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Book Reviews

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BOOK REVIEW

LEGAL REASONING AND LEGAL THEORY. Neil MacCormick. Oxford: The Clarendon Press, 1978. Pp. xi, 298. *Reviewed by Kevin M. Clark.*

Philosophers have always questioned the nature of rationality. The history of philosophy appears to many as an ongoing struggle between dogmatism and scepticism, between those who defend the broad scope of reason and those who assert its strict limitation. Concern for the nature of reason has thus become almost synonymous with philosophy. In the past few decades, however, the nature of this concern has changed in a fundamental manner, giving rise to inquiry into the interrelation between different modes of rationality.

One of the most interesting results of this change has been the rise of concrete studies of actual processes of scientific and everyday reasoning. Neil MacCormick's LEGAL REASONING AND LEGAL THEORY[1] is one such study, a detailed account of legal argumentation considered as an institutionalized mode of practical reason. The foremost purpose of the book, and the one which commends it to lawyers and legal theorists, is to "describe and explain the elements of legal argumentation advanced in justification of decisions, or claims and defences put to the courts for decision . . . ."[2] The bulk of the study is taken up with a detailed and provocative analysis of legal argumentation as it actually occurs, seeking to isolate its logical structure. Over 115 cases (drawn primarily from England and Scotland, but also from France, Canada and the United States) are cited as evidence of the account given. Given the nature of the institution, as well as the aims of the study, a merely descriptive account is insufficient. Rather than ignore the interpretive and normative aspects implicit in any description of social institutions and activities, MacCormick incorporates them as a central element in his study. Thus, he not only describes norms actually operative within legal systems but offers arguments in support of their normative status. He writes from an internal

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1. N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978) [hereinafter cited as MACCORMICK].

2. *Id.* at v.

point of view which accepts the norms arrived at through the study as binding for the mode of argumentation of the study itself. His description of legal reasoning, therefore, derives from and instantiates a theory of law.

With regard to contemporary legal theory, MacCormick situates himself between H.L.A. Hart's positivism and the rights thesis of Ronald Dworkin. He defends a modified positivism against Dworkin's criticisms of Hart; the modifications he makes in positivism being in large part designed to accommodate what he sees as the strong points of Dworkin's theory. According to Dworkin,[3] Hart's theory of law leaves no room for the proper operation of principles within the judicial process; it takes too strong a view of judicial discretion; its rule or recognition is insufficient for the identification of legal principles; and it is based on an untenable theory of social rules.

MacCormick's reinterpretation of legal positivism is designed to meet these criticisms. He does not defend Hart so much as demonstrate that a theory consistent with Hart's version of legal positivism can be developed in a manner which avoids Dworkin's criticisms. Thus, he demonstrates the manner in which arguments from principles play a central role in legal decision and shows that the interpretation of rules is in large part affected by considerations of principle. By closely observing the actual function of principles in legal argumentation, he is able to develop a weak sense of judicial discretion which enables a more thorough account of the interaction of rules and principles than Dworkin is able to offer. MacCormick argues that Dworkin's stipulative definitions of rule, principle and policy confuse rather than clarify the issue. Principles and rules, for example, both serve in practice to identify rights and so cannot be distinguished on that basis.

MacCormick's view is that "principles are relatively general norms which are conceived of as 'rationalizing rules or sets of rules.'"[4] We know what rules to rationalize because we have a criteria of recognition or institutive rule. This view of principles, he argues, clarifies their relation to the rule of recognition as an indirect one. Legal principles are such because of their function in relation to rules of law identified through such a criteria of recognition: "to explicate the principles is to rationalize the rules."[5] This is an ongoing process; the rationalization of rules in judicial deci-

3. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
4. MACCORMICK, *supra* note 1, at 232.
5. *Id.* at 157.

sionmaking also implies a process of interpretive application of principles. By setting these processes in their social context, MacCormick is able to provide a more concrete analysis of the social aspect of legal decisionmaking than he sees in Hart, while avoiding the problems he finds with Dworkin.

The fundamental difference between MacCormick and Dworkin is in their view of practical reason. MacCormick is highly critical of what he regards as Dworkin's ultra-rationalism. Dworkin, he argues, regards all disagreement in law as speculative disagreement which could be resolved given the proper theory. Speculative disagreements over what is the case do not in principle exclude the possibility of a single right answer being found when all irrationality has been eliminated. MacCormick argues that judicial disagreements are essentially practical, concern what to do rather than what is the case, and result from fundamental differences in value rather than from the irrationality of one or both parties to the dispute. This view of disagreement is closely related to the disputed matter of judicial discretion. MacCormick and Dworkin both reject any notion of strong discretion; judges do not choose in quasi-legislative fashion, the decision which seems best to them on whatever grounds they deem appropriate. But they also do not have weak discretion in Dworkin's sense, which, MacCormick holds, allows discretion only over the weight to be given the various legal standards bearing on the decision. Whereas strong discretion theorists view legal disagreement as purely practical, Dworkin's theory of weak discretion views it as purely speculative. MacCormick argues for a third view, combining elements of each. He views judicial discretion as limited by a system of law and the norms of justification operative within it (norms which it is the purpose of his study to discover and demonstrate). But these place limits only on the mode of argumentation with which a decision can be justified; they do not settle what decision is ultimately to be so justified. They leave an inexhaustible residue of pure practical disagreement. Although there are reasons for this disagreement, the disagreement itself is not ultimately resolvable by reason.[6] Evaluative and subjective elements enter into judicial decisionmaking as an essential element of the logic of justification. Such elements are not an intrusion of irrationality into an essentially theoretical application of reason to judicial problems but are constitutive aspects of practical reason itself as operative within the institution of the

6. *Id.* at 265.

courts. Justification of this claim provides the central focus of MacCormick's argument.

The argument of the book is set forth with admirable clarity. MacCormick first demonstrates the occurrence of purely deductive justification of judicial decision. The possibility of the application of deductive logic to law is shown to depend on theoretical presuppositions of jurisprudence and on practical-legislative presuppositions of the institutionalization of courts. These presuppositions are utilized to demonstrate the limits of deductive justification. Consequentialist arguments (which are necessarily evaluative and in part subjective) and arguments based on the coherence and consistency of the legal system (which presupposes a strict conception of formal justice) are shown to be essential elements of the non-deductive justification of legal decisions. Analysis of this combined mode of argumentation is then extended to a demonstration of the role of legal principles and arguments from analogy in legal reasoning. This is followed by an analysis of the processes of case law and statutory interpretation within their operative contents. The theory of law implied by this mode of argumentation and legal reasoning is then explicitly treated in a discussion of Hart and Dworkin. The book concludes with an account of the structure and limits of practical reason.

MacCormick structures his argument to provide an example of the theory of argumentation defended in the book. At each step, evidence from case records is presented and analyzed; objections are posed and met; and justificatory arguments are offered. The book is aimed at both lawyers and philosophers and is written in such a way as to be both comprehensible and interesting to each. Frequent prospective and summary statements of the argument add to the clarity and cogency of MacCormick's case. An appendix, "On the Internal Aspect of Norms," clarifies the normative status of MacCormick's account.

The view offered of the necessary engagement of the theorist in the understanding of a legal system does not sit well with the typical (or stereotypical) view of positivism. MacCormick finds it necessary, therefore, to distinguish his own version of positivism by means of a stipulative definition (the only kind possible in this case, he claims). Legal positivism, he says, can be characterized minimally as "insisting on the genuine distinction between description of a legal system as it is and normative evaluation of the law which is thus described."[7] Engagement, grasping a legal sys-

7. *Id.* at 239-40.

tem from inside, does not require assent but only an awareness of what assent would require in the application of the law. Interpretive understanding cannot be said to eliminate criticism. While this view of the complexities of interpretation makes good sense, the insistence on maintaining positivism as its label is less convincing. MacCormick seems to identify legal positivism with the assertion of a rule of recognition as a criterion of valid law. He moves between this view of legal positivism and the methodological positivism defined above without distinction. The desirability of either label is not argued for in the present work and seems to add little to it.

Related to this matter is MacCormick's insistence on the Humean pedigree of his theory of practical reason. As he states the case, this theory seems closer to that of Hume's critic, Thomas Reid, but, it is not really developed enough for either label to serve as more than a very general guidepost. Given MacCormick's proper insistence on the integration of judicial rationality in social and cultural processes, on the orientation of legal interpretation to future application, and on the structure of argumentation in practical decision, an identification with contemporary hermeneutical theorists such as Hans-Georg Gadamer or Karl-Otto Apel would be more meaningful.[8] MacCormick's book offers an excellent opportunity to those philosophers interested in extending the dialogue between Anglo-American and continental thought. It should prove even more valuable for anyone interested in achieving a better understanding of the judicial process.

8. Gadamer's general theory of hermeneutics is heir to a long tradition of legal and theological hermeneutics. His theory of interpretation has its most extensive statement in TRUTH AND METHOD (New York: Seabury Press, 1975). Apel's major work, TRANSFORMATION DER PHILOSOPHIE (Frankfurt: Surhkamp, 1976), is as yet unavailable in English. A number of his essays have appeared in English in a variety of journals.

MILITARY OBEDIENCE. N. Keijzer. The Netherlands: Sijthoff and Noordhoff. 1978. Pp. 349. cloth. $45.00. *Reviewed by Lieutenant Colonel Charles A. White, Jr.**

Two major characteristics, the concepts of command responsibility and obedience to orders, distinguish military law from civilian law. In *Military Obedience,* Professor Keijzer examines the second characteristic. Obviously, *U.S. v. Calley* was the touchstone which led to the writing of this book but the subject matter is much broader than the "defense of superior orders." He has compiled a definitive work on this aspect of military law.

The author, an Assistant Professor of Criminal Law at the Free University of Amsterdam, states in his preface that this book has been written for the benefit of the soldier. The intended recipient will benefit only indirectly because the material is far too detailed and legalistic for most modern volunteers or conscripts. However, its values will be appreciated by the law professor and the professional officer. *Military Obedience* should be a standard library acquisition for all military legal libraries.

The book is divided into four main parts. The first section, "Prolegomena: Acting on Orders," explores the theoretical nature as well as the various actors involved in the process. The second part, "Quid Facti: The Social Situation," examines the conduct of the person who receives an order within three environmental situations. These are: the social influences which have molded the person and his norms and value structure; the military organization with its perceived legitimate charter to do violence and its required hierarchical and authoritative structure; and the behavior standards of the peer group in which the person operates. These situations often create conflicting norms and demands, especially under combat stress.

After describing the dilemmas for both individuals and societies, Professor Keijzer details the solutions which six nations[1] have evolved for their citizens. In the third section, "Quid Juris: The Legal Duty to Obey," Professor Keijzer examines the opposing sides of the issues. This section has many excellent and detailed

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1. United States of America, United Kingdom, France, Federal Republic of Germany, The Netherlands, and Israel.

discussions of the issue of the objective limitations to the duty to obey. Among these limitations are impossibility, violation of legal norms, the lack of military purpose, defects in the competence of the person giving an order, and an order to commit a criminal or illegal act. The other side of this issue is represented by the discussions of the concept of "compliance with orders as a defense" or, the defense explored at Nuremberg, "Befehl ist Befehl." Included also are the doctrines of military necessity, changed circumstances, and contradictory orders or orders harmful to services or to individual interests. The author completes this section with a discussion of the controversial subjective limitation of the duty to obey, conscientious objection.

The publication was produced under a research fellowship provided by the North Atlantic Treaty Organization. Only one of the six nations under study was a non-Nato country. The author included Israel because he wanted to determine the degree to which a military threat has influenced the rigidity of Israel's military law of obedience, and to assess one non-Nato country to compare its solutions to those of nations within the alliance. Examination of a Moslem country, an East European country and an Asian country could have provided further useful comparisons, but the validity of this type of book depends on the availability of legislative acts, governmental regulations, court decisions and scholarly commentaries. These sources, in a language common to that of the writer, are abundant in the countries included in the study but they are more difficult to obtain in other countries.

Professor Keijzer adopts three tests for evaluating each nation's law of military obedience.

1. Disobedience must not be punishable if the order was unlawful.
2. Unless it is manifestly unlawful, an order given by a superior must be presumed to be lawful, the burden of proof to the contrary being laid upon the shoulders of the subordinate.
3. The general principle of penal law *Nolla poena sine Culpa*, finally requires that nobody should be punished for an act for which it could not reasonably be demanded of him that he should have avoided it. This implies that a reasonable mistake of fact or law must be excused.

Professor Keijzer concludes that only the military law of the United States meets the test in all three categories.

To demonstrate that he is not part of the problem, Professor Keijzer offers an optimal solution with provisions in six

paragraphs[2] that embody the three test principles of a correct law.

However, this model set of provisions is filled with perceptions that are beyond the comprehension of the ordinary soldier, or, for that matter, much of the officer corps. He offers a more simplified version:

> For the subordinate, these provisions come down to the following rule of conduct: lawful orders must be obeyed; orders to commit unlawful acts may not be complied with; in case of doubt: obey. This does not mean that a subordinate who suspects an order of pertaining to an unlawful act would be safe if he obeyed . . . . Every subordinate must to the best of his knowledge determine whether an order must be obeyed or, perhaps, may not be obeyed. If he cannot decide, his best changes (an order of a superior generally being presumed to be binding) are to obey. But he will always run the risk that a court will decide that he should have known better, as any reasonable man would have seen that the ordered act was unlawful.

As evidenced by Professor Keijzer's book, cognitive dissidence is still, unfortunately, alive and well for the military subordinates of the world. The lack of a better solution by the author is forgivable in light of the decades or even centuries in which the six nations studied have had to evolve better systems.

Despite this difficulty, *Military Obedience* should be a standard reference for the practitioner who must draft charges or regulations for the modern armies of the world. The book is well written

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2. I(a) Any military person who, willfully or through neglect, does not execute an order of a superior in rank or command, or arbitrarily deviates from such an order, shall be punished by . . .

I(b) In the cases referred to in paragraph (a), a subordinate does not act unlawfully if the order is not binding, in particular if it concerns the commission of an unlawful act, or is not given for a purpose of the service, or otherwise does not pertain to the tasks or responsibilities of the person who gave it.

I(c) A superior in rank is justified, under exceptional circumstances, in assuming a task or responsibility which he would not normally have, if this is necessary for maintaining or restoring safety or good order.

I(d) An order given to a subordinate by a superior in rank or command is presumed to be binding, unless it is proved not to be binding, or any reasonable man would know it not to be binding.

I(e) Nobody may be punished by force of paragraph (a) if it could not reasonably be demanded of him that he should have avoided the offence.

II Any military person who has committed an offence by complying with an order given to him by a superior will be excused unless it was known to him or would have been understood by any reasonable man of his position, age and education, faced with the same factual situation, that the act was unlawful.

with previews and summaries in each chapter and section. Professor Keijzer mixes references to Cicero, Sophocles, Shakespeare, Locke, Hobbes, Augustine, and Winthrop with historical and timely cases, coupling these with exhaustive research in governmental documents and legislative history. The bibliography is complete. Although the basic research was done in 1972 and 1973, it is updated through 1977. The writing style is clear. The text and the bibliographic sources offer a good guide for future writers in the area. The completeness with which Keijzer explores each facet of the concept of obedience to orders makes the book worth its price to the military or civilian attorney who is called upon to defend an individual charged with disobedience of an order or obediences of the improper command.