to the heaviness of the encounter with the employment of private international law techniques in *Phillips v. Eyre*. It is, in other words, an opening for the 'hopeful despair' that Debolina Dutta wonderfully charts in her own contribution to this issue.

In 1947 B.A. Wortley, professor of jurisprudence and international law at the University of Manchester, read a paper before the Grotius Society of International Law on 'The Concept of Man in English Private International Law' (Wortley, 1947). In a post-World War II world in which much attention was being shifted to the standing and rights of individuals under international law, Wortley was keen to suggest that English private international law 'may well set an example to the rest of the world' (Wortley, 1947, p. 148). The private international law rules in tort were cited as the crown jewel. If the double actionability rule led more often to the application of English law, this was a good thing, he argued. Applying English law on the quantum of damages reflected the fact that English law 'recognizes rights as inherent in the person, and applies their own ideas of compensation' (Wortley, 1947, p. 161). To accept the American theory at the time that damages should be calculated according to the law where the tort occurred would provide 'too low a standard for human values' and 'result in an unduly restrictive view of common right and liberty, and fail to do justice as between man and man as required by our law' (Wortley, 1947, p. 161).

It would be wonderful to unpack this with students slowly. As Ralf Michaels and Annelise Riles remind us, there are multiple ways of understanding law's technical magic (Michaels and Riles, 2021). From one angle, law's technical magic could engulf the addressee into submission. Faith in law could capture as much as faith in magic, helping to mask the context of power in which law operates. From another angle, law's technical magic could be humble, an acknowledgement of the limits of human thought, a provisional moment of hope bracketing away law's political perversion. In the latter sense, private international law techniques navigate the complex legal pluralist context with an acknowledged legal fiction to make the analysis manageable and concrete – 'as if' the conflict of laws scenario was not grounded in a deep political and cultural conflict but always in full awareness of this conflict (Knop *et al.*, 2012). In the former sense, private international law techniques could fail to acknowledge the political and cultural conflict altogether and trick a reader into accepting the result as inevitable, indeed enlightened by a cosmopolitan ethos. In this sense, private international law's techniques allow multiple avenues of worldmaking and students can take a part in unpacking the options.

There is certainly plenty of arrogance and irony in Wortley's view, but also a sense of increased responsibility for tortious harm. There is both utopia and critique to unpack. It is dangerous to assume that one's own law provides the optimal calculation of damages for tortious harm. The entire framework of private international law is meant to discourage such arrogance (Michaels, 2019). Wortley's statement is also deeply ironic given that the double actionability rule did not lead to the application of English law in Jamaica so, contrary to Wortley's bold assertion, private international law rules did not 'protect the ordinary man from tyranny and abuse of power at home and from the assaults of foreign enemies' (Wortley, 1947, p. 147). To add insult to injury, in the year following Wortley's speech, a Scots guard patrol shot and killed twenty-four unarmed civilians in another uprising, this time in Selangor, the British Protected State in the Federation of Malaya. The UK Supreme Court recently ruled against holding a public inquiry regarding these historical events (*Keyu and others v. Secretary of State for Foreign and Commonwealth Affairs and another*, 2015). The human rights dimension of private international law that Wortley was proclaiming was nowhere to be seen.

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Despite these notes of irony and arrogance, Wortley's human rights speech suggests that courts assuming jurisdiction over a tort occurring elsewhere and applying the law of the forum may ensure that tortfeasors are not shielded from responsibility. That would certainly be the case if courts in highly developed countries took jurisdiction and applied their tort laws to hold multinational corporations committing torts in developing countries to account. Here we come back to the realisation, to be emphasised in teaching over and over again, that localising a transnational dispute in one or another location for purposes of applying a particular law is a deeply consequential exercise. It matters whether the torts of transnational corporations are localised at the place of their headquarters, at the place of the corporation's local subsidiary or at the place where injuries are incurred. These 'connecting factors' between a dispute and a jurisdiction 'come to matter' in the production of legal meaning for cross-border disputes and cannot be picked out of a hat (Kang and Kendall, 2019).

To help students reflect on Wortley's proposition that there may be an empowering dimension to private international law rules we could ponder on two examples: one from Wortley's lifetime and one in which history comes back to bite in contemporary times. In 1910 at the initiative of Jewish social work groups, the National Desertion Bureau was set up in the US to respond to an increasing social problem – that of men deserting their families by relocating to another country. The context generating this problem was multi-faceted and it was going in all directions. European families newly settled in the US had been broken up by war, by the lack of employment opportunities during the depression or by strict immigration rules. European women and children were left without financial support from the only breadwinner. As one social worker wrote in 1932, 'many agencies are replete with such records, and almost fourteen years after the Armistice they do not cease to come' (Zunser, 1932, p. 235).

One legal aspect that compounded the problem was the initial reluctance of American courts to take jurisdiction when European women attempted to bring claims for cross-border maintenance in the US. Sometimes this was due to the fact that the husband (and by association the wife) might have lost their American domicile and other times because of the way in which the dispute was characterised. According to US state law, local welfare authorities had to step in and support American women if their husbands committed the 'criminal' act of desertion. Since local welfare authorities had no such duties towards foreign women, the husband's desertion was considered 'localised' abroad with the consequence that foreign, rather than American, courts would have to take responsibility to hear such claims and offer relief (Wainhouse, 1935; Warren, 1932, p. 468). In other words, this was supposed to be a European problem. American and European social workers, most of them women, employed the private international law methodological toolbox to reshape the debates. They argued that desertion was either a criminal act against US statute or a 'local' tort or a family law matter that is localised in the US from the moment the spouses take domicile in the US, regardless of subsequent changes in domicile outside of the woman's control (Banu, forthcoming 2022). Private international law techniques were deployed as a way of ensuring that Europe and America shared the financial responsibilities for families scattered across borders.

It may well be that this bit of women's history fits Wortley's idealisation of the empowering dimension of private international law techniques. But could this empowering function ever be conceived of in a colonial context? The Morant Bay rebellion was certainly not a case in point. But in 2018 a more recent dimension of colonial history resurfaced when thirty-four individuals brought a claim against the UK government for alleged assaults, beatings, rape and other acts of violence against them from 1956 to 1958 in Cyprus during the uprising against English colonial rule (*Athanasios Sophocleous & Ors v. Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence, 2018*). Most likely on the assumption that emergency powers would have shielded English colonial officers in Cyprus as much as in Jamaica, the court was directly asked to ascertain whether an exception can be made leading to the application of English law, even if the acts had been justifiable under the local law in Cyprus at the time. The court applied such an exception on precisely the grounds that had been pleaded unsuccessfully in *Phillips v. Eyre*. Now the court recognised that the defendants represented precisely the state which made the law that may absolve them from liability and that the tort could even be 'localised' in England rather than Cyprus, because the Crown bore responsibility

for justice in Cyprus. It also noted that the case relied on the basic principle of curtailing state power abuses against its own subjects and that it would be disingenuous to invoke the doctrine of comity since the independent state of Cyprus would welcome the application of English law to redress an injustice done to its citizens. In the powerful words of the court:

> '[W]here a state stands to be held to account for acts of violence against its citizens, it should be held to account, in its own courts, by its own law and should not escape liability by reference to a colonial law it has made itself.' (*Athanasios Sophocleous & Ors v. Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence*, EWHC, 2018, para. 197)

This departure from *Phillips v. Eyre* was short-lived. The Court of Appeals reversed the lower court's decision and ruled that whenever the double actionability rule still applies 'it must remain the general rule; 21st century revulsion at the allegations in this case (if proved) cannot justify an "instinctive and arbitrary" (to use Lord Hope's words in the Kuwait Airways case) departure from it' (*Athanasios Sophocleous & Ors v. Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence,* EWCA, 2018, para. 37). Although the court recognised that

> 'the intentional infliction of harm by the state on its own citizens is inherently repugnant, that is of itself not a reason for ignoring the double actionability rule and holding that the law of the place where the torts were committed has no relevance at all.' (*Athanasios Sophocleous & Ors v. Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence, EWCA, 2018*, para. 44)

Allegedly,

> 'it makes no difference whether the relevant territory is a colony (whose laws are made by the Queen in Council) or a colony or dominion with its own home-grown legislature. The law of the colony in Cyprus is as much a foreign law for the purposes of the double actionability rule as the law of France or the United States.' (*Athanasios Sophocleous & Ors v. Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence*, EWCA, 2018, para. 40)

This is a striking proposition on which to end a historical journey that investigates the role of private international law's techniques. Shouldn't the field's technical arsenal allow us precisely to distinguish between torts occurring 'in a colony (whose laws are made by the Queen in Council) or a colony or dominion with its home-grown legislature' or between an uprising in Jamaica at the height of colonial rule and a regular tort occurring in the Confederation of Canada or between Cyprus and France in 1956? If in interwar cross-border maintenance cases, private international law techniques could be used precisely to show that characterising and localising family desertion has deep socio-economic and political consequences, why not in a colonial context? And if Wortley is right that private international rules can have a deeply empowering function, when might this be highlighted by operation of private international law's techniques? In a colonial context, is it equally available to hold colonial officers to account for rebellions against colonial rule or only for male colonial judges to 'protect brown women from brown men'? (Spivak, 1988, p. 297).

4 Contextualising context

We seem to have come full circle through a historical journey of private international law that places the entirety of private international law rules in tort matters in a whole different light. What is left of the initial matrix of abstract legal techniques that this chapter started with? The matrix is still there, but hopefully by now it looks like a complex set of legal techniques and principles backed by a range of different, sometimes contradictory, considerations. These techniques are still piled upon each other in

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what seems like an orchestrated way, but the order and stability of this exercise fluctuate depending on the context in which they are employed and depending on the goal they are meant to achieve.

Now we can reframe the methodological arsenal of private international law altogether. What might students learn from this detour through history? They learn that in the first step, when courts characterise a dispute, they set in motion one or another set of principles, which has massive implications for the case and the parties involved. Characterising desertion as a tort, a family law dispute or a crime was thought to make the difference between families' starvation or survival in Europe in between the wars and after World War II. In the second step, they learn that determining the relevant 'connecting factor' between a transnational dispute and a particular jurisdiction, such as to enable it to hear a dispute and apply its own law, has enormous consequences for the distribution of wealth, power and resources across borders. Localising the tort in the colony or the metropole or both lowered or raised the degree of responsibility for colonial rule. Third, students learn from history that linking private international law theory to mere a-contextual slogans is dangerous. How could one justify colonial subjugation with cosmopolitan language? It is sobering to remember that British colonial rulers were absolved from responsibility during the many rebellions against colonial rule and that more recently American corporations were absolved from responsibility in the Bhopal disaster, all in the name of the 'comity of nations' (Baxi, 1986).

Perhaps most importantly, students can now grasp the enormous complexity of this field of law, as well as the enormous consequences it produces. So much for neutrality and the alleged apolitical nature of the field. So much for the constantly repeated slogan that private international law does not directly mandate a particular result; it only points to an applicable law. And so much for the perception that if private international law is tied to any particular principle, this is inherently a cosmopolitan one of respect for sovereign equality and comity. Hopefully students would have learnt from this historical excursion that the context in which these general principles are implicated (colonial, post world war, gendered etc.) has (or should have) massive implications upstream, piercing through private international law's entire methodology. From this vantage point, focusing on hard cases is more illustrative than focusing on the mundane cases of cross-border road accidents.

Yet by the time this excursion through history is done, it would be helpful to encourage students to step back and reflect on what one might reasonably expect from private international law's legal techniques. From one angle, one could critique private international law's techniques for not contextualising enough. From another angle, private international law's techniques could sometimes be seen as masking context precisely because they try to contextualise too much.[7] If private international law had stuck to a broad (formalist?) principle of territorial sovereignty, as Thomas Baty for example suggested, might it have been easier to grapple with the colonial context of territorial sovereignty in Jamaica (Baty, 1914)?[8] In other words, maybe comity and characterisation got in the way in seeing the obvious functioning of state sovereignty in a colonial context.

5 Demanding, but slow contextual pedagogy

If one understands private international law as potentially contextualising too little or too much through its techniques, it is clear that examining each case with this duality in mind is challenging historical work. It requires serious commitment from both students and professors to constantly unpack private international law's limits and potentials with every legal case.

Although teaching private international historically should be comfortable because it does not require professors to step outside of their field, it requires them to step into the field in a much more detailed and nuanced way than it is customary in the field. More so than in other areas of

[7]For a discussion of how private international law's techniques created both utopias and dystopias in the history of private international law, see Panel Discussion between Banu R, Michaels R and Van Loon H (2022).

[8]For a similar argument – from a legal realist lens – that private international law techniques often get in the way of obvious ways of achieving justice, see Weinberg (1997; 2005).

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international law, the history of private international law is yet to be written. To encourage professors to write the field's history by teaching it through a historical contextual lens is an enormously exciting proposition, but professors need time, academic freedom and support to rethink the curriculum in this way. Similarly, students need to be allowed to reflect on the complexity of the field's historical development slowly. Less should be taught in greater depth.

Finally, this type of teaching requires a re-envisioning of the learning materials. Unless textbooks were radically redrafted, their value would be limited when teaching contextually. It would be enormously empowering for students to recreate these historical episodes in which private international law operate, through original materials. Students would engage in legal magic in a more direct way. For example, in a class on cross-border torts, they could read some of the original correspondence between colonial officers and Crown officials on the Morant Bay rebellion (Madden and Fieldhouse, 1991), together with some contemporary historical accounts of these colonial events (Kostal, 2005) and a sketch of private international law philosophy (Lambrechts, 1895). This would allow them not only to step into the social context in which these private international law rules operate, then and now, but also to judge for themselves what alternatives were available. Is there an inherent constraint in private international law – maybe linked to sovereign equality – for private international law techniques to operate in the way they did in these transnational tort cases? Have we reflected well enough on what sovereign equality means and how it should be understood in different contexts? Was the operation of private international law simply restrained politically so that nothing could have ever been achieved through the law? Why was it possible to try to make inroads with private international law techniques in one context (transnational spousal support orders in the interwar period) but not in another one (suppressing rebellions against colonial rule)? The point is not for students to answer, but simply to be guided to even ask, these questions. It seems to me that the most promising dimension of contextual teaching is to lead students to ask the right questions, rather than to press them to offer definitive answers by thinking the legal and political complexity away. Teaching by historicising private international law allows these questions to unravel naturally.

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Conflicts of Interest. None

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