JURISPRUDENCE

This essay is still to be written. The form it will take will be to advance a "third way" in jurisprudence between the general division made between positivism and natural law in Anglo-American jurisprudence. It is a sociologically-based conception, although different from Roger Cotterrell's work on sociology and law. My basic point is that jurisprudence must be applied to the functioning both of the substantive law and, more significantly for my essay here, of the legal system in general. That is, it must be applied to the day-to-day operation of the entire justice system of courts, lawyers and so forth. Now this is not new ground in relation to the sociology of law, to critical theory or even to Habermas's most recent work on the practical functioning of law. What I do mean that is different is a conception of law as being political; that is, to do with the allocation of public resources and the observation of public officials.

In this sense I want to reinterpret the role of law away from the idea of it being positively sovereign, or based on a moral grundnorm in natural law, and instead being something which stems from the people. In democratic societies the law must draw its authority from the people. The only legal orders to think of law as stemming from the people in this way have tended to be Marxist states who looked to their revolutions as the moment at which law acquired this birth in the collective consciousness of the people (even though for purists the law ought to have withered away).

In democratic societies the notion of the rule of law should now be understood as requiring that all people are equal before the law and therefore that the legal system and its officers are servants of the people, whereas the historical development of the law as the monarch's diktat is still in the language when the positivists talk about the law as being "sovereign" issuing commands as though a form of king. Law comes from the people. Understanding the true impact of that statement has profound ramifications for a judiciary who must now understand themselves to be servile rather than powerful, a civil service which must remember the responsive nature of good bureaucracy rather than its power, and so on. A justice system which serves the people is a justice system which educates the people as to the rights, which makes access to rights as easy for the poor as for the rich and well-advised. It is a truly radical notion built on equality of access; it is not simply a question of recognising that laws come from Parliament and blah, blah, blah.

This is the thesis behind *Towards a Just Society* and my policy work for the Labour Party in opposition: I intend to return to it in the future.

Positivism versus natural law

Getting beyond "positivism versus natural law"

Law stemming from the people

The limits of jurisprudence

The detail of the discussion in this part is predicated on one simple premise: in the absence of sufficient access to justice it is not possible for jurisprudential theory to provide an adequate account of the nature and administration of law. The points made in the introductory essay to my book *Towards a Just Society* about restricted access to justice and to legal services mean that law is something which is done *to* ordinary people and not something which is a tool,[1] or a contract,[2] or a system[3] which is in some sense owned by ordinary people. Rather, law is outwith their grasp: it is too expensive for them and too closed from them, Therefore, law cannot be a system which it is important to consider in jurisprudential terms before it has been considered in political terms.

Law is political in the sense that it involves the imposition of judgement and the exercise of power over disenfranchised citizens. In that sense it is less important to consider the technical or philosophical nature of law than it is to account for it in political terms. In this part, the discussion will attempt to set out a political theoretical account of law, rather than a jurisprudential account. It is possible to explain even a coercive legal system in which citizens are disenfranchised in jurisprudential terms. However, it is hardly useful if the result of that analysis is simply an acceptance that some citizens are disenfranchised. Law in the UK is primarily an issue of politics and power in a changing world.

To illustrate this point the analysis will consider a suitably dialectical account of the legal system in a social democratic context. MacCormick's essay *Legal Right and Social Democracy*[4] seeks to explain the history of the term "social democracy" and its relationship to law by juxtaposing Hume's account of property rules on the one hand, taken together with libertarians like Hayek, Nozick and even Pushkanis, with the socialist account of law identified in Marx and in Rawlsian social contract theory.

MacCormick identifies the term "social democracy" as one which has been used by Marxists but which was latterly appropriated by European welfare state socialists, and (he must acknowledge) which has more recently been claimed by the rejuvenated centre-left typified by the Blair administration. He identifies four principles standing at the heart of social democracy: that social justice cannot be realised through market institutions, that the state therefore has a role to play in economic life, that civil rights and liberties are

[1] Sartre, *Critique of Pure Reason*, (London, Verso,).
[2] Rawls, *A Theory of Justice* (,).
[3] Luhmann, *The Differentiation of Society* (,).
[4] MacCormick, "Legal Right and Social Democracy", *Legal Right and Social Democracy*, (Oxford - Clarendon Press, 1982), 1-17.

nevertheless of great importance, and that the inclusion of property rights among those liberties negates the possibility of a collectivist reorganisation of society. This conception of social democracy is advanced as the best one available, conforming to a respect for the rule of law and "legal right".

In MacCormick's account Hume "treats of justice as the virtue we exhibit when we strictly respect other people's legal rights, especially their rights over property".[5] Human beings are perceived to be primarily individualist but with a necessarily social element.[6] For Hume, property rules are required to be applied universally, regardless of any individually unjust result of such application. Further, the distribution of such rights have no basis in egalitiarianism on the realpolitik grounds that such a policy would be impracticable, inefficient and pernicious. The benefit of this approach is that it is the rule of law which is the basis of government, rather than a discretionary and consequently dictatorial system. Hayek has made the link[7] in this thinking with Kantian ethics - that is, that individuals ought to be free to act within the constraints of law. The alternative would be rigid government by reference to principles of ad hoc fairness which would made citizens subject to the discretion of the arbiters of fairness in that context.

The core of Hume's argument, as taken up by Hayek, is that individuals are free because they are equally constrained and unconstrained by law. At the heart of this position is the understanding that all individuals are equal before the law. In theory, that is the case.[8] Law applies evenly in theory in that judges apply it without grace or favour. In practice, nothing is further from the truth. Citizens who are unable to afford a lawyer, or who are not sufficiently educated about the rights to which they are entitled, are less equal before the law than those citizens who can afford lawyers or who have access to the necessary knowledge.

The anti-thesis, which MacCormick identifies, is the Marxist thesis that equality before the universally-applied law is no guarantee of equal access to social goods. In its place is suggested a form of decision-making and justice allocation which is based on collectivist principles. Again, in the absence of the conditions upon which this thesis is predicated, it does little for the ordinary citizen. The Marxist position requires that there be a proletarian revolution which introduces the collectivist structures under which law with wither away. More generally, the form of social justice sought by this thesis (broadly an equality of outcome considered below) requires that no citizen is empowered differently from other citizens. Under the legal system as currently composed citizens are differently empowered because of their different access to the justice system.

Thus MacCormick's project is to correlate the "Whig thesis" (based on liberty before the law) and the "Marxist thesis" (based on a revolutionary, egalitarian distribution of

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[5] MacCormick, *op cit*., 2.
[6] Hume, *Enquiries concerning Human Understanding and concerning the Principles of Morals*, ed. Selby-Bigge and Nidditch (Oxford, 1975).
[7] Hayek, *Law, Legislation and Liberty - The Mirage of Social Justice (Vol. 2)* (London, 1976).
[8] Aside from a more difficult argument about the political machinations which cause some people to benefit from those legal rules and other people who do not benefit: that is, any right for A imposes obligations on B not to interfere with A's right, thus advantaging A in comparison to B.

power). MacCormick has a different sense in mind when he says "Justice is not teleological but purely and simply procedural".[9] The more interesting sense for this discussion is that justice is to be isolated in its procedural aspect. This practical focus returns the analysis to the void which separates the citizen, and the disputes and problems of her lifeworld, from access to advice, knowledge and representation. In short which separates her from justice.

It is not proposed to pursue the detail of MacCormick's argument from there. Nor is it intended to pick out MacCormick from other jurisprudents for any reason other than that he develops a workable notion of social democracy - albeit, not one that is favoured in this text, as will emerge below. The core point is that jurisprudence is a logically posterior question to the issue of access to justice as considered in the following analysis of the political loadstars of a feasible strategy for access to justice.

[9] MacCormick, *op cit*., 8.