

Thomas Wilhelmsson

Contextually Critical

Consistently Critical?

The symposium giving rise to this publication was based on Adam Gearey's impressive account of poverty law as an expression of critical legal scholarship.¹ Inspired by this book, the participants were required to reflect on the role and future of critical approaches to law in contemporary society. As will be demonstrated below, the book offers considerable food for thought regarding several issues related to critical legal scholarship.

In considering the contemporary task of critical legal scholarship, the first question to be resolved is the definition of what counts as 'critical' in this discourse. The participants attending the symposium were described by the organisers as 'critical' lawyers. But what does that mean? It is difficult to discuss the task of critical legal scholarship without having a clear understanding of the definition and scope of this task. So, we need to start with the question: What is 'critical'? What gives us the right to define ourselves as 'critical'?

The symposium gathered scholars from different legal traditions, from the USA and the Nordic countries, in particular. I will, therefore, endeavour to avoid addressing this issue exclusively from the point of view of any one national tradition, as a discussion on a general level is required in order to support and encourage valuable learning across borders. However, it is natural that my own Nordic background colours my understanding of the critical approach and, in particular, of the opportunities arising from that approach. So, despite the general level of discussion, this paper

¹ A. Gearey, *Poverty Law and Legal Activism* (Abingdon and New York, 2018).

can also be read as a Nordic comment on the debate on the contemporary task of critical legal research, as the societal context of the Nordic critical approach to law necessarily differs from its American counterpart.

The question concerning the characteristics of a critical approach is linked with a second question regarding the possible consistency of such an approach. Not only do we need to ask what it means to be a critical legal scholar, we also need to answer the question: Can one be consistently critical, a consistently critical legal scholar? What could 'consistency' mean in this context? My sceptical attitude to the possibility of any meaningful grand narrative on a consistently critical approach may already have been revealed in the posing of these questions; I think critical research would often be more productive and more in tune with reality if it searched for the opportunities provided by smaller legal narratives that could contribute to the shaping of a better world.

I will argue here that the substance of a critical approach must be defined contextually, in relation to the societal situation at hand. As consistency may only be reached on a very high level of abstraction,² it is more important to be able to be contextually critical, in a relevant way, than consistently critical. A useful critique has to take into account both the historical and contemporary context of the society and legal order in question and their change over time. The contextual is, in other words, determined both by spatial and temporal variations. Positions that can be termed 'critical' not only vary from society to society, but they also change over time within each society. The dynamic nature of law and society must be reflected on in critical legal reasoning.

To many of us, this may sound self-evident; however, the relevance of contextuality needs to be stated and analysed further in order to facilitate a fruitful cross-border dialogue. In this paper, I will comment on some aspects of contextuality that need to be taken into account in critical legal reasoning.

Having set the tone, I would like, in the interests of clarity, to add a Nordic *caveat* to the search for an understanding and definition of critical legal scholarship, and emphasise the softness of the boundaries between 'critical' and other approaches. 'Critical' should not be understood as an 'on-off' concept, which includes a particular group of researchers but excludes all others. One should rather describe scholarship as a continuum,

² As Gearey, p. 56 notes: 'CLS and CRT were not finally able to pull together their insights into a coherent ethics of poverty law'.

ranging from writings expressing various degrees of critical attitudes towards mainstream legal research. Scholars may express quite critical, and even radical, attitudes towards the prevailing legal situation without expressly labelling themselves as 'critical'. Therefore, critical scholars should not attempt to isolate themselves in a distinct group playing on a different field than other lawyers, if that means that it detracts from the discourse within the legal community as a whole. In order to have an impact, it is important to connect with and convince those who were not already convinced.³ This open-minded attitude towards crossing the borders of different legal discourses is based on experience from the small and inclusive Nordic societal context, in which critical research occasionally has a discernible influence on mainstream law. Admittedly, the need to establish distinct groupings and movements of critical legal scholars may be greater in a different societal and legal context.

A Personal Query

So why does this issue puzzle me? Why am I juxtaposing 'consistently critical' with 'contextually critical'? A few words on my background may explain my struggles concerning the consistency of critical legal thought, as I am, in fact, speaking of the consistency of my own thought as well. A brief description of how my views have changed over time also reflects the relevance of a changing societal context for the building of a credible critical perspective. Critical legal research must, at least to some extent, be different in a society rapidly building a welfare state, in a society struggling to retain its welfarist tradition and in a society strongly affected by Europeanisation and globalisation.

I pose this issue in a personal form, even though I – nowadays – think that one should avoid using the attribute of 'critical' with reference to one's own work. From my perspective, 'critical' is a lauditive attribute when speaking about legal scholarship and, at least in the Nordic tradition, laudation should be given by others, rather than by the author him- or herself. With such a perspective, to define yourself as 'critical' is akin to describing yourself as 'good' or 'creative' or possessing some other particularly positive quality. So, in principle, I think it is up to others,

³ For example, the movement for an alternative use of the law (*uso alternativo del diritto*) in Italy in the 1970s and 1980s was built on the recognition of the proletarianisation of the judiciary and the opportunities this was seen to offer for a real change in judicial practice.

rather than the author, to define whether a piece really can be considered 'critical'.⁴

It should be noted that my perspective is the perspective of private law. My analysis here is related to my experience in that field. Plausibly, the space for critical reasoning may be somewhat different in private law than in, for example, criminal law or administrative law. While private law predominantly confronts an often relatively diffuse economic power, criminal law and administrative law deal directly with public coercive power. Therefore, the latter need to emphasise formal principles related to the rule of law, such as *nullum crimen sine lege*, more strongly than a fairness-oriented private law. In other words, the appropriate balance between form and substance might, even in mainstream legal thinking, be perceived differently in private law than in administrative and criminal law.

This is not to say that political-ideological issues are not relevant within private law. On the contrary, when I started my work, various approaches seemed to be at the disposal of a critical legal scholar. In Europe, some preferred ideological critique, following the quasi-Marxist *Ideologiekritik*-tradition, while others were inspired by the idea of an 'alternative use of the law'⁵ to reach the societal goals proposed by critical scholars. I tasted the first kind of approach,⁶ but when the second type of critical research was flourishing in the 1980s, I found myself asking how private law could be reshaped in a welfarist fashion.⁷ Even though my own study was limited to the question of how the roles of the unemployed, ill, and those with less property or income could be made relevant in the context of private law (for example, through the concept of *social force majeure*),⁸ at the time I did believe that it might be possible to create a complete

⁴ Compare Gearey, p. 173: 'The radical lawyer repeats or affirms the desire to be a radical lawyer. But perhaps this is a little too high sounding.'

⁵ Good examples, from the Nordics: K. Tuori (ed.), *Rättsdogmatikens alternativ* (Tammerfors, 1988), and from Germany: U. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Neuwied und Darmstadt, 1979).

⁶ Trying to show the ideological functions of the principle of protection of the weaker party in the context of insurance law and, more broadly, of consumer law in the consumer society. In order to avoid too many self-references, I will refrain from mentioning the publications. They are only published in Swedish anyway.

⁷ *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law* (Dordrecht, Boston and London, 1992).

⁸ Op. cit., Chapter VII.

and coherent welfarist code of private law. After all, these were still the heydays of the Nordic welfare state, when income differences were ever diminishing, and social security was continuously improving.

However, the growth of the welfare state halted and some shrinking occurred, even in the Nordic countries. The vision of a coherent welfarist legal system became less realistic – and was, in any case, probably impossible, due to the inherent contradictions in the ideology of the welfare state. Still believing in welfarist values, however, I felt compelled to acknowledge the fragmented nature of societal change, implying that law could also develop quite incoherently, moving simultaneously in various directions. Primarily working with tort law issues at the time, I advocated small good narratives of legal change in an uncertain and fragmented societal context as the solution.⁹ This underlined the personal moral responsibility of lawyers, including the academic ones, for the choices made in these narratives. But there was a weak spot in this approach: How to define which narratives on legal change could be counted as ‘good’, in the particular spatial and temporal context?

In 1995, Finland and Sweden became members of the European Union. This created a new space for critical discourse, both defensive (do not limit our welfarist approaches!) and offensive (how can we use learning from other legal systems to improve ours?). My answer was basically the fragmented one: I preferred a free movement of legal ideas rather than (to my mind) a backward-looking and static European codification.¹⁰ The national learning processes were at the centre of these ideas, but again, the understanding of when the learning could be considered ‘good’ was lacking. It was still a puzzle.

Needless to say, the European project is now in difficulties. Maybe today, when the EU is torn by Brexit and various right-wing nationalist forces, the symbolically ‘good’ stance would be to promote joint European development of private law, rather than national learning?

This short personal overview illustrates both the historical contextuality of critical choices, and the Nordic approach to legal critique. In a period of growth of the welfare state, it was natural for a critical scholar to try to contribute to the discussion of what a welfarist private law should

⁹ *Senmodern ansvarsrätt* (Helsingfors, 2001).

¹⁰ ‘Private Law in the EU: Harmonised or Fragmented Europeanisation?’ (2002) 10 *European Review of Private Law* 77.

look like and how to support legal development in this direction,¹¹ and equally natural to meet the subsequent decline of the welfarist project with a combination of defensive and diverse critical legal strategies. Europeanisation, again, required taking a stand on how to promote social values at the European level¹² and whether, for example, the suggested European codification of private law should be regarded, from the critical perspective, as a calamity or an opportunity.¹³ In the Nordic setting, the critical responses to these societal changes were formulated in dialogue with other legal actors, with a subsequent impact on the development of private law.¹⁴

Critical as Social

The term 'critical' is commonly used in discourses on science in general, as a positive or even necessary quality of all research. In the value-catalogues of universities, the word 'critical', or some derivative thereof, is a recurrent expression.¹⁵ The foundation of the scientific attitude is that science should continuously question established truths and be prepared to reassess established knowledge when new results so demand. In this sense, all serious research is and should be defined as 'critical'. From this conceptual perspective, to be regarded as serious, mainstream research should also be based on a critical epistemological attitude.

However, when speaking about critical legal scholarship, the term 'critical' assumes more than just a critical epistemological attitude. While, of course, such scholarship must be epistemologically critical, and indeed is often characterised by a high degree of self-awareness regarding methodological issues, the usual definition of critical legal scholarship requires

¹¹ See e.g. R. Brownsword et al. (eds.), *Welfarism in Contract Law* (Aldershot, 1994).

¹² See e.g. M.W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague, 2006).

¹³ Even though many critical researchers were negative to codification, there were also codification-positive views: U. Mattei, 'Hard Minimal Code Now – A Critique of "Softness" and a Plea for Responsibility in the European Debate over Codification', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague, 2002), p. 215.

¹⁴ For example, the concept of *social force majeure* was discussed in a research paper funded by the Nordic Council of Ministers, see J. Bärlund, *Sociala prestationshinder i konsumentavtal* (NÄK-rapport 1990:6, Copenhagen, 1990), and introduced in the Finnish consumer protection legislation, see Consumer Protection Act 5:30(3).

¹⁵ For example, in the strategic plans of University of Helsinki, 'critical thinking' and 'critical mind' have been presented as a core value of the University.

something more. Criticism of established standpoints is a necessary, but not sufficient, feature of an approach that we would classify as critical legal study.

‘Critical’ in the legal context has a societal meaning. The term is used to point at the outwards relationship between law and society, rather than inwards at the methodological discourse. In other words, for the critical legal scholar, it is the societal substance of his or her work that determines the degree of ‘criticalness’. ‘Critical’ is related to societal critique, usually concerning a particular society at a particular time, as part of the legal analysis.

The critique may have, and indeed often has, methodological consequences related to new and creative understandings of how law could be used as a means to remedy problems revealed by the societal critique. The focus is often on the internal contradictions or tensions within law,¹⁶ such as between various concrete legal materials, between different basic values or between different levels of the law,¹⁷ and on how these contradictions may be used for the purpose of reinterpreting the legal order. However, even with this emphasis on renewal of legal methodology, the societal critique is still a *sine qua non* for a study that wishes to be classified as ‘critical’ in the perspective adopted here. Even if the methodology is radical, the research can hardly be described as part of critical legal scholarship as usually understood, if the ethos of improving society in a ‘social’ direction is lacking.

In the following discussion, I take a societal definition of critical legal scholarship as a starting point. Admittedly it is very vague, but it is sufficient to place societal issues in the spotlight. At least it is shared by the various national critical schools referred to in this paper, including the Nordic perspective.

Having defined critical legal scholarship as scholarship with a particular and conscious societal focus, the obvious question when discussing the tasks of contemporary critical scholars concerns the content of the societal commitment. Clearly, this commitment must relate to societal justice, in an attempt to improve, in some way, the position of the weak

¹⁶ My personal favourites from different legal traditions were R.M. Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 563, U. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Neuwied und Darmstadt, 1979) and from the Nordic countries, L.D. Eriksson, ‘Utkast till en marxistisk jurisprudence’ (1979) 11 *Retfærd* 40.

¹⁷ See e.g. K. Tuori, *Critical Legal Positivism* (Aldershot, 2002).

and the vulnerable, similar to that which in American discourse is called 'poverty law'. But is this the only acceptable approach for a scholar wishing to be called 'critical'?

Critical Across Borders?

The question of what counts as 'critical' is challenging, even when posed within a national legal discourse. This challenge is multiplied if one attempts to define 'critical' detached from any particular national legal order.¹⁸ There is an evident risk of ending up comparing approaches that have completely different tasks. However, in a symposium such as this, bringing US and European scholars together, we must arrive at some form of joint understanding to make a dialogue possible, even though such understanding can offer only a vague basis for the discussion. However, experience shows us that critical scholarship is able to move across borders, despite the challenges.¹⁹

It goes without saying that, in a societal perspective, a 'critical' stance in one society may be rather mainstream in another. The 'critical' in each case is dependent on the context of the surrounding society. For good reasons, Adam Gearey stresses that his 'approach to poverty and alienation relates to the time and place studied in this book'.²⁰

Even when we limit the critical theme to cover only poverty issues, the concept of 'critical' can be given many interpretations. In the US, Bernie Sanders' views are probably defined as critical enough.²¹ But he has identified the Nordic societies as one of the models for his vision, and indeed many of his proposals, such as tuition-free higher education and a healthcare system available for all, are a reality in these countries, as they are in many other European countries as well. However, it does not seem to require a very critical attitude of a Nordic researcher to defend the status quo. It is important to defend the achievements of the welfare

¹⁸ I had the privilege of participating in the famous US-German meeting of critical scholars in the heydays of critical studies in which deep differences of understanding came to the fore (e.g. on the role and meaning of "theory"), see C. Joerges and D. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Baden-Baden, 1989).

¹⁹ A good illustration of the cross-fertilisation of continental, Nordic and common law perspectives can be found e.g. in the conference volume T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Aldershot and Brookfield, 1993).

²⁰ Gearey, p. 5.

²¹ Gearey, p. 145.

state, but should one really call a purely defensive strategy, defending the situation at hand, 'critical'? Obviously, the fights taken by a Nordic critical researcher will, to a considerable extent, concern different issues than the stances taken in a US context.

The importance of contextuality does not, however, relate only to the differences between the Nordic (or European) and US societies. Even in very similar societies, the traditions and political constellations may result in different understandings of concrete issues. To give a topical example, in recent Norwegian political discourse some attention was focused on the issue of whether schools should offer all pupils a (free) warm lunch every day – with the left proposing, and the right vehemently opposing (some even calling it 'socialism'). From a Finnish perspective, this is a strange debate: Even though Finland is a very similar country to Norway (albeit not as super-rich), the warm school lunch has already been offered for 50 years, and everybody, even the right-wing, finds it natural. It would not require a radically critical stance to defend this practice.

Legal traditions, as well as societal traditions, shape the context in which critical strategies are elaborated. Looking in particular at the role of academic lawyers, one cannot avoid taking into account their different positions in different legal traditions. The great divide between common law and so-called civil law countries certainly has an impact on the kind of critique that is able to have the desired societal impact. The important role of academic lawyers in developing what the Germans call *Stand der Lehre* (the established view) makes the creation of an alternative legal dogmatics with real impact on the development of law perhaps more realistic. New concepts developed by critical legal scholars, and used in both academic teaching and in legal practice, can make a real difference in the Continental setting. This may be one reason why, for example, in the last few decades, there has been a strong current among more or less critical scholars on the Continent focusing on fundamental rights and human rights as a tool for developing private law.²²

In particular, from the Nordic perspective, it is easy to emphasise the particular role of academics, including critical ones, in shaping and de-

²² See e.g. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (München, 2007) and C. Mak, *Fundamental Rights in European Contract Law* (Austin, Boston, Chicago, New York and The Netherlands, 2008).

veloping the conceptual structures of law. The Nordic legal tradition,²³ combining a Continental style of legal reasoning, in which concepts and structures play an important part, with the absence of a comprehensive and well-structured civil code, tends to place academic legal scholars in an important role as concept-builders. It is therefore hardly surprising that Nordic critical scholarship has focused heavily on concept-building.

In other words, even though we can certainly learn from each other, across borders, how to develop the critical analysis, the goals of the critical endeavour are necessarily contextual, related to the prevailing situation in the society in question. In addition, in the multi-layered European context,²⁴ critical strategies need to relate to the fact that some issues can easily be moved forward on a national level, while others may require EU-related strategies, which consider European society as a whole.

A complicated pattern of critical learning emerges. At best, we can continuously learn from experiences across borders, by recognising the value of a free movement of legal ideas. However, in order to avoid the alleged difficulties and even fruitlessness of legal transplants,²⁵ such learning has to be contextually informed. Societally critical thinking can be properly fed by experiences across borders, only if the experiences are disseminated with due regard to their societal context at a certain point of time. Learning is not the same as passive borrowing.

It is worth noting a particular contemporary challenge in this context. Much of societal discourse today circles around various understandings of nationalism and globalisation. Even though internationalism was a key element of the 19th century socialist movement, contemporary critical researchers have often, and understandably, been involved in fighting (liberalist, trade-driven) globalisation, alongside various kinds of anti-globalisation movements.²⁶ This puts us in an awkward position,

²³ Defined and described as a particular legal family by K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford, 1998), p. 277.

²⁴ See e.g. U. Neergaard and R. Nielsen (eds.), *European Legal Method – in a Multi-Level EU Legal Order* (Copenhagen, 2012).

²⁵ See on legal transplants A. Watson, *Legal Transplants*, 2nd ed. (Athens, Georgia, 1993), and on the critique against this concept, underlining the difficulties in moving a legal solution from one societal context to another, e.g. P. Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52 and G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

²⁶ Mentioned also by Gearey, p. 141 fn 12.

where societal debate is structured around the concept of nationalism. How can one formulate a critique of the negative features of a laissez faire globalism, without being trapped in a more or less extremist right-wing nationalist discourse? On the other hand, how can one defend the self-evident value of an international outlook on societal issues, without sliding into an acceptance of the negative societal consequences of an unlimited globalisation? Again, the answer, if there is one, must be sought in the features of the actual concrete issue in its context. We require smaller, more analytical narratives than a generally phrased contradiction between globalisation and nationalism as such.

Consistent Societal Goals?

It is easy to see that we must have at least partially different critical aspirations in different countries, but also, within each jurisdiction, the definitions of 'progressive' and 'radical', and thus of 'critical', vary across the political spectrum. Even if, flattening the analysis considerably, we include a politically leftist element in the 'societally critical', excluding, for example, right-wing populist movements from our understanding of 'critical', many issues remain on which various stances can be taken within a critical paradigm.

We certainly agree on the need to fight poverty, but the basic approach to the issue may vary anyway. Some may find it most effective to focus on the poorest and their support, while others might think it is societally more sustainable to build a welfare state based on the principle of universalism, meaning that welfare services should be freely available for all (free schooling, free health services, etc.). For example, the Nordic approach to welfarism emphasises the importance of universal services that contribute to legitimise the welfare state within all layers of society. One may even ask to what extent is it acceptable to speak about 'the poor' as one clearly defined, and thereby easily stigmatised, group? Does that not already represent a misuse of stigmatising power?²⁷

This can, of course, be termed a matter of technique or tactics, the ultimate goal being the eradication of various aspects of poverty. The question becomes trickier when discussing societal goals, other than the

²⁷ In other words, one might question whether one really should speak about a 'poverty line' (Gearey, p. 172) or about an 'institutional divide' between the poor and us (Gearey, p. 177)?

fight against poverty alone. What about climate change? And the loss of biodiversity? Should fighting these not be the primary goal of any critical movement today?

Many have read the IPCC reports²⁸ and their warnings, and even more disturbing is the analysis of the Anthropocene by a multidisciplinary group of researchers that shocked the world a few years ago.²⁹ Climate change combined with a rapid loss of biodiversity deeply challenge the contemporary way of life. Shouldn't the critical human mind now concentrate on how to save the world and humanity from itself?

And how can this goal be combined with societal goals related to equality and the combatting of poverty? What is the right path to choose, if the (short-term) interests of the poor are in conflict with the sustainability goals in a specific situation? Is it possible to find a socially-just sustainable solution? Obviously, the concrete context must be decisive.

Critical researchers are not alone in struggling with the difficulty of societal goal setting in the complex contemporary society. In many quarters, a popular starting point for ethical reasoning today is the 17 Sustainable Development Goals adopted by the UN in 2015.³⁰ As well as critical scholars, many others are bowing towards these Development Goals. Even big investors, advertising sustainable investment, approach the issue using the UN Sustainability Development Goals. Can this approach be called 'critical' in our understanding of the word, and does it matter whether it is called so?³¹ The way in which the goals are operationalised in various contexts obviously determines our assessment.

In other words, it seems that a focus solely on general substantive goals does not bring us very far in our search for a consistently critical stance. It is certainly easy to agree on general catchwords, such as equality, eradication of poverty and sustainability, but the picture becomes blurred as soon as the discussion continues at lower levels of abstraction.

Perhaps the solution should not be sought in the substantive goals alone. A 'procedural' or 'personal' element might be needed as well. Such an inroad is offered by Adam Gearey. Activism and equal cooperation

²⁸ <https://www.ipcc.ch/>.

²⁹ On the Consensus Statement first issued in 2013, see A.D. Barnosky et al., 'Introducing the Scientific Consensus on Maintaining Humanity's Life Support Systems in the 21st Century: Information for Policy Makers' (2014) 1 *The Anthropocene Review* 78.

³⁰ <https://sustainabledevelopment.un.org/?menu=1300>. The first goal is: 'End poverty in all its forms everywhere'.

³¹ Compare R. Nader, *'Only the super-rich can save us!'* (New York, 2009).

with the poor are decisive elements: 'The theorist is no longer a spectator, but one whose point of view comes out of doing and being with others: an activist.'³² In addition to the substantive goal of fighting poverty, the procedure by which this goal is approached, 'being-with' the poor in an activist fashion, is presented as a hallmark of a critical legal scholar. Putting the focus in this way on procedure and personal engagement rather than substantive content is firmly in line with the claim that the 'critical' is not primarily characterised by the substantive consistency of the approach, but can rather be found through a contextual assessment of the activity.

For decades, a prevailing claim in sociological discourse has been the increasing complexity and uncertainty, even chaos and ambivalence,³³ of late modern society. Ulrich Beck's analysis of the risk society³⁴ and Anthony Giddens' presentation of the consequences of modernity³⁵ are well-known classics. The outcome of causality chains in an increasingly complex world is ever more difficult to predict, and such epistemological uncertainty is, in the present century, underlined by the effects of globalisation, digitalisation and rapid technological advancement – not to mention the COVID-19 pandemic. The difficulty is exacerbated by a growing ethical ambivalence due to the declining authority of tradition and ethical expertise. Such a state of uncertainty requires societal decision-making that can flexibly adapt to concrete experience of the effects of previous decisions. Management of societal complexity must foster an experimental culture of decision-making. This affects legal decision-making as well. There has been much discussion in legal quarters on the role of law in a state of growing uncertainty. In an uncertain and complex world, law must also be able to adapt, to 'learn' from experience.³⁶ As

³² Gearey, p. 172. See also p. 171: 'Being with' is the ongoing attempt to deal with an historical legacy from the perspective of a future that is not necessarily limited by the past'.

³³ Z. Bauman, *Modernity and Ambivalence* (Oxford and Cambridge, 1991).

³⁴ U. Beck, *Risikogesellschaft* (Frankfurt am Main, 1986).

³⁵ A. Giddens, *The Consequences of Modernity* (Cambridge, 1990).

³⁶ A few examples out of many discussing the law as a learning mechanism: A. Ogus, 'Risk Management and 'Rational' Social Regulation', in R. Baldwin (ed.), *Law and Uncertainty, Risks and Legal Processes* (London-The Hague-Boston, 1997), p. 139, H. Collins, *Regulating Contracts* (Oxford, 1999), p. 8, and E.R. de Jong, 'Tort Law and Judicial Risk Regulation: Bipolar and Multipolar Risk Reasoning in Light of Tort Law's Regulatory Effects' (2018) 9 *European Journal of Risk Regulation* 14.

learning from experience is contextual, law and legal reasoning have to become more contextual as well.

This certainly applies in the case of critical legal activity too. Critical legal work has to be experimental. A softer form of ‘procedural’ approach to critical legal scholarship than the ‘being-with-activism’ referred to above is to consciously take an experimental position on the ways in which our societal goals may be achieved. We need to continuously learn what works to the benefit of the weak and the vulnerable in various contextual settings.³⁷ We must accept that our small, good narratives are experimental.

Legal Critique as a Means of Controlling and Counterbalancing Power

The same questions that I have posed above, concerning the various and conflicting goals that a critical scholar may pursue, could be posed by any political activist and decision-maker. There is nothing particularly legal in them. Is there anything more that can be said from a legal perspective?

A crucial task of law is the control of societal power. According to the principle of rule of law, societal power has to be legally controlled. As we have already learned from Montesquieu, law is supposed to set the boundaries for the use of political and administrative power. A fair law, aimed at the protection of weaker parties, should also counterbalance economic power. Respect for democracy and human rights requires societal power to be controlled by law. Law is expected to provide a bulwark against the arbitrary use of societal power.

A critical scholarship is a scholarship that takes this task of law seriously. A critical scholar strives to use law to effectively counterbalance other societal power and to question unfounded societal power structures, in the interest of the weak and the vulnerable. Of course, this includes the need to criticise legal power as well.³⁸

This goes for private law too. Private law may, in many ways, be used as a tool to limit arbitrary use of societal power, be it economic, political or

³⁷ Compare Gearey, p. 146 on LatCrit methodology stressing ‘collective engagement and experiments’.

³⁸ As Gearey, p. 48 notes, a radical lawyer should seek to ‘challenge and delegitimise the legal system from within’.

administrative power. Some even see opportunities for ‘counter-hegemonic interpretation’ of private law to be a part of a ‘counter-hegemonic project’ that could profoundly change the power structures of contemporary society.³⁹ Others may, perhaps more realistically, regard private law as offering instruments that can occasionally, depending on the context, help suppressed groups challenge societal power structures.

By way of example, tort law often appears as a useful tool for controlling societal power.⁴⁰ Some tort lawyers even claim that tort law ‘has been transformed into state control of personal and corporate conduct through private law’.⁴¹ This is, of course, not news for an audience from the US where punitive damages and class actions have made tort litigation an important tool, both for legal development (for example, in the area of product liability) and for the earnings of well-paid lawyers. Tobacco litigation is a good example. Increasingly, tort law is used in this way in Europe as well, and tobacco cases have also been brought to courts here.⁴² This certainly opens interesting comparative perspectives for critical private law.

The use of tort law to control problematic behaviour of economic players offers a good example of the fragmented and contextual nature of possible legal advancement. Not only is the assessment of negligence necessarily contextual, as it offers the legal players a range of argumentative patterns relating to the concrete nature of the business at hand, but in many countries there is also a curious oscillation between the main principle of negligence-based liability and stricter forms of liability related to more dangerous activities,⁴³ and this oscillation is often rather contextual as well. It is difficult to convincingly raise the critical perspective above

³⁹ U. Mattei and A. Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (Cheltenham and Northampton, 2018).

⁴⁰ Mattei and Quarta, p. 121 even claim that ‘[t]here is perhaps no area of private law that shows more potential for transformative power than tort law’.

⁴¹ G. Brügge-meier, ‘The Control of Corporate Conduct and Reduction of Uncertainty by Tort Law’, in R. Baldwin (ed.), *Law and Uncertainty, Risks and Legal Processes* (London-The Hague-Boston, 1997), p. 57, at 59.

⁴² On tobacco litigation, see G. Howells, *The Tobacco Challenge: Legal Policy and Consumer Protection* (Farnham, 2011).

⁴³ See e.g. F. Werro and V.V. Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law* (Bern, 2004). This opportunity is included also in the Principles of European Tort Law (available at <http://www.egtl.org/>) Art. 5:101 (1): ‘A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.’

the contextual assessments, without resorting to such broad generalisations that they become almost empty.

Tort law is useful not only as a controller of economic power, but it can be, and has been, used against political and administrative power as well. Theoretically interesting in this context is the question as to what extent omissions by the public authorities – and in particular omissions with regard to the well-being of weak and vulnerable groups in society – can be remedied through private law action. To what extent can political claims for a ‘better welfare state’ be addressed as claims for compensation under private law? Interesting examples can be given from the Nordic countries in which constitutional guarantees regarding social and health services have been referred to as a reason for finding public entities liable.⁴⁴

But again, to what extent is this ‘critical’? A private law action with a relatively narrow perspective is not necessary an optimal method for decision-making concerning the distribution of public resources. It is possible that those who would most enjoy the use of liability procedures are the well-resourced groups in society. Even though the universalist principle characteristic of the Nordic welfare state might imply that some fruits of the actions of well-resourced groups may benefit weaker groups as well, it is not feasible to assume that the well-resourced would have much interest in taking action in areas that are of particular importance to the weakest, such as the homeless and unemployed. The critical potential then lies in the existence of action groups or ‘poverty lawyers’ who would be prepared to take such action on behalf of, and together with, the weak.

In particular, from the Nordic perspective, it is also necessary to note that all societal power, as such, is not intrinsically bad. Societal power is bad when used in a wrongful way or in instances that lack sufficient legitimacy to use power. In discussing this aspect, one should bear in mind that, generally, the state and public administration are viewed in quite a

⁴⁴ See e.g. the Finnish Supreme Court decision 2001:93: As a municipality according to the day care legislation was obliged to offer daycare service as a public task, a municipality was found liable in tort when the plaintiff during ten days was not offered a day care place, even though the municipality argued that it had taken extensive measures to remedy the lack of sufficient number of day care places. Interestingly, the Appellate Court in its decision did not only refer to the daycare legislation, but also to the Finnish constitution, according to which the public sector is obliged, as defined by law, to guarantee each and everyone sufficient social and health services.

positive light in Europe, and in the Nordic countries in particular.⁴⁵ The state is more trusted here than it may be in the US. Even though this should by no means lead to the adoption of an uncritical stance against public authorities, it certainly affects the place of the critical legal view in the tension between economic and political power.

As the examples here show, when private law is examined as a device through which economic, political and administrative power may be controlled, the possibilities for critical advancement must also be assessed contextually. The focus on private law as a power-controlling mechanism does not relieve us from the basic question: What is 'critical' in each context?

Contextually Critical: Learning-by-Doing

In attempting to sketch a conclusion, I will start from the obvious: It is not important whether you define yourself as 'critical' or not, what counts is what you actually do. And the assessment of the critical value of your doings, in particular, of your research, can be made only in relation to the context in which it is presented and performed.

The question of whether one can be 'consistently critical', therefore, seems to be based on a wrong ideal. It means longing for a coherent view of a Utopian law that cannot be attained and that would be alien to the reality of society and the real needs of its members. Contemporary societal uncertainty, both epistemological uncertainty with regard to the causal chains in a complex societal environment, and ethical uncertainty, requires a learning law that is prepared to experiment and continuously learn from concrete experience.

This applies to critical studies as well. A fruitful critical position must be able to take its stand in context.⁴⁶ It must be prepared to revise its standpoint according to experience. It must be able to admit that its assessments can go wrong. Instead of a grand critical narrative on legal change, we need small, experimental narratives, based on contextually

⁴⁵ For example, the general trust in the courts in the Nordic countries is higher than in most other countries, see e.g. The 2018 EU Justice Scoreboard, Figures 9 and 11: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_factsheet_en.pdf.

⁴⁶ Compare Gearey, p. 137 on the new property law scholarship: 'the only way to understand poverty law was to examine its various practices against a background of theoretical plurality'.

relevant critique. From a pragmatic Nordic perspective⁴⁷ at least, this seems to be the natural approach.

This requires an aspiration to be as transparent as possible regarding both the societal and the legal context to which the decision-making and the critique relates. A critique should not accept decision-making hidden behind formal legal constructions, but expose it to realistic contextual analysis that makes it possible to learn from experience.

The transparency and the contextual nature of the critique should facilitate a dialogue with the whole legal auditorium, not only with those defining themselves as 'critical'. Indeed, rather than speaking just to the already convinced, one should emphasise the moral responsibility of every lawyer. In the contemporary, uncertain, complex and fragmented world, with its increasingly flexible and fragmented law, the responsibility of each legal professional necessarily becomes more personal. The lawyer cannot completely hide behind a traditional formal legal conceptuality, but is forced to meet real societal issues in their societal context.⁴⁸

Such personal moral responsibility requires the lawyers, including the critical ones, to understand their changing and multi-dimensional roles in contemporary society. In Nordic discourse, the Danish legal sociologist and theorist, Jørgen Dalberg-Larsen, has described the role of a good contemporary lawyer very well. According to him, such a lawyer should combine the best parts of three historical roles: '1) from the classical jurist role: respect for the individual and his/her liberty; 2) from the role of the welfare state jurist: efforts to further general aims and values; and 3) from the postmodern role: the idea of basing one's work on the realities of contemporary life and its legal affairs, and on one's own choice.'⁴⁹ Obviously, in different contexts, different parts of this role-description may dominate the approach of the enlightened and critical lawyer.

As Zygmunt Bauman has convincingly argued, the contextual nature of decision-making in an era in which the actors are 'liberated' from the straitjacket of large ethical systems forces decision-makers to face moral

⁴⁷ On Nordic pragmatism, see S. Blandhol, *Nordisk retspragmatisme: Savigny, Ørsted og Schweigaard: om vitenskap og metode* (København, 2008).

⁴⁸ As the presentation of the book of Gearey underlines, 'the book argues that at the heart of both critical and liberal thinking is an understanding of the lawyer as an ethical actor'.

⁴⁹ J. Dalberg-Larsen, 'The Legal Profession in a Changing World', in T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot, 1999), p. 99, at 112–113.

issues 'point blank, in all their naked truth'.⁵⁰ Moral decisions have to be made on practical grounds, without philosophical assurances.⁵¹ Moral roads are not made with the help of any pre-existing map, but we make the roads by walking them.⁵²

Critical lawyers should contribute by opening and walking paths of law in directions that support the weak and the vulnerable, and the future of our planet. To find the right paths, the lawyer has to know the surroundings (the context) in which he or she is walking.

⁵⁰ Z. Bauman, *Life in Fragments: Essays in Postmodern Morality* (Oxford and Cambridge, 1995), p. 43.

⁵¹ Z. Bauman, *Intimations of Postmodernity* (London, 1992), p. xxxiii.

⁵² Z. Bauman, *Life in Fragments: Essays in Postmodern Morality*, p. 17.

