CLAUDIO MICHELON JR.

MacCormick's Institutionalism between theoretical and Practical Reason

Neil MacCormick's untimely passing last spring has prompted an avalanche of tributes both to the man and to the theorist. The number, sincerity and the depth of sorrow expressed in those tributes bear witness to a life spent trying to further everyone's understanding of law and politics, including his own. His legendary intellectual generosity poured out of himself in seminars and lectures, in his writings, and in his willingness to comment on everyone's ideas. This attitude sprung from a deep-seated conception of academia as a collective effort carried out by means for different forms of interaction between seekers after the truth. His greatness as a theorist sprang from his potent theoretical voice; his greatness as a person prevented him from seeing that voice as, in any sense, special. But special it was.

This paper attempts to identify some of Neil MacCormick main contributions to the contemporary debate in legal theory and to locate his efforts in legal theory's own "history of ideas". I have no hopes of being thorough. MacCormick has written about most aspects of moral, legal and political theory, ranging from proposing innovative interpretations of Adam Smith and Herbert Hart, to the foundations of private property and torts law; from sovereignty to legal reasoning; from the philosophical conception of institutions to the notion of the rule of law. Instead of attempting to present a comprehensive view of his contribution to legal theory, I shall focus in what follows on the field to which he contributed more systematically for more than three decades, to wit: the relation of legal reasoning, legal theory and politics.

An appropriate account of MacCormick's conception of legal reasoning and of its connections to legal and political theory supposes an understanding of the theoretical environment in which this understanding was formed. In his *Legal Reasoning and Legal Theory*, MacCormick seeks to offer a solution for what many consider to be an intrinsic insufficiency of legal positivism. The attempt to tackle that shortcoming of positivism, even if carried out in a spirit not entirely inimical to positivism, has progressively distanced MacCormick from his positivist forbearers and contemporaries. A good way to understand

that trajectory is to start by identifying this alleged insufficiency of positivism. And that alleged deficiency is better perceived in the canonical presentations of epistemic positivism by Kelsen and Hart. Simply put, that deficiency, which is apparent in both Kelsen's Pure Theory and Hart's analytical positivism is that epistemic positivism offers very little help to the legal decision-maker or, more broadly, to the practitioner. Neither has it offered the secure basis for a legal methodology or for a theory of legal argumentation.

The very sparing comments on methodology made by Kelsen in chapter 8 of the 2nd German edition of the *Pure Theory*, are clearly attempts to detach theories of legal interpretation from positive law. In the standard interpretation, these remarks state that each legal norm establishes a frame within which many different and competing interpretations are acceptable. However, the choice between those possible interpretations is not an act of cognition, but an act of will. In other words, a certain degree of interpretation (cognition of the positive law) might help to identify possible interpretations, but a choice between the possible interpretations is not guided by interpretation of the law, but (in relation to law) is to be understood as an act of will *creating* another norm. To use one of Kelsen's favourite distinctions, the derivation is not static, but dynamic.

This usual interpretation of chapter 8 would be enough to perceive the main message of a Kelsenian theory of interpretation: the will to create a norm, and not knowledge of the content of the superior norm, is the relevant element of legal "interpretation". After all, Kelsen never tired of saying that law is a dynamic, not a static, normative system, where norms are created by the will, not by understanding. I would like to propose an even more radical interpretation. In one of the most overlooked passages of chapter 8, Kelsen states that:

"Here it is to be noted: By way of authentic interpretation (that is, interpretation of a norm by the law-applying organ) not only one of the possibilities may be realized that have been shown by the cognitive interpretation of the norm to be applied; but also a norm may be created which lies entirely outside the frame of the norm to be applied[1]".

I believe we should take this passage seriously. Kelsen is stating that the *legal* organ can actually create a new norm which goes beyond the "frame" given by the superior norm. But how could that be, if the superior norm is the only source of legal authority of the organ itself? Wouldn't that imply a contradiction? I believe not. Kelsen's Pure Theory is not conceived by him as part of practical reason. He is trying to present a theory of how to construct a truly scientific explanation of certain aspects

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[1]   KELSEN, H. (1967) *Pure Theory of Law* (Berkeley, University of California Press), 354.

of the world[2] and, as such, the explanations of the legal scientist are always going to be *ex post facto*. There are certain observable acts of violence performed by certain people against other people. Those acts could be understood causally (from the point of view of, say, sociology, or neurology, or perhaps even physics), or they can be understood as "due" (from the point of view of imputation). An exposition of Brazilian law, Italian law or Scots law is an explanation of those acts of violence that already happened in the same way that an explanation of a particular kind of cell by biology supposes the existence of that cell.

Now, acts of violence are, of course, highly contingent. If courts start ordering acts of violence (i.e. issuing norms) outwith the scope of the superior legal norm on which the scientist sees the ultimate ground for their authority, it just so happens that the fundamental norm postulated by the legal scientist as the ultimate imputative ground for the act of violence performed is not an adequate explanation for the acts of violence of those particular people (the system's officials) against others (those subject to them). That is why, from the point of view of the pure theory of law, courts (and indeed legal officials, without the sanctioning of courts) can act outside the frame provided by the norm. The frame is a scientific explanation of certain facts in the world, not a guide for action. It refers to the past, not to the future.

Incidentally, that is the key to interpret Kelsen's puzzling statement that efficiency is not a *condictio per quam*, but simply a *condictio sine qua non* in relation to the *Grundnorm* (and, consequently, to the whole legal system). I confess that for years this passage sounded to me like an unwelcome concession that Kelsen had to make in order to limit the scope of freedom of the scientist who postulates the fundamental norm (otherwise, what would stop the scientist from postulating that, say, the will of his mother is to be taken as the fundamental norm). If it were so, this would be indeed an unwelcome concession to tarnish an otherwise coherent and structured explanation. But, from what was said above, the role of efficiency can be seen in a very different light. The reason why efficiency is a *condictio sine qua non*, is that any *Grundnorm* is postulated in order to explain a certain number of acts of violence that actually occurred in society. If law is the explanation of those acts of violence, the postulation of the *Grundnorm* by a scientist that did not help explain (imputatively, not causally) those acts of violence would not so much be wrong, as it would be pointless. It would be an explanation about nothing. To put it briefly: for Kelsen, law is not the *explanandum*, but the explanation.

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[2]   In Kelsen's own understanding, an explanation of *physical facts*, as one can see in *Pure Theory of Law*, ibid, 1-2.

It is a matter of course that, from the point of view of a theory of democracy, or some other political theory or belief, it might be a good thing that judges work within the frame posed by the norm, as identified by the scientist. It might help to control power, or to provide legal predictability, etc. In fact, Kelsen himself seems to have favoured this, from a political point of view. However, Kelsen's conception of a legal science obviously is not about that: it is not practical, but simply theoretical.

If I am correct in the interpretation just sketched, it is fair to say that the absence of a methodology of legal reasoning in the pure theory is not a *gap*. Indeed, such methodology would be a conceptual impossibility for such kind of theory.

Hart, on the contrary, tried to provide a sketchy account of legal reasoning. As any self-respecting legal theorist would know, this was the main objective of chapter 7 of *The Concept of Law*. The most well known feature of that chapter is the distinction between core and penumbra of meaning in legal rules, but elsewhere there are other interesting directives as to what to do in the penumbra of meaning. Hart believes that, even in the penumbra, judges are not to behave arbitrarily, but are to be guided by certain parameters, which are specifically judicial (although not legal). This is very clear in the following passage of chapter 8:

At this point [i.e. judicial decisions that involves choice between moral values] judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some fell reluctant to call such judicial activity 'legislative'. These virtues are: impartiality and neutrality in surveying alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision[3].

I do not which to enter the discussion here as to whether those judicial virtues would imply that Hart's description of the legal system as a practice is inherently incomplete, because it fails to take into consideration the need to provide a *legal* explanation of that important aspect of the practice. What I want to emphasize is simply that, Hart's positivism does not offer a methodology of judicial decision-making, even though he discusses certain aspects of that methodology.

It seems to be safe to conclude then, that the canonical presentations of epistemic positivism available in the late 1960's and early 1970's did not offer a articulated account of legal reasoning that would be both descriptively accurate (in relation to what legal practitioners actually do) and com-

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[3]   HART (1994) *The Concept of Law* (2nd ed. Oxford, OUP), 205

patible with epistemic positivism. That is a larger problem than it might
seem at first sight, in particular for Hartian positivists: if legal positivism is
an appropriate explanation of a social practice and that practice is a practice
that necessarily involves courts and legislatures (i.e. institutions directly
connected to secondary rules), it follows that not paying attention to the
actual practices of reasoning in court might make your explanation at best
incomplete, but potentially wrong (in the same way that giving an account
of a whole orange fundamentally based on observation of its outside might
lead one to conclude that the orange has no seeds).

That is precisely the kind of challenge raised by Dworkin and others:
if one pays appropriate attention to how cases are argued (i.e. how the law
is interpreted) there is much more at stake than simply the union of pri-
mary and secondary rules, each of which is linguistically formulated and
has a meaning divided into core and penumbra. Other kinds of arguments
that try to make sense of the system as a coherent whole must be taken
into consideration.

Approximately at the same time that Dworkin was developing his own
critique to Hart's positivism, Neil MacCormick started developing an
account of legal reasoning that could be both descriptively acceptable in
relation to argumentative practice in court and compatible with a concep-
tion of law that was broadly Hartian. This account would walk the fine
line between vindicating certain general epistemic positivist insights on
legal interpretation (e.g. about the distinction between core and penumbra
of meaning) and explaining how judges do not run completely out of law
when they move into the penumbra of meaning.

Both MacCormick's *Legal Reasoning and Legal Theory* and
Dworkin's *Is law a system of rules? s*tart by assuming the relevance of
giving a *legal* answer to a question that both Hart and Kelsen relegated to
the domain of the non-legal, to wit: how judges decide hard cases? The
solution of those cases is part of legal practice and, as a consequence, no
theory of law should get away with not explaining it properly.

The starting point of MacCormick's theory of legal reasoning is the
identification of its function, to wit: the function of *justifying* an action. So
legal reasoning is not simply about persuasion. While persuasion is ori-
ented at a specific subject or group and admits of a wealth of methods that
aim at influencing the opinions of that subject or group, legal reasoning is
about providing an objective justification for action.

Now, there are many argumentative strategies that might work as jus-
tifications. The most elementary justificatory argumentative form is de-
ductive reasoning. By the time in which MacCormick was writing *Legal
Reasoning and Legal Theory*, the use of deductive arguments by lawyers
had been subject to decades of fierce critique. So MacCormick's first
worry in the book is to defend its use as both a good description of what

judges do in many (if not most) cases and as a necessary (though not sufficient) feature of legal justification.

Obviously that MacCormick is was not defending a return to the ways of the *École de l'Exégèse*, but a vindication of the usefulness of deductive argument against the critics that, in MacCormick's understanding, went too far in dismissing deduction altogether. Nevertheless, he is deeply aware of its limitations when applied to legal contexts. First and foremost, there is the problem regarding the choice of premises to be locked together in a deduction (or series of deductions). In *Legal Reasoning and Legal Theory* MacCormick focuses primarily on the challenge of finding the appropriate normative premise(s) of the legal syllogism, but in later work he will also try and explain the criteria we use to select our minor premises[4]. It is clear to him that law is not always clear and that it might harbour apparent contradictions and gaps, all of which would demand more rational resources than deductive argument can furnish.

Which, then, are the legal premises from which we should start our deductive argument? An epistemological positivist, as far as he would be interested in giving this question an answer (and, as I said before, it is not entirely clear whether they should necessarily have any interest in this), would have to say that normative legal premises are those that best explain the behaviour of the legal officials. I do not want in this context to get tangled up in the endless debate about who counts as officials, or about whether the attitude of acceptance by the population of those official acts is also part of what is been described, or about which precisely are those acts (decision-making according to certain standards, acts of physical violence, or the threat of it, etc). What is important is to perceive that this way to conceive the major premise sees it as a description of certain facts[5].

That is apparent when positivists are asked to explain what a legal justification might possibly be. They are often pushed to say something along the lines that "legal justification" means something entirely different from what is meant by the normal use of "justification" in practical reason. And indeed, words like "duty" and "obligation", when applied to legal contexts, are *descriptive* rather then prescriptive concepts (or, as Kelsen would have it, are prescriptive but have no ultimate claim to guide

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[4]   For instance, and paradigmatically, in MACCORMICK, N., *Rethoric and the Rule of Law* (Oxford, OUP, 2005), chapter 11.

[5]   By calling it a "description", I am admittedly pushing it a bit, as far as Kelsen's Pure Theory is concerned. Norms, in accordance with the account of Kelsen's theory put forward above, are *imputative explanations*, rather than simple descriptions, but I venture to say that they are both kinds of explanation are, in a more abstract sense, descriptive.

behaviour). In other words, having a legal obligation or a legal duty does not mean that I have to act in a particular way, unless we push the dissociation to say that *legally* I have to act in a particular way. But one can only push the dissociation thus far, since at the end of the day my action is only one and the ultimate question would of course be not whether I should do something from a particular point of view (law, etiquette, etc), but whether I should do something *tout court*.

MacCormick believes that this exclusion of the prescriptive, of the element of practical reason, from legal theory is a mistake. For him, both legal theory and legal reasoning must be based in a general theory of practical reasoning[6]. Law is, after all, an institutional normative order[7], and not simply a way to describe certain facts (or a set of prescriptions that do not have, in themselves, a clear claim n future behaviour). His insistence that law be understood in the context of general practical reason (i.e. as having a direct, although not final, bearing on action) is the reason, put at its most abstract, why MacCormick considered himself to be a "post-positivist". That does not mean that MacCormick did not assign an ontological place for law in a description of the world. Indeed his institutional theory of law is precisely an attempt at justifying the thesis that legal objects (rules, groups of rules, etc) should belong to any acceptable ontology. It is a fundamental metaphysical question about the kinds of being that there is and his main source here is the distinction between brute and institutional facts put forwards by the likes of E. Anscombe and J. Searle. MacCormick never ceased to believe on that metaphysical conception that accepts the existence of not only physical facts, but also institutional facts. However, law, as an institutional normative order that can be described as existing in the world, gains its meaning from a general theory of practical reason (more on that bellow).

Let us go back to the limitations of purely deductive arguments. It is not only the case that we would not know for sure the status of our major premise (if it is simply a description of a complex social fact or else a norm with practical punch). The major premise is often difficult to ascertain because the legal sources from which we derive them are not entirely clear. They are, for instance, expressed in natural language (which is inherently open textured, as Hart has argued); also legal sources are complex and their interplay itself, might give rise to competing interpretations. However it may be, it is clear that other argumentative strategies are called for. Here MacCormick elaborates on Hart's insight that there are

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[6] MACCORMICK, N., *Legal Reasoning and Legal Theory* (2nd ed. Oxford: OUP, 1994), 265.

[7] MACCORMICK, N., *Institutions of Law* (Oxford: OUP, 2007), 11 ff.

specifically judicial "virtues", with the twist that, for MacCormick, the argumentative strategies derived from those judicial "virtues" are integral to a description of law. If law's foundation is, ultimately, practical reason, it follows that those argumentative strategies that help judges use the law to orient action cannot be lightly dismissed as non-legal. There is no need here to go into any detail on the legal argumentative strategies identified by the Scottish philosopher, which include arguments from coherence[8], arguments of consistency, a qualified form of consequentialist argument and arguments that help the legal decision-maker to cope with the particularity of the case, without being blinded by universal legal propositions, among others. What is important is to acknowledge the importance, both descriptive and prescriptive, attached by MacCormick to those arguments.

Those arguments form what MacCormick dubbed second order justification. First order justifications are effectively the syllogistic inference that makes the backbone of legal arguments connecting some universal premise about the law with some particular premise about facts (and allowing for very complex degrees of interconnection). A second order justification is a justification of the premises used in the syllogism(s) and that is not itself simply another syllogism. It might need inductive or analogical forms of argument (as it happens in arguments based on coherence), or it might take the form of a test of universilizability, which itself might be conceived in many different ways which are not reducible to a syllogism, or it might combine different kinds of arguments, and so on.

But external justification is still legal justification, and it is so in two related ways. Firstly, they are legal in the sense that no description of the nuts and bolts of the legal system would do without giving them pride of place. If a theory of law brushes those forms of arguments aside by referring to them as merely moral, it is bound to be (at best) an incomplete theory of law. The legal theorist should not underestimate the centrality of legal reasoning to the phenomenon of law. Secondly, they are arguments about sources of law which are institutionally created, that is to say, they apply to law that is created by certain acts of certain agents in certain contexts. The law to which those arguments apply is primarily *created*. The best way to understand MacCormick's particular take on law as practical reason would be to see it as an attempt at providing a middle way

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[8]   Both normative, in which case he is referring to something similar to what means by "integrity" (cf. *Legal Reasoning and Legal Theory*, chapter 7, 152 ff; also *Rhetoric and the Rule of law*, chapter 10, 189 ff), and narrative, in which case he is referring to canonical arguments to identify the minor premise in the legal syllogism (*Rhetoric and the Rule of law*, chapter 11, 214 ff).

between Dworkin's ultra rationalism and the exaggerated voluntarism of most epistemic positivists. The former tends to obscure the fact that law is an institution, that is to say, is created by contingent social decisions by social actors and the community at large. The latter is blind to the fact that law can only derive its sense from a broader conception of practical reason (and, consequently, legal decision-making can only be seen as part of rational decision-making). Between the Scylla and Charybdis of ultra rationalism and voluntarism stands MacCormick institutional theory of law.

Remember that, according to MacCormick, law should be understood as an institutional normative order. While its institutional nature would differentiate law from general morality and general practical reason, its normative nature would differentiate law from the raw reality of politics and social fact. Now there are a number of distinct conceptions of what counts as an institution. The most relevant to understand MacCormick's ontology is the philosophical sense that MacCormick derives from E. Anscombe and J. Searle. Constructing his theory on that canon, MacCormick conceives an institution as a set of rules that determine the creation of an instance of the institution (institutive rules), establish the consequences of the creation of that institution (consequential rules) and the disappearance of a particular instance of the institution (terminative rules)[9]. What results from that is an anti-reductivist metaphysics that resonates with Weber's comprehensive sociology, Peter Winch's idea of social science and Hart's conception of law[10]. Institutions are real entities and not simply subjective appropriations of the physical reality. Although they might be dependent on aspects of physical reality[11], they exist as separate beings to that physical reality.

To say that law is institutional means to accept the reality of legal sources (and, more abstractly, norms) as *objects*. Moreover, those are objects created whose existence is contingent on the incidence of institu-

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[9]   Among other places, see MACCORMICK, N. and WEINBERGER, O., *An Institutional Theory of Law* (Dordrecht, Kluwer, 1986), 52-53.

[10]   A similar explanation of MacCormick's anti-reductivism is to be found in LA TORRE, M., (2009) *Institutional theories and Institutions of Law: On Neil MAcCormick's Savoury Blend of Legal Institutionalism*. In DEL MAR, M. and BANKOWSKI, Z. (eds), *Law as Institutional Normative Order* (Ashgate), 71. I have dealt with the anti-reductivism that underlies the projects of both MacCormick and Hart and tried to provide the metaphysical underpinning of this position in contrast to the physicalism of other positivists in MICHELON, C., (2004) *Aceitação e Objetividade* (São Paulo: RT), *passim*

[11]   According to Weinberger, for instance, they must exist in time. See MACCORMICK, N. and WEINBERGER, O., *An Institutional Theory of Law*, 38.

tive and terminative rules. But they are created as elements that a particular community institutes in order to bear on the practical reason of its members (and officials). So they are, at the same time, objects that can be described with an appropriate level of detail and abstraction (paradigmatically in legal doctrine), but which should also be incorporated into *practical reasoning* by the appropriate social players (and, ultimately, by the whole citizenry). That is the way in which MacCormick attempts to explain how law can be understood descriptively (as Hart famously set out to do in the preface of *The Concept of Law*) and prescriptively (as an integral part of practical reason).

As I said in the introduction to this short contribution, I did not set out to provide a complete account of the impact of Neil MacCormick's vast published production. I have said nothing about his views on civil liberties, on the relationship between economy and law, on the political doctrine of nationalism, on the concept of sovereignty, on the legal-institutional structure of the European Union, on the foundations of private law institutions, among many other subjects dear to him. I deliberately refrained from engagement with some to the issues raised by MacCormick in order to provide a clearer picture of what I believe to be the place of some central aspects of his conception of law in the history of ideas and, in particular, the history of legal theory in the last century.

It was a joy and an honour to have worked with him and it is frustrating that I cannot fully express that within the canon of respectable academic writing. However, my frustration would be partially appeased if this article prompts some legal theorists to acquaint (or reacquaint) themselves with Neil MacCormick's rich contribution to the field.