# On *Institutions of Law*: Introductory Remarks, by Neil MacCormick



It is obvious that there is an institutional aspect to law that invites attention through the prism of some appropriate philosophical methodology. How much attention this aspect deserves is, however, controversial. Ronald Dworkin dismisses this 'sociological' feature of law as being of no real interest to philosophers of law. He opines that the vital underpinning of a comprehensive understanding of law must be a grand theory of justice in which are integrated sub-themes such as those concerning distributive justice, retributive justice corrective justice and justice in exchange. Substituting for this an explanation or analysis of the concept of institutional normative order is opting for what is boring and rather obvious, and omitting what is fundamental to understanding law as a whole or any particular branch of it.

I agree that I need a broader theory of justice than that which *Institutions of Law* includes, but fall back on the excuse open to the author of a multi-volume series on a single theme. ('Law, State, and Practical Reason' is my overall theme.) My theory of justice is now stated *Practical Reason in Law and Morality*.[1] On the other hand, I reject the proposition that explanatory work on the institutional nature of law – and what we mean by 'institutional nature' – is either pointless-because-obvious, or indeed boring. *Institutions of Law* is a work in four parts. The first ('Norm, Institution, and Order') has an explanatory purpose; the second, ('Persons, Acts, and Relations') an analytical one; the third ('Law, State, and Civil Society') a synthetic one, and the fourth ('Law, Morality and Methodology') an evaluative one in various dimensions of value.

So far as concerns the explanatory part, one can safely say that very few people who have though or written about law in at any rate the last hundred years have been at all inclined to deny that it has an institutional aspect (in perhaps more than one sense of the term 'institutional'). But most have either thought this too obvious to need any explanation, or, perhaps, have thought it already adequately explained via Hart's 'union of primary and secondary rules' or Kelsen's theory of 'legal dynamics' or something of the kind. For me, however, much as I have learned from both Hart and Kelsen (especially Hart), I do not find their explanations satisfactory. Pressed to the point of explaining actual cases and situations, they break down. We do need something better than either finally achieved.

Starting from the idea that human beings are norm-users (since they are speaking animals) before they can possibly become norm-issuers or norm-analysts, and developing thus the Hartian insight about the 'internal aspect' of human rule-oriented behaviour, one can explain what norms are and what 'normative' means. Considering possible human conduct (e.g., standing in a spontaneously formed queue) where people interact on the basis of mutual beliefs about each other's behavioural orientation, one can understand how each thinks others ought to, and probably will, behave. From this also, we can construct an idea of 'orderliness' in conduct as distinct from disorder, orderliness that results from reciprocal observance of essentially similar beliefs and dispositions of different persons. Hence one can understand normative order, in this case of a purely customary or conventional kind.

Next, however, one may consider how in some social setting the management of some service may include (for example) management of the queuing behaviour of customers in a railway station or airport or delicatessen. (Perhaps there is a numbered roll of tickets and each new arrival takes a fresh consecutively numbered ticket and waits for the number to be called or electronically displayed.) This involves an at least two-tier normative practice, one that authorizes queue-managers to tell people the rules they must follow here, and to enforce them by only serving those who observe the rules. The normative order of the queue is thus institutionalized.

Institutionalization on the grand scale occurs in the state and other large-scale organizations. Because states purport to, and to a considerable extent do successfully, monopolize coercive force in the territories over which they claim jurisdiction, the institutional normative order of the state can have a unique influence in contemporary human life and thought. As legal pluralists correctly insist, however, the state is not by any means the

[1] Oxford: Oxford University Press 2009

only, or an all-purpose all-important theatre of law, not even from the point of view of legal professionals involved, for example in human rights law or in international commercial law. It is however an important theatre and deserves to be taken seriously as such.

To describe it briefly, there are institution-agencies of the state that in various ways are responsible under a constitution for issuing new rules and repealing old ones. There are others responsible for seeing to the execution of rules validly made. There are yet others that adjudicate upon alleged breaches of or failures to implement properly the rules that have been made. This they normally do in the light of a body of interpretative precedents themselves established in prior judgements of the adjudicative institutions. The constitution under which they act, however formally established, has itself ultimately to be underpinned by a customary or conventional norm accepted by the personnel of most of the institutions and most citizens as well. This custom is to the effect that the constitution must be implemented and respected, for if this is not a prevailing attitude the state cannot function coherently. Here, one finds an analogue of Kelsen's *Grundnorm*, not of Hart's 'rule of recognition'.

This is neither boring nor obvious, and without some such an account one cannot begin to comprehend the body of state-law which the courts (the adjudicative institutions) apply using interpretative arguments of various kinds. Certainly, such arguments are ideally guided by some attractive overarching conception of legal justice such as Dworkin seeks to place at the heart of jurisprudence. But this does not reduce the explanatory (or, in a weak sense,[2] 'sociological') elements in the explanation to redundancy.

I claim one can explain the essential character of a certain kind of law widely pervasive in human society by unpacking this 'explanatory definition': 'Law is institutional normative order'. Am I then open to attack for the very use of a definition of this kind at all? It is very hard to see now that H LA Hart's objections to the use of definition as an aid to theory have much convincing force. As a goal of theorising, definitions are of course too slight, but as tools of explanation they can be genuinely useful if deployed appropriately. One test-bed for checking the adequacy of the explanation is to see how much it helps explain.

To see what it achieve in this way, one should scrutinize the analytical part of *Institutions of Law*. Discourses of lawyers and many non-lawyerly discourses about law use a network of interrelated concepts and technical terms like 'persons', 'duties', 'rights' obligations', powers', 'immunities'. Many of these terms and the concepts they name are also in use in broader normative discourse beyond the range of institutional law – in ideal moral discourse, for example.

An analytical approach to elucidating the meaning of such terms is one that seeks to see how they all interconnect in linkages of mutual implication or opposition, or by way of enabling change at one level so as to confer a dynamic character on the whole conceptual network or framework. This is a kind of exercise in conceptual grammar or even (as is sometimes said) 'logical grammar'. It requires a reflexive inquiry into the norms of the discourse we engage in when we are discussing the legal rights and duties of persons, or their acquisition of property or their immunity from arbitrary arrest, or … . This can be a relatively abstract discourse, or, in a lawyer's chambers trying to solve a client's legal problem, an intensely practical one. The complexity of life under highly developed systems of law guarantees also that the network one analyses is a dense and thickly concatenated one. Part II of *Institutions of Law* aims at such an analysis.

If the explanatory part did its work well, it will have made possible a clear and illuminating account of law's conceptual framework showing networks of mutual implication and the like – which at this level are indeed far more important than any essay into definitions of terms. This will not involve a slavish reproduction of everyday speech about law. Rather, it will to some extent have a reforming or at least a tidying-up purpose, showing how lawyers

[2] From a sociologist's point of view, bare observations about institutions would seem very pre-theoretical, and requiring theoretical construction to come within the domain of the sociological properly understood. So the Dworkinian-sociological is indeed sociological only in the weak sense of amounting to some kind of pre-theoretical 'raw data'. The approach embraced by legal-institutional theorists is to theorise institutions within jurisprudence in the hope of creating a serious bridge across two cognate disciplines, and constructively linking legal and social theory.

might use their special common terminology with a higher degree of accuracy than under the terminological compromises that daily life sometimes calls for. Nevertheless, analysis must respect ordinary legal speech as the basic data from which to start, and it must be faithful to its implicit grammar. The critical element will, however, be stronger in relation to earlier attempts at similar analyses (Hohfeld's or Hart's, for example) where these seem to have missed their mark, or badly distorted the 'basic data' with no compensating gain in achieved new clarity.

Analysis, as its name implies, breaks things down. It takes a complex conceptual framework and examines each component in relation to every other. It therefore needs to be complemented with synthesis. How do atomic concepts build up into complex molecular wholes, and how does this map on to ways of seeing law and divisions of legal practice? One way to look at this is to take well known branches of law, such as Public Law, Human Rights Law, Criminal Law and Private Law (and use the latter as a grab-bag for all those branches of law that bear on the 'private sector' of a market economy, hence not separating out such sub-sets as consumer law, commercial law, labour law, or family law). This enables one to take a large view of the relations of Law, State and Civil Society.

Public law plainly has to do with the structure of the state and with its raising and spending of revenues necessary or desirable for the performance of state functions. Under the prevalence of social-liberal or social-democratic ideals and ideologies it is at least desirable and perhaps obligatory for the state to attend to matters of distributive justice among citizens and to provide the basics, or more than the basics, of a general system of social welfare. Thus public law can be associated both with principles of effective and efficient organization of governance and with distributive justice. In analytical terms, a great deal of public law concerns empowerment of institution-agencies charged with the various tasks of modern government. Typically, but not exclusively, powers of this kind are unilaterally exercisable. But they must be exercised for general public goods, not for the private good of those who, on behalf of the institutions, take the initiative in activating the powers vested in them. Typically, but not exclusively, the powers exercisable in private law differ in both respects.

Human Rights law in the primary present understanding of Human Rights, affects 'vertical' relations between citizen and state rather than 'horizontal' relations among citizens. It confers wide immunities upon citizens protecting them from potentially oppressive exercises of state power and in general confers complex rights in relation to states of being (like remaining alive) or states of affairs (e.g., no criminal penalties without prior fair trials). Hence it forms a bridge between general public law and criminal law, for criminal law is also an area in which citizens may face oppressive interventions by the state, not all of which are backed up by true claims of retributive justice. Ideally, one seeks a system of criminal law that does adhere rigorously to the requirements of retributive justice, with fair and objective prosecution services working through independent courts that fully respect the presumption of innocence in favour of all accused persons, but that punish appropriately those who are in the end convicted of crimes. Such a system is one essential background condition of the establishment and maintenance of peace and civility among persons and thus enables the society comprising a state's citizens to develop into genuinely civil society. There is much else that falls within the province of criminal law, as the thesis of the 'moral substratum' of criminal law developed in *Institutions of Law* tries also to show. Nevertheless, it is important when taking a broad view of law and society to acknowledge the essential part criminal law does play in securing and maintaining the civility among citizens that makes possible the existence of civil society. Thereby it also helps establish conditions in which, given an appropriate body of private law, a commercial market economy can also flourish.

In private law, justice in exchange ('synallagmatic justice') prevails so far as concerns dynamic interchanges in markets. When things go wrong, the corrective justice of civil remedies comes to the fore. But the overall distribution of property and resources that results from the workings of markets in goods, labour, services, and moveable and immovable forms of capital is quite undesigned and hence the issue of distributive justice lies largely outside the scope of private law. Large scale class-actions based on strict liability for harmful conduct, sometimes involving heavy punitive damages, may in some jurisdictions (chiefly in the USA) introduce substantial redistributive elements into the domain of private litigation. Yet this can often seem to exacerbate a sense of distributive injustice as between those who succeed in

coming within the ambit of such a many-party claim and those who, similarly harmed in other contexts, do not. Of course, one cannot too simply assign the task of distributive justice to public law, retributive justice to criminal law and corrective justice to private law by way of a simple and unquestioned division of legal labour. For each has elements of all aspects of justice in it.

Taking a broad view, however, the main engagement of state law with distributive justice comes through the taxation system and the welfare and public service elements dealt with by public law. The main engagement with retributive justice is through criminal law, and with corrective, through private (or 'civil') law. The sustenance of the state is achieved through public law primarily; the most essential foundation of the civility of civil society lies in a satisfactory and reasonably well-working system of criminal law implemented through uncorrupted and efficient police, prosecution services and criminal courts. The market economy in turn depends on a similarly satisfactory system of private law that makes available machinery for enforcement of contracts, for securing of property and for compensating for harm achieved. This is done through the civil courts as instruments principally of corrective justice. There is perhaps some danger of over-simplification in trying to establish a large view of this kind, yet on the other hand in some contexts under-simplification can be as great a barrier to clear understanding as over-simplification.

I turn now to the evaluative part and to final issues of method and methodology. The facts that criminal law has a moral substratum in popular or conventional morality and that different aspects of justice are engaged in different branches of law by no means determines the content of a state's law in any very confining way. For the issue of what justice requiresin any of the domains we have considered and the issue of what is a satisfactory form of economy are the perennial issues of legislative politics and are continuously in controversy in democratic (or even partly democratic) political systems. There is no single justice that is *the* justice of law; there are rival conceptions of justice that contend for temporary mastery through legislative politics and ultimately through judicial interpretation and application of law. These processes are of course central to the achieved institutionalization of state law as one particular manifestation of institutional normative order.

By contrast, moral argument, though it may address institutions, especially legislatures but often also courts, depends at base on the autonomous commitments of individual moral persons. In moral argument, people are autonomous; they are their own source of law-like imperatives or norms. These they can deploy in purely personal and social contexts or also in political ones. But not all views can prevail politically. Some become institutionalized as part of law in force for the time being, others do not. Moral discourse is essentially autonomous, discursive among equal discussants, and non-institutionalized. It therefore follows that law as institutional normative order and morality understood in terms of autonomy are quite distinct conceptually though mutually influential practically.

Whether such an understanding in terms of autonomy is correct is a serious question, and the main one for the discussion in Oxford on 8 December 2008. I make a further attempt to re-state the case for this view in the fourth volume of the quartet on 'Law State and Practical Reason', *Practical Reason in Law and Morality*. If it is correct, it follows that one tenet of the legal theoretical stance known as legal positivism is true, namely that law and morality are conceptually distinct from each other. A quite different question is whether there are any moral constraints on what can possibly be classified as genuine law. I think there are, and have come close to sharing the view of Robert Alexy and Gustav Radbruch – there are extremes of injustice that negate the existence of 'law' even where some of the normally necessary and presumptively sufficient conditions for existence of law are present. But why and how can such an outer limit be set in moral terms? Why hold that the normal conditions for law-ness are defeasible in extreme cases? Why say that institutionalization is only presumptively sufficient for legal existence and validity?

There are both theoretical and (connectedly) practical reasons for holding this.

Theoretically, we start from the observation that understanding law synthetically, under such a heading as 'Law, State, and Civil Society', requires us to see how aspects of justice are implicit in the rules and principles and practices of the various branches of state law taken as a whole. Law exists to serve justice and peace and to promote the common good and the cause of civility. What this overlooks, however, is the problem of the 'law' that no one

is willing publicly to avow. The Nazi's anti-Jew Nuremberg Laws were open and published and vilely discriminatory, but there was a kind of public accounting given of them by the regime – expressed also in Hitler's *Mein Kampf*. When it came to the great crime of shipping Europe's Jews to death camps and there killing and incinerating about 6 million of them, the public record was silent. All was achieved by largely secret, at any rate unpublished, administrative decrees. The administrative institutions were empowered by some means to do as they did, and they acted with hideously consequential efficiency. Was this law in action?

Nothing constrains a legal theorist to continue counting as 'law' whatever institutionalized enactments there may be, however secret and lacking in public avowal by their authors, however on their face irrational, however lacking in any discursively statable principle of justice. Such defects of governance can properly be treated as defeating conditions for law. Where they are found, the presumptive sufficiency of institutional rule-making for law does not hold good and neither need nor should be sustained. In such circumstances, there may be kind of institutional order, but any true normative as distinct from brute coercive character is lacking from what is done, certainly in extreme cases like those we have cited above.

In 'real time' in the 'real world' this theoretical absence of lawfulness may not make a practical difference. Brutal dictators will continue brutally to dictate. Nobody will be safe from arbitrary treatment, or worse. But bad regimes eventually come to an end, and what is to be said then? Do we have to say that bad things were done but were legally done at the time? Or can we conclude that the worst of the bad things (at least) were never done under anything better than a pretence at legality which cannot protect the perpetrators from some due legal responsibility after the restoration of conditions of (better) legality? This seems the better answer – not all pretended legality is the genuine article, and simple institutional say-so is not alone enough to erect into legality whatever the institutions say at a given time under any circumstances, no matter how cruel and oppressive.

In this quite restricted sense, the extremely unjust 'law' is no law at all. It is never better than pretended law. It may purport to be law, but those who lie outside the malign sphere of the then governing powers should not countenance it as any kind of 'law'. Those who take this stand are not after the event cancelling the legality of something that was once really a law, they are denying the correctness of ever counting it as having at any time been truly law.

Here, I make a use of the 'focal meaning' approach of John Finnis that differs from his use of it. We share the view – rather, I learned from Finnis the view, which I gratefully adopted – that in all matters of practical human concern there is a point to what we do and thus in domains of human activity some instances are more focally instances of the domain in view than others are. Law is an example. Where institutional normative order exists in a way that broadly serves ends of justice and the common good according to some reasonable conception of these, and where law helps to secure the conditions of civility and a viable economy, there one has 'law' in its focal meaning. Many are the examples of legal systems that fall short of this ideal condition, and some at least are thoroughly corrupt even if not yet across the extreme limiting line into non-law.

That line lies, for me, at the point at which instruments of government do not even purport to, or cannot do more than pretend to, serve any conceivable and discursively statable far less arguable conception of justice and common good. For Finnis, it appears that the issue is not one of what purports to be the case, but of what is the case. Deviation from focal meaning (but how far deviating?) tends to un-law, in Finnis's schema; in mine it is the total failure even to address the concerns of 'focal meaning' or a fortiori active opposition to them in some partisan cause that defeats the pretence at 'law'. Of course the world of legislative politics is a world of rival views on justice and the common good. Those who think divorce should be permitted or abortion allowed in certain circumstances differ from those who think both should be prohibited and arguments rage around such issues, with different outcomes in different countries. But those who disagree, disagree about what is just, and each has a well-argued case for the position advocated. The same can be said about most big issues concerning consumer law, the welfare state, the liability of corporations for crimes and so on. A theorist who insists that nothing is law in the way of institutional order unless it expresses some statable conception of justice does not propose a single template for all law, but

acknowledges a great range of arguable possibilities. That, for me at any rate, is quite enough in the way of relativism, and as far as it is either necessary or desirable to go in the way of positivism.

Yet on one understanding of the term 'natural law', it is not a 'natural law' position either. For the 'ideal code' version of natural law is as firmly rejected as the out and out 'anything can count as law' version of positivism. In such a universe of false oppositions, a post-positivist stance such as that suggested here in repetition of the point in *Institutions of Law* seems much preferable.

A final word on methodology: A theory of law that dealt with topics and things other than those that ordinary lawyers and ordinary citizens concern themselves about and talk about as law would be a very absurd sort of enterprise. We are tied to the discourses that we try to clarify and understand better. But they do demand better understanding. They do not speak to us clearly and unequivocally as though already incorporating some ideal theory. Inevitably, therefore, there is a 'constructive' element in any effort to produce an explanatory, analytical, synthetic and value-relevant overall account of law. What is produced is (or anyway ought to be) clearer and more informative than the 'raw data' that are available to begin with. It builds upon prior attempts at theorising much the same data, but tries to construct a clearer picture. To be an attractive account of its subject matter, it must convey some sense of the point and value of the whole enterprise when it is working well, and that is inevitably a point of possible controversy. We cannot escape such controversy, nor can we escape the task of constructing (as distinct from merely finding) an account of law in the light of what we propose as its point and value.

So much for *Institutions of Law* (2007). The theory of law so expounded is not advanced just for its own sake. *Institutions* is the central book of a quartet. The institutional theory is applied to other questions in the other volumes. States and nations, and the issue of the continuing utility of the concept of sovereignty, especially in the European Union, are the concern of *Questioning Sovereignty* (1999). The dynamics of applying institutional law and the modes of argumentation and interpretation that are required for this form the topic of *Rhetoric and the Rule of Law* (2005). How reasons are engaged without actions and activities, and the issue of moral autonomy and our capability to pursue the good while observing the constraints of one's obligations, including obligations of distributive justice, and one's engagements, are the themes of *Practical Reason in Law and Morality* (2009). A comprehensive understanding of 'Law, State and Practical Reason' requires no less than a body of work with this range. It is an open question whether the quartet does succeed in conveying such a comprehensive understanding in a satisfactory way, but I hope the attempt will have proved to be at least worth the tribute of close and critical reading by those who seek such understanding.