Book Reviews:

NEIL MacCORMICK, *LEGAL REASONING AND LEGAL THEORY*,
Clarendon Press, Oxford, 1978, pp. xi + 298.
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Reviewed by Lauchlan Chipman

MacCormick's aim is to throw light on the idea of justification which he rightly sees as underlying our ideal so far as the practical aim of persuasion is concerned. His concern is immediately with the way in which justification may persuade us to accept a particular judicial determination, but he rightly sees, following J.L. Austin and Ch. Perelman, that the judicial case is of interest also for our understanding of persuasion in normative contexts generally. Professor Perelman has recently reminded us that he is trying to do for justification and persuasion what Gottlob Frege did for logic. Frege took mathematics as the exemplary case of formal logic at work and used it to illumine formal logic, in its non-mathematical applications, and thereby displaced in one revolutionary step the Aristotelian approach to logic which dominated western thought for two thousand years. For Perelman legal reasoning, and in particular the reasoned judgment published in leading cases in common law jurisdictions, stands to justification and persuasion generally in the way that mathematics stands to formal logic generally. The former is an application of the latter which, because of its transparency and relative purity, provides a key to the understanding of its wider and less cautious parent class.

MacCormick stresses what to the layman may seem the obvious fact that arguments in practical contexts are designed to persuade; a fact recognized by Aristotle in *Topica* and *Rhetorica* and, according to MacCormick, 'ably resuscitated' by Professor Ch. Perelman in *La Nouvelle*

Rhétorique. It is necessary to stress this because, like many facts obvious to the layman, philosophers have seen fit, if not to deny it, to downplay it. They have tended to thing of persuasion as something 'pragmatic' and therefore unseemly, and have by and large been more at home with an idea of argument that is mathematical rather than dynamical in character. Justification has been seen as something that has to flow from a theoretical structure taken as given, rather than as something which could simultaneously add to, amend, or shift the gravitational direction of theory. Thanks to recent work in the philosophy of science, and in particular the work of Donald Davidson in the philosophy of the social sciences, W.V. Quine in the philosophy of logic and language, and Ronald Dworkin in the philosophy of law, the inseparability of theory utilization from theory change and development is increasingly accepted. To quote the figure which Quine quotes from Otto Neurath, we are like sailors who have to remain afloat, steer our boat, and constantly rebuild it simultaneously.

MacCormick describes his own thesis about legal reasoning and theory as 'both descriptive of actually operative norms within actual legal systems, and in its own right normative in arguing for what I see as good procedures of decision making and justification.' (p. 77) Thus it is largely empirical in character. As he himself sums his project in retrospect:

> I argue that the interrelated elements of consequentialist argument, argument from coherence, and argument from consistency are everywhere visible in the Law Reports, providing strong evidence that they really are requirements of justification implicitly observed and accepted by judges; and in my own right I argue that these are good canons of argument to adopt because they secure what I regard as a well-founded conception of the 'Rule of Law'. (p. 251)

Consequentialist argument for MacCormick means drawing out and examining the consequences which would flow from a particular ruling and assessing the correctness of that ruling in the light of those consequences. The assessment of the consequences is inevitably evaluative - we look to 'what makes sense in the world' and whether the resultant pattern would

be coherent, or more or less coherent than some alternative - and to that extent inescapably subjective (p. 106). It also requires the exercise of creative imagination when done at its best, as in the great judgments.

MacCormick follows Julius Stone in rejecting the idea that there is a single *ratio decidendi* in each authority, or even in each judgment in each authority, essentially for the reason given by Professor Stone; namely, the problems posed by the inevitable possibility of reading any judgment at different levels of generality. (The same problem attaches to Kant's doctrine of the universalizability of the moral decision. Kant's injunction that we should be prepared to will the maxim of our action as a universal principle binding on all mankind falls down on the problem of locating *the* maxim of one's action. The same action satisfies an indefinitely large number of different true descriptions. Which description I choose to figure in my maxim will make quite a difference to the principle I embrace.) Curiously, MacCormick re-admits the notion of a *ratio decidendi* subsequently (p. 215) as if the problems associated with it were overcome provided only that one allowed for plurality. This is to under-estimate the extent of the difficulties plurality generates, for it means that the same ruling can inevitably be made to exemplify logically incompatible rules. (MacCormick would argue that considerations of coherence would enter to 'arbitrate', but this makes the *ratio* look increasingly like a retrospective imposition rather than a derived rule.)

Legal Reasoning and Legal Theory is best read after reading H.L.A. Hart's *The Concept of Law* and Ronald Dworkin's *Taking Rights Seriously*. This is not because it is in any sense a mere footnote to that celebrated debate but because MacCormick's discussion, which would certainly be intelligible to people unfamiliar with the Hart-Dworkin controversy, throws considerable light on it. In essence MacCormick is marginally more in the Hart-positivist tradition than on the side of Dworkin and his 'antecedent right to win' and 'always a uniquely right answer' theses. His two most interesting suggestions are firstly, that the argument over whether judges are, in hard cases at least, really

legislators, is essentially an arid and trivially verbal one, and secondly, that while Dworkin is correct in attempting to understand litigation in terms of the rights of the parties, this does not sustain his contention that there always exists, in one party, an antecedent (but perhaps not correctly identified) right to win.

On the first point, MacCormick claims that interstitial legislation, of the sort judges may deliver in hard cases, is so different from architectural legislation - the sort that issues from Parliaments - that the very calling of them both legislation generates an obscurantism which in turn begets the mule which is the debate over whether judges make law. Interstitial 'legislation' is subject to justification in terms of analogy or principle - something which Dworkin thinks means that it is not legislation. There is a sense in which MacCormick is plainly right. If all sides agree on what is actually happening, but disagree on whether judges are legislating, then it looks as if it is the word, not the phenomenon, which is problematic. MacCormick himself recommends the re-introduction of the word 'declaratory' as a more descriptively accurate and less tendentious representation.

As to the second point, MacCormick is again right in thinking that Dworkin is guilty of a *non sequitur* if he thinks that the representation of legal conflict in terms of competing claims about rights must, if correct, entail that just one party has the right (in advance) to win, and the court's job is to discover who has that prior right. Rights may clash just as obligations may clash. In an interesting adaptation of Sir David Ross's sadly neglected discussion of *prima facie* duties in morality - practical morality typically being the problem of deciding which of two or more competing *prima facie* duties (e.g. truth telling, or loyalty to a loved one) is more stringent in the present circumstances - MacCormick introduces the idea of *prima facie* rights. (He correctly resists, incidentally, the fashionable error that rights and duties are logically correlative; that to every right there is a duty and *vice versa*.) The job of the court is to decide which of a number of competing *prima facie* rights is to prevail

and to justify that choice, thereby justifying its declaration of the law. And this, as Hart would agree and *pace* Dworkin, inevitably involves an element of retroactivity.

Clearly MacCormick's discussion is a valuable one to jurisprudential scholars and others trying to get clear about the logic of the legal process. His discussion of a number of generally unfamiliar Scottish cases adds to the interest. Unfortunately the first part of the book, and particularly the discussion of deduction, is laboriously written. It would be a pity if the reader was deterred by this. An over ambitious and excessively sketchy discussion of why Hume was wrong to insist that reason is, and ought to be, the slave of the passions, is most unsatisfactory, and the reader could well skip that section from the first moment of bewilderment. These are blemishes on what is basically a significant and convincing work.

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