Natural Law and Critical Theory

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David McIlroy blogs on Natural Law Theory ahead of giving the 12th Richard O'Sullivan Memorial Lecture at the Institute of Advanced Legal Studies in London, on 24 October.

Introduction

A cursory glance at the history of English legal philosophy would seem to indicate that natural law theory and critical theory are opposed. In the eighteenth century, the natural law theory of William Blackstone was close to being the official legal theory of the British constitutional settlement following the Glorious Revolution. Jeremy Bentham's

utilitarianism, with its grand project of reforming and rationalising English law, was the critical theory of its day. Bentham sought to bring reason to bear on the confused, illogical and unscientific state of the judgments of the common law that Blackstone so lauded. Natural law theory is inherently conservative and reactionary; critical theory is radical and progressive.

On natural law theory

In fact, natural law theory goes back far beyond William Blackstone, to Aristotle in Greece and to Jewish prophets in Israel. The family of natural law theories includes thinkers as diverse as Cicero, Augustine, Aquinas, Grotius and Kant (though the absence of any women from that list is to be noted). What natural law theories have in common is the assertion that there is an objective standard against which law is to be measured. As Fergus Kerr puts it: at the heart of every natural law theory is the core commitment 'that in some sense or other the basic principles of morals and legislation are objective, accessible to reason and based on human nature.' (*After Aquinas*, p.98). Understood in this way, to describe a theory as a natural law theory is to make a judgment first about its methodology, for it is from the search for objective principles of law and morality that a natural law theorist's conclusions come.

On critical theory

Critical theory depends, for its purchase, on the assertion

that there is *something wrong* with the status quo. The gender pay gap matters because it is wrong that men are paid more than women for doing the same jobs and/or because it is wrong that more of the top jobs go to men. White privilege matters because it is wrong that, in all sorts of ways both visible and invisible, BAME people are disadvantaged. The ineffectiveness (or is it complicity) of liberal regimes of human rights with hyper-capitalism matters because it is wrong that the incomes of a few billionaires continue to grow whilst those of the proletariat, the precariat and now the petit bourgeoisie decline.

Theorists making and supporting such critiques mean more than the current arrangements are not to their liking. The objection is meant to be stronger than: "I don't happen to like what you are doing to me". The force of the critique is not that if its validity is not recognised there will be violence on the streets. The claim of such critiques is that the status quo is *unfair*, that a system which silences or stifles the voices of those it routinely disadvantages, is *unjustifiable*.

It is no answer to respond to complaints about the gender pay gap by denying women the right to vote; it is not acceptable to reply to complaints about white privilege by introducing apartheid; it is iniquitous to react to complaints about expanding inequity by allocating votes in accordance with wealth. Legal systems founded on each of those principles: votes for men only, votes for whites only, votes allocated to or bought by property owners, have (and do) exist. Relativism cannot save them. "That's just how we do

things around here" is not a reason for regarding Gilead in Margaret Attwood's *A Handmaid's Tale* as anything other than abhorrent.

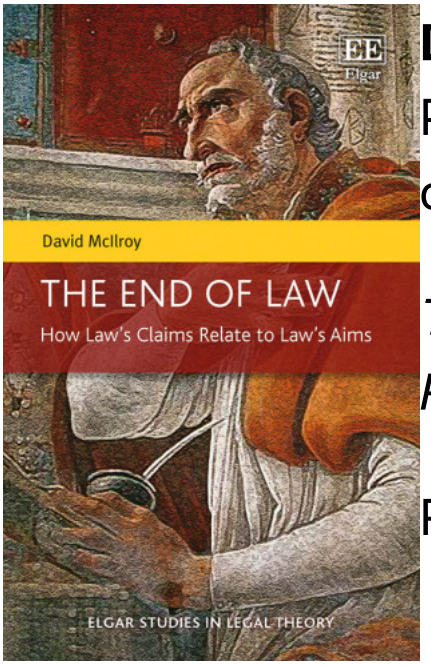
Conclusion

If reason and objectivity are the measure of law, then Bentham's theory was just as much a natural law theory as was Blackstone's. Bentham and Blackstone disagreed about the correct standard against which English law should be measured, they disagreed about what made for human flourishing, and they disagreed about the extent to which English law promoted their preferred vision of human flourishing. Beneath their very significant disagreements, however, lay a common commitment to the view that English law should promote human flourishing, that English law should be judged by the extent to which it promoted human flourishing, and that this judgment was to be made objectively and rationally.

Critical theory and natural law theory need one another. Critical theory needs to be based on an assertion that the *status quo* is, objectively, wrong. To be coherent, a critical theory must assert that, even though its advocates are writing from a particular perspective and may only see part of the truth, it is *wrong* for what they have exposed to be disregarded. The challenge which critical theories pose to natural law is to expose the limitations of the perspective from which natural law theorists have been writing. Too many natural law theorists (including Bentham) have

jumped too quickly from the premises that the basic principles of law and morality are accessible to reason to the conclusion that they have provided the definitive account of them. Critical theories remind natural law that our situatedness and unconscious biases mean that any theorist's account of natural law can be no more than an adumbration, in need of revision in response to voices not yet heard.

Dr David McIlroy, Visiting Professor at CCLS, Queen Mary University of London, will be giving the 12th Richard O'Sullivan Memorial Lecture at the Institute of Advanced Legal Studies, London, on 24 October 2019. Places can be booked via Eventbrite or by emailing editor@lawandjustice.org.uk. In the lecture, Professor McIlroy will be discussing themes from his new book 'The End of Law: How Law's Claims relate to Law's Aims' published by Edward Elgar.



David McIlroy, Barrister and Visiting Professor, CCLS, Queen Mary University of London, UK

The End of Law: How Law's Claims Relate to Law's Aims is out now.

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