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Neil McCormick's Theory of Legal Reasoning and Its Evolution

1. Introduction

Neil McCormick's theory of legal reasoning is based on the findings of two of his books: *Legal Reasoning and Legal Theory* (hereinafter: *LR<*) and *Rhetoric and the Rule of Law* (hereinafter: *Rh&RoL*)². The former dates from 1978, the latter 2005, and from this fact it can be surmised that McCormick's legal-theoretical views crystallised gradually: they evolved over time and took their final shape thanks to establishing international cooperation with other philosophers of law (among them, Robert Summers, Zenon Bankowski, Ota Weinberger, Robert Alexy, Aulis Aarnio, Aleksander Peczenik and Chaim Perelman), creative criticism, and the resulting extensive polemics³. Above all, however, it should be noted that the methodological significance of the existence of two different stages in McCormick's concept of legal reasoning is highlighted by his contemporary commentators⁴. In their view, this aspect of his theory justifies the use of a diachronic approach for its description.

McCormick himself seems to accept the methodological distinction of two phases in his concept of legal reasoning, being aware that a large part of his views has undergone numerous changes over the years, and thus the differences between the basic assumptions are too significant to speak of their homogeneity⁵.

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² N. McCormick, *Legal Reasoning and Legal Theory*, Oxford 1978; N. McCormick, *Rhetoric and the Rule of Law*, Oxford 2005.

³ In the preface to *Rh & RoL*, McCormick lists a few dozen names of those who contributed intellectually to the formulation of his theory of legal reasoning. N. McCormick, *Rhetoric...*, pp. 5–6. The foreword to the second edition of *LR & LT* contains a long list of critical remarks by other authors together with their polemical answers. N. McCormick, *Legal Reasoning and Legal Theory*, Oxford 1994, pp. 17–19.

⁴ E.g. G. Pino, *Neil McCormick on Interpretation, Defeasibility, and the Rule of Law*, "SSRN Electronic Journal" 2011, pp. 1–3, <https://ssrn.com>, accessed on: 7.02.2018; A. Schiavello, *Neil McCormick's Second Thoughts on Legal Reasoning and Legal Theory. A Defence of the Original View*, "Ratio Juris" 2011/2, pp. 140–141; S. Berteau, *McCormick's Latest Views of Legal Reasoning and the Positivist Concept of Law*, in: A.J. Menéndez, J.E. Fossum (eds.), *Law and Democracy in Neil McCormick's Legal and Political Theory: The Post-Sovereign Constellation*, Dordrecht 2011, pp. 88–89.

⁵ In the autobiographical note cited by William Twining, McCormick distinguishes separate stages, whose summation makes his intellectual approach. W. Twining, *Donald Neil McCormick (1941–2009)*, in: *Biographical Memoirs of Fellows of the British Academy*, Oxford 2012, p. 453.

MacCormick gives expression to this in the foreword to the second edition of *LR & LT*, indicating which parts of it need to be amended as they no longer agree with his views⁶. Then, in the preface to *Rh & RoL*, he states that, instead of rewriting the next edition of *LR & LT*, and thus giving it a new perspective and a different meaning from the original one, he prefers to answer all critical remarks regarding the content of the previous work by means of this new publication⁷.

At the same time, a different presentation of the theory of legal reasoning in *Rh & RoL* should be considered more a creative supplement to the theses from *LR & LT* rather than a complete break with them. Therefore, it is not a rapid revolution, but a gradual evolution of views. This statement particularly pertains to the deductive aspect of MacCormick's theory, namely his views on the role of deduction and syllogism in legal reasoning.

2. Legal Reasoning and Legal Theory (1978)

LR & LT is considered one of the most important achievements of MacCormick in the field of 20th century philosophy of law. At the time of its publication, this book was probably the first scientific work fully devoted to the problems of reasoning and legal interpretation written by a philosopher rooted in positivist analytical jurisprudence⁸.

The need to examine legal reasoning is evoked by the very title of MacCormick's book. It can be inferred from it that the relationship between theory of law and theory of legal reasoning is conceptual. MacCormick is well aware that the assumption of open texture of law in the concept of Herbert L.A. Hart requires that theory of law – claiming to be complete – does not ignore or underestimate the problem of legal reasoning⁹. The Scottish philosopher therefore quite authoritatively states that “a theory of legal reasoning requires and is required by a theory of law”¹⁰. In 1978, this was a fairly original approach; until the 1970s, European legal positivism, analytically oriented, was mainly interested in structural problems of law such as the notion of norm, the structure of a legal system and features distinguishing it from morality¹¹. However, it was high time for representatives of legal positivism to take a closer look at legal reasoning, since works on argumentation and rhetoric published by Ch. Perelman had already received quite a wide response, and Ronald Dworkin had just started his crusade against the Hartian concept expressed in *The Concept of Law*. At the same time, *LR & LT* approximates Hart's classic position in many respects¹². This is not only because it creatively supplements *The Concept of Law* with a theory of legal reasoning, a concept that is fully compatible with and even required by the positivist concept of law proposed by Hart, but also because both works, published about twenty years apart, have made a great impact on twentieth-century debates in the philosophy of law¹³.

⁶ N. MacCormick, *Legal...*, pp. 15–16.

⁷ N. MacCormick, *Rhetoric...*, p. 5.

⁸ G. Pino, *Neil MacCormick...*, p. 3.

⁹ H.L.A. Hart, *The Concept of Law*, Oxford 1961.

¹⁰ N. MacCormick, *Legal...*, p. 229.

¹¹ G. Pino, *Neil MacCormick...*, p. 3.

¹² Incidentally, it should be noted that, moving in Oxford circles, MacCormick repeatedly defended Hart's views, due to which he deserved to be called one of his best students and followers. He introduced himself then as a supporter of Hartian theory of law, thus remaining in dispute with R. Dworkin.. See W. Twining, *Donald Neil...*, p. 453; N. MacCormick, *1968 and all that, Balliol College Annual Record 2009*, Oxford 2009, p. 14.

¹³ MacCormick himself mentions the desire to creatively complement Hart's concept. He refers to Hart also in the next chapters. See N. MacCormick, *Legal...*, pp. 15, 63, 138–140, 240–245.

MacCormick's primary aim in *LR & LT* is to elucidate the nature of legal reasoning that occurs in judicial application of law¹⁴. Starting with the philosophical views of David Hume and Thomas Reid, MacCormick states that legal reasoning is a special case of practical reasoning¹⁵. His theory justifies the statement that legal reasoning used in the process of law application can be rationally organised and reconstructed – and thus subjected to some form of rational evaluation. According to Aldo Schiavello, behind adoption of such a vision of legal reasoning lay a need to provide “a middle way between Dworkin's ultra rationalism and the exaggerated voluntarism of most epistemic positivists”¹⁶.

The starting point in MacCormick's theory of legal reasoning is to identify the role that reasoning should play in the process of law application. According to the Scottish philosopher, its function is that of justifying an action¹⁷. Thus, legal reasoning is not just persuasion, but aims to provide an objective explanation of the judge's actions. According to MacCormick, this means that, ultimately, legal reasoning is primarily about justifying the decision¹⁸.

Today, there are many argumentation theories that may successfully function as justifications for judicial decisions, but at a time when MacCormick wrote his *LR & LT*, the use of deductive reasoning by lawyers was strongly criticised. Even the Hartian concept of law lacks any postulate of using methods derived from logic¹⁹. MacCormick, however, believes that legal reasoning is primarily about applying rules to facts: “The simple but often criticized formula: $R + F = C$, or Rule plus facts yields conclusion is the essential truth²⁰. Of course, this does not mean MacCormick reverses to the path marked by *École de l'Exégèse*, but only opposes those critics who, by his measure, too ostentatiously reject deductive inference as a method of legal reasoning²¹.

In *LR & LT*, the Scottish philosopher examines the criteria applied in legal practice to distinguish between well-constructed and poorly-constructed justifications. He also wonders if, from a normative perspective, these criteria are suitable for assessing the quality of legal decisions. According to MacCormick, it is not always possible to identify one right answer. Nevertheless, his theory of legal reasoning makes it possible to distinguish between justified and unjustified court decisions.

Adopting the distinction made by Hart, MacCormick distinguishes between clear and hard cases²². This has a number of consequences. According to Giorgio Pino, to MacCormick the existence of a clear case depends both on semantic and pragmatic factors²³. At the semantic level, a case is clear when it is subject to a clearly formulated rule, while pragmatically the case is clear when the judge has no compelling reason to depart from the usual meaning of the rule. Occasionally, MacCormick seems to rely on yet another, one could say sociological, understanding of the pragmatic dimension of

¹⁴ N. MacCormick, *Legal...*, p. 7.

¹⁵ N. MacCormick, *Legal...*, p. 5.

¹⁶ A. Schiavello, *Neil MacCormick's...*, p. 141.

¹⁷ MacCormick's considerations on this subject, *i.e.* in reference to Archimedes and Karl Popper, are based, among other things, on the analogy between the justification of court decisions and the justification of scientific hypotheses. N. MacCormick, *Legal...*, p. 16.

¹⁸ N. MacCormick, *Legal...*, p. 19.

¹⁹ Hart himself doubted that certain legal decisions can be achieved by deductive reasoning: “logic is silent on how to classify particulars,” H.L.A. Hart, *Positivism and The Separation Between Law and Morals*, “Harvard Law Review” 1958/4, p. 67. Quote from F. Atria, *Legal Reasoning and Legal Theory Revisited*, “Law and Philosophy” 1999/5, p. 550.

²⁰ N. MacCormick, *Legal...*, p. x.

²¹ N. MacCormick, *Legal...*, p. 19.

²² N. MacCormick, *Legal...*, p. 195.

²³ G. Pino, *Neil MacCormick...*, p. 4.

clarity, in which a case is clear when nobody has had any sort of doubt about it or when the court was not convinced by arguments put forward by a defence lawyer to challenge an unclear case²⁴.

According to MacCormick, the pattern of conduct of a judge in a case depends on its specific properties, which is why he distinguishes two orders of justifying the judge's decision. In the first order justification, the decision issued by the court defends itself by reference to a legal rule and the facts of the case. In clear cases, first order deductive justification may be considered sufficient. In hard cases, however, a legal rule requires from a judge broader interpretation and justification. This means, therefore, that the judge's application of deductive justification is possible only after solving earlier interpretation problems. According to MacCormick, in hard cases a judge is required to provide a second order justification because only this ultimately proves that their earlier interpretation process can be rationally defended²⁵.

2.1. Deductive justification

According to MacCormick, legal syllogism, which is a deductive model of legal justification, should be based on rules whose validity had been previously established on the basis of the rule of recognition²⁶. Thus, the reasoning underlying the first order justification can be reconstructed as deductively right. For legal syllogism is based on the existence of a major premise, a minor premise and a conclusion to be drawn from them. According to the rules of logic, this reasoning makes correct deduction if its premises entail the conclusion, regardless of their content.

The use of legal syllogism is crucial for first order justification. According to MacCormick, a legal rule can always be represented in the form of inference: "if {p}, then {q}", when some facts {p} have specific legal consequences (q). If the meaning of the "if {p} then {q}" rule is completely clear in a given context, it does not require any interpretation, and the facts {p} easily give the rule a certain value, then – according to the Scottish philosopher – the case is clear. Thus, conclusion {q} (court decision) clearly follows from the previously adopted premise.

Since all the premises of this reasoning can be considered as compliant with legal norms, the conclusion of such correct reasoning, namely the final decision, is also true in a legal sense. To MacCormick, all premises in the inference scheme: "if {p}, then {q}", although not expressed verbally, can be regarded as legal norms on which a judge can base the authority of their judgment²⁷. The justification of a decision therefore depends on the implied claim that there are certain criteria of recognition on the basis of which a specific legal source can be considered as having authority. Hence, according to MacCormick, deductive justifications are always put forward within a framework of values whose presence makes them sufficient²⁸. In the light of this theory of reasoning, other premises of inference are proved by significant facts or conclusions drawn on the basis of minor facts (which were inferred deductively from significant facts together with the premise, namely a legal rule).

²⁴ N. MacCormick, *Legal...*, p. 199.

²⁵ N. MacCormick, *Legal...*, pp. 100–101.

²⁶ N. MacCormick, *Legal...*, p. 139.

²⁷ N. MacCormick, *Legal...*, pp. 29–32.

²⁸ N. MacCormick, *Legal...*, pp. 63–65.

In the light of MacCormick's theory, the structure of each inference – in terms of first order justifications of a decision – is the same. The first order justification always includes the general rule contained in the scheme “if {p}, then {q}” (the rule is applied to certain facts {p} in order to obtain legal consequences {q}). Using the rules of logic, it is always correct deductive reasoning. Thus, according to MacCormick, the requirement of logical correctness is justified by the requirement of formal justice, meaning that similar cases should be treated similarly. A legal decision must therefore be based on a general rule in the form “if {p}, then {q}”, because its rational justification always involves correct deductive reasoning, and the condition of deductive correctness is a general requirement for any form of rational inference. Therefore, to MacCormick, legal reasoning can be considered a highly institutionalised and formalised type of moral reasoning because of the presence within it of pre-assumed values²⁹.

2.2. Second order justification

First order justification can be based on a legal rule whose meaning is absolutely clear in a given context. MacCormick notes, however, that often there is no such rule, or the meaning of the existing rule is unclear with regard to the facts of the case³⁰. Then the procedure should be as follows: if there is no legal rule, a new rule may be formulated, whereas if there is a rule but its meaning is unclear, it should be interpreted accordingly³¹. To MacCormick, in such hard cases, deductive justification is possible only after a new rule is formulated or after the existing rule is interpreted. For this new rule or interpretation to be acceptable, a second order justification is required³². It is therefore a justification of the premises used in syllogism and is not just another syllogism. It may require inductive or analogous forms of argumentation or take the form of the test of universality. Therefore, the second-order justification – according to MacCormick – can raise numerous issues.

The first type of issue – the problem of interpretation – occurs when it is unclear whether a rule applies to certain facts. The rules often turn out to be ambiguous or unclear in relation to the dispute before the court. This is because they are formulated in natural language and must have open texture, namely be vague as regards at least some contexts.

According to MacCormick, the sense of the problem of interpretation is that {p} is an ambiguous concept in the reasoning “if {p}, then {q}”, so it should be determined whether the rule should be interpreted as “if {p'}, then {q}” or as “if {p'’}, then {q}”. Resolving the ambiguity of a legal rule therefore requires making a choice between two possible interpretations. Thus, only after making these determinations can the decision be justified in a deductive way³³. Nevertheless, complete justification of the decision still relies on how to defend the choice between two competing interpretations³⁴. According to MacCormick, this choice cannot be defended by deductive justification.

²⁹ N. MacCormick, *Legal...*, p. 272.

³⁰ N. MacCormick, *Legal...*, pp. 100–101.

³¹ E.T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht 1999, p. 78.

³² N. MacCormick, *Legal...*, p. 101.

³³ N. MacCormick, *Legal...*, pp. 67–68.

³⁴ N. MacCormick, *Legal...*, p. 68.

The second type of issue, the problem of relevance, occurs when there is no legal rule applicable to specific facts³⁵. Theoretically, the exemplification of this issue is “X” claims that a certain decision {q} should be made on the basis of the facts {p}, although at the same time there is no recognised legal rule which says that when the facts {p} occur, legal consequence {q} should follow. According to MacCormick, the action of the hypothetical plaintiff is thus intuitive as it is based on his belief that in his case the rule “if {p} then {q}” should be proclaimed by the judge³⁶. However, since there is no binding rule in the case, it is only up to the judge to decide whether recognition of this rule can be justified within the overall legal system by granting certain facts legal significance.

To MacCormick, a practical example of the problem of relevance is a case in which there can be two (possible, competing) applicable rules³⁷. Therefore, the argument for applying one of them by the judge should be that the chosen reason must also be good in other cases³⁸. In effect, this means that the condition for issuing a specific decision in this case is first to generalise it, and then to check whether it is true as a generalisation. At the same time, however, the argument that justifies the establishment of this legal warrant can by no means be based on deductive reasoning³⁹.

Thus, whenever MacCormick faces a problem of interpretation or relevance, he sets the condition of formal justice requiring that the court’s decision always be based on a general rule (general-abstract norm). Therefore, the judge’s task is to formulate such a rule that would allow generalisation of a given case in relation to a greater number of similar cases. According to the assumptions of MacCormick’s theory of legal reasoning, defining such a rule also allows the establishment of criteria of relevant similarity of future cases⁴⁰.

The third type of issue – the classification problem – arises when it is unclear whether certain primary facts {r} that occurred in the case can be considered as substitution of some legally qualified secondary facts {p} in the syllogistic inference scheme “if {p}, then {q}”⁴¹. Therefore, as regards the classification problem, the key issue is to determine how some facts should translate into legal relationships. MacCormick examines this problem with reference to the example of a case in which some primary facts were proven, but it was to be determined separately whether these facts met the definition of a secondary fact⁴². In this case, the judge had to choose between two possible interpretations of the rule “if {p’}, then {q}” and “if {p}”, then {q}”⁴³. This consisted of recognising whether the syllogistic inference pattern “if {p}, then {q}” should be interpreted as “if {p’}, then {q}”, or as “if {p}”, then {q}”.

To summarise, the elements of the second order justification include those considerations that play a role in interpretation, relevance-choice, and classification⁴⁴. These arguments are based on rules that are different from the ones used in deductive justification. Although a legal rule that comes from a binding source of law in a given system may be considered as existing, and therefore an accepted valid rule, considerations

³⁵ E.T. Feteris, *Fundamentals...*, p. 79.

³⁶ N. MacCormick, *Legal...*, pp. 69–70.

³⁷ E.T. Feteris, *Fundamentals...*, p. 80.

³⁸ N. MacCormick, *Legal...*, p. 70.

³⁹ N. MacCormick, *Legal...*, p. 71.

⁴⁰ N. MacCormick, *Legal...*, p. 81.

⁴¹ E.T. Feteris, *Fundamentals...*, p. 81.

⁴² N. MacCormick, *Legal...*, pp. 93–94.

⁴³ N. MacCormick, *Legal...*, p. 94.

⁴⁴ N. MacCormick, *Legal...*, p. 103.

underlying the process of interpretation or relevance of the choice can never be considered universal⁴⁵. This is due to the fact that the second order justification is based on the choice between two possible decisions, and according to the already mentioned statement by MacCormick, this form of justification cannot be reconstructed as correct deductive reasoning.

According to MacCormick, in order to justify their choice, a judge is obliged to test the ruling by applying the common sense criterion. First, they must demonstrate that the decision may be justified as one that can be deductively inferred from a rule that has better consequences than any other alternative rule⁴⁶. The judge does this by reasoning, which MacCormick calls the consequentialist argument. Second, in assessing the desired consequence of the preferred interpretation, the judge must refer to certain general moral values and principles of the law. It is their responsibility to show that the judgment does not contradict these, and that it is endorsed by analogies from existing law or the "general principles of the law", preferably authoritatively stated by judges in *obiter dicta*⁴⁷. In other words, the judge must demonstrate that their legal decision is consistent with existing legal norms and coherent with general legal principles⁴⁸.

2.3. Consequentialist arguments, arguments of coherence and consistency.

There are two types of consequentialist argument in MacCormick's theory of reasoning⁴⁹. The first relates to when the judge anticipates factual consequences of the ruling they choose. The second is about when the judge indicates logical consequences of the rule, and in particular the hypothetical consequences that could occur if the rule were applied in similar cases.

In addition, arguments from the consequences are, according to MacCormick, also required in cases where there is a problem of interpretation or classification. Not taking into account the argument from the consequences would, according to MacCormick, lead to a conclusion inadmissible due to its absurdity⁵⁰. This form of argumentation therefore concerns the consequences of the universal rule underlying the decision, and not the specific consequences of this decision for individual parties⁵¹. In line with the principle of formal justice, individual cases should be treated in a way that can also be justified in similar future cases⁵².

As MacCormick observes, arguments from the consequences are nevertheless insufficient to justify the judge's decision, as the judicial application of the law requires that each individual decision fits into the legal system understood as a whole. The decision that establishes a new rule aims to ensure coherence in the legal system⁵³. MacCormick distinguishes between two types of arguments that can be used to determine coherence: arguments based on legal principles and arguments based on analogy.

⁴⁵ E.T. Feteris, *Fundamentals*..., p. 82.

⁴⁶ N. MacCormick, *Legal*..., p. 105.

⁴⁷ E.T. Feteris, *Fundamentals*..., p. 82.

⁴⁸ N. MacCormick, *Legal*..., pp. 119–128.

⁴⁹ E.T. Feteris, *Fundamentals*..., p. 83.

⁵⁰ N. MacCormick, *Legal*..., p. 148.

⁵¹ E.T. Feteris, *Fundamentals*..., p. 84.

⁵² N. MacCormick, *Legal*..., pp. 148, 115–116.

⁵³ N. MacCormick, *Legal*..., p. 152.

An argument based on a legal principle indicates that a decision is justified because of its coherence with a generally recognised legal principle. However, according to MacCormick, there may also be situations in which two (or more) legal principles apply, and, since there are two generally accepted applicable principles in a given case, neither of them provides sufficient justification for the ruling⁵⁴. The choice between the two principles must be made and properly substantiated with a consequentialist argument which should demonstrate that a decision would also be acceptable in similar future cases⁵⁵.

From the reconstructed assumptions of MacCormick's theory of legal reasoning it follows that, in the arguments from analogy, the decision is justified by demonstrating that a rule is similar to a rule expressed in another legal decision⁵⁶. To conclude that the same rule should be applied, it should first be pointed out that the facts are similar to the facts in the previous decision, and then that the proposed rule and the rule expressed in the previous case are based on the same legal principle⁵⁷.

However, according to MacCormick, arguments from coherence are not enough to prove that a rule complies with general legal norms. For it must be demonstrated – on the basis of a rule which excludes the possibility of objection to the binding legal provisions – that the applied rule is consistent with the existing law. In the light of this theory, the consistency of a rule with an existing rule depends on the interpretation of the latter. In order to determine whether a judge's decision is consistent with the rule in force, in the inference scheme “if {p}, then {q}”, it must first be shown that this rule can be interpreted as “if {p'}, then {q}” and “if {p'’}, then {q}”, and then that one of the two interpretations of this rule complies with the newly proposed rule⁵⁸.

To sum up, if interpretation or choice of a decision is justified by consequentialist arguments and arguments of coherence and consistency, then such arguments always constitute sufficient justification for the decision. According to MacCormick, the inter-related elements of the three ways of argument are present in the files of many trials, providing solid evidence that these are well-founded requirements for decisions made by judges. For this reason, MacCormick considers these arguments to be good patterns of reasoning, as they safeguard the essence of what he regards as the concept of the Rule of Law⁵⁹.

3. *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (2005)

In *Rh & RoL* MacCormick summarises the progressive development of his views on legal reasoning since the publication of *LR & LT*. The very structure of this work indicates that it is to complement the Scottish philosopher's earlier output, as a significant part of the text is devoted to the responding to criticism and supplementing the previously expressed views. In addition, MacCormick admits in the introduction that some of the chapters of *Rh & RoL* are corrected and revised versions of the already published articles and the papers presented at conferences⁶⁰. All this makes the revision of the

⁵⁴ E.T. Feteris, *Fundamentals...*, p. 86.

⁵⁵ N. MacCormick, *Legal...*, p. 171.

⁵⁶ E.T. Feteris, *Fundamentals...*, p. 86.

⁵⁷ N. MacCormick, *Legal...*, p. 192.

⁵⁸ E.T. Feteris, *Fundamentals...*, p. 87.

⁵⁹ N. MacCormick, *Legal...*, pp. 250–251.

⁶⁰ N. MacCormick, *Rhetoric...*, pp. ix–x.

assumptions behind legal reasoning theory presented by him in *Rh & RoL* rather dispersed in comparison to the synthetic denseness of the concepts contained in *LR & LT*. Therefore, it may be said that McCormick's shift from formalistic positions toward the argumentation theory has also left its mark on the structure of this book.

The scope and quality of the changes in the Scottish philosopher's approach to the nature of legal reasoning are contained in the following statement: "The basic forms of legal argument still appear to me to have been well described in the 1978 book. Now, however, it seems to me that the whole enterprise of explicating and expounding criteria and forms of good legal reasoning has to be in the context of fundamental values that we impute to legal order"⁶¹. As for the philosophical background, McCormick's later work describes his attitude towards the former inspiration with the views of Hume using the following example: "One of the most famous eighteenth century critics of David Hume asks, "Why do we call judges judges? If Mr Hume is right, we will call them feelers". It is not true. Feelings may matter, but, at the end of the day, moral judgement is judgement, as legal judgment is judgement"⁶². Therefore, these words can be interpreted as acceptance of the thesis on the mutual connection between moral reasoning and legal reasoning due to their parallelism.

In *Rh & RoL* McCormick states that reasoning in the process of law application is done in the light of the above-mentioned fundamental values, i.e. it is persuasive instead of demonstrative⁶³. At the same time, McCormick's primary aim in *Rh & RoL* is to present the theory of legal reasoning as a field of practical reasoning based on institutional theory of law⁶⁴. Basing legal reasoning on institutional theory of law should be understood as a statement of social inseparability of the institutional order with the concept of interpretation, which requires the observer to take an internal position in relation to the legal system⁶⁵. In the light of McCormick's disquisition, the interpretability of law inevitably leads to issues regarding the validity or invalidity of reasoning, and to questions about the criteria used to assess them. From here, it is very close to Perelman and analyses of methods of effective argumentation and rhetoric – skills that are absolutely indispensable in the institutionalised process of law application⁶⁶.

Emphasising the argumentative nature of law and faith in the significance of reason, both in morality and in law, meant to McCormick a gradual shift in some of the issues he reflected on from a position close to Hart's views towards one represented by Dworkin, especially regarding the acknowledgement of the thesis that, in the hardest cases, there is often one correct answer to the disputed legal issue, and this answer is based on morality⁶⁷. Thus, McCormick converts to the post-positivist camp in the philosophy of law. In one of his recent essays, he clearly states: "I am not entitled to call myself a natural lawyer given all that I inherited from Hart and Kelsen, but I am no longer a positivist, but a post-positivist"⁶⁸.

⁶¹ N. McCormick, *Rhetoric*..., p. 1.

⁶² N. McCormick, *McCormick on McCormick*, in: A.J. Menéndez, J.E. Fossum (eds.), *Law*..., p. 19.

⁶³ N. McCormick, *Rhetoric*..., pp. 1–2.

⁶⁴ N. McCormick, *Rhetoric*..., p. vi.

⁶⁵ Cf. N. McCormick, *Institutions of Law: An Essay in Legal Theory*, Oxford 2007; N. McCormick, O. Weinberger, *An Institutional Theory of Law*, Dordrecht 1986; M. Smolak, *Prawo, fakt, instytucja. Koncepcje teoretycznoprawne Prawniczego Pozytywizmu Instytucjonalnego* [Eng. *Law, Fact, Institution. The Theoretical Legal Conceptions of the Institutional Legal Positivism*], Poznań 1998.

⁶⁶ See Ch. Perelman, *Imperium retoryki. Retoryka i argumentacja* [Eng. *The Realm of Rhetoric. Rhetoric and Argumentation*] Warsaw 2004; Ch. Perelman, *Logika prawnicza. Nowa retoryka* [Eng. *Legal Logic. New Rhetoric*], Warsaw 1984.

⁶⁷ W. Twining, *Donald Neil McCormick*..., p. 460.

⁶⁸ N. McCormick, *McCormick*..., p. 24.

3.1. Rhetoric and the rule of law

In *Rh & RoL*, MacCormick analyses the relationship between the idea of the Rule of Law and the thesis about the argumentative nature of law⁶⁹. MacCormick, drawing from Perelman's findings, adopts the concept of "commonplaces" (Greek *topoi*), aiming to show that, despite their apparent incompatibility, they can – like the Hegelian thesis and antithesis – be reconciled into one and make a synthesis in the form of the fundamental assumptions of the theory of legal reasoning⁷⁰.

The first is the *topos* of the argumentative nature of the law. According to MacCormick, the validity of each argument used in the dispute (or rather the probability of its truthfulness, since rhetoric goes beyond strictly logical reasoning) can be verified by providing the best counterargument that would most effectively refute the other party's claim. Then, a comparison of both arguments allows a reassessment of the value of each of them in a dispute. According to MacCormick, the use of appropriate argumentation leads to the presumption that its result is considered to be objective truth, and thus the most appropriate judgment that can be pronounced in a given case. However, this does not change the fact that the law is not logical and the truth in judicial application of the law is only what can be proved by argumentation⁷¹.

The second *topos* in the interpretation process is the idea of the Rule of Law⁷². According to MacCormick, it may be regarded as contrary to the argumentative nature of law. Such a belief is connected with the statement that recognition of the disputed nature of the law as an object of argumentation excludes fundamental values of the Rule of Law, such as legal security and legal certainty. MacCormick comments on the discrepancy between these *topoi*: "I do believe in the argumentative quality of law, and find it admirable in an open society. (...) But I also believe in the Rule of Law, and think that our life as humans in community with others is greatly enriched by it"⁷³. The above statement is MacCormick's intellectual creed. On the one hand, he is fascinated by the disputable nature of law, on the other, he respects the idea of the Rule of Law and notes its value in society.

Thus, MacCormick endows the idea of Rule of Law with his own meaning. According to the Scottish philosopher, its implementation is supervised by the argumentative nature of law, which causes all members of society to participate in the process of law-making because they postulate the application or defence of their own interpretations of those legal norms that are relevant to their affairs.⁷⁴ In other words, MacCormick acknowledges that there are no clear cases that do not require interpretation. Therefore, even in the case of a clearly formulated rule, the possibility of putting it aside is always an option. A legal rule may always be questioned for the sake of some more weighty principle⁷⁵.

All this fits perfectly with the Scottish philosopher's conversion to the post-positivist current in the philosophy of law. This means that, in the second phase of MacCormick's theory of legal reasoning, the role of an interpreter of the law reminds one of that of a guardian of the idea of the Rule of Law⁷⁶. An example of such action would be a judge's search for a res-

⁶⁹ N. MacCormick, *Rhetoric*..., pp. 12–31.

⁷⁰ N. MacCormick, *Rhetoric*..., p. 13.

⁷¹ N. MacCormick, *Rhetoric*..., p. 15.

⁷² N. MacCormick, *Rhetoric*..., p. 15.

⁷³ N. MacCormick, *Rhetoric*..., p. 16.

⁷⁴ G. Pino, *Neil MacCormick*..., pp. 13–14.

⁷⁵ N. MacCormick, *Rhetoric*..., p. 28.

⁷⁶ G. Pino, *Neil MacCormick*..., pp. 13–14.

olution in the event of a conflict between specific legal norms. According to MacCormick, the judge's conduct follows the pattern of *determinatio* (taken from St. Thomas Aquinas), i.e. the final stage of the concretisation of legal norms⁷⁷. Therefore, function of a judge as the guardian of the idea of the rule of law results from the fact that their most important task is to ensure, using the available interpretive tools, the realisation of values resulting from the functioning of the Rule of Law in a given legal system. Pino even claims that, in the event of extreme violations of these values by the bodies authorised to make law, MacCormick grants the judge the power to declare that *lex iniusta non est lex*⁷⁸.

3.2. The problem of universalisation.

In *Rh & RoL*, MacCormick states that the requirement of universality is the basis of legal reasoning. Thus, he opposes universalism to particularism and maintains that universalisation must be involved in the justification of decision by the judge⁷⁹. His theory is at the other extreme from those concepts that assume that legal reasoning is based solely on certain reasons in certain factual circumstances.

To further characterise the idea of universality, MacCormick uses two different concepts with slightly different meanings: universalisability and universalisation.

Universalisability is the property of an argument which gives it the potential to be universal in character, and thus provides it with the capability of being decisive in a pending case⁸⁰. Universalisation is defined as any action which – by giving certain arguments or legal norms universalisability – leads to creation of generalisations⁸¹.

To explain the problem of universalisation, MacCormick examines the well-known dilemma of King Solomon⁸². He notes that, in Solomon's ruling, apart from the particularist approach, a universalistic one was also applied. In the biblical text, the king first learns which of the women is the mother of the child, and then pronounces that she should have it because she is the mother. Thus, apart from settling a specific case, Solomon actually states that every mother should have and care for her child. MacCormick comments on this discovery as follows: "For the motherhood relationship to be a justifying reason, a 'because-reason' in this case before Solomon, it must be understood to be equally a because-reason in any other case. In that sense, reasons are, and have to be, universalisable"⁸³.

The Scottish philosopher therefore maintains that universalisation is part of justification of a legal decision. Hence, reasons behind the motivation of a judge may be particular, whereas reasons justifying their decision must be universal. MacCormick even states that: "There is (...) no justification without universalisation; motivation needs no universalisation; but explanation requires generalization. For particular facts – or particular motives – to be justifying reasons they have to be subsumable under a relevant principle of action universally stated"⁸⁴. To MacCormick, the requirement of universalisation is an essential moral condition in the sense that he considers it justified in the concept of rational impartiality. Thus, he drifts from the positivist faction to the post-positivist position.

⁷⁷ N. MacCormick, *Rhetoric*..., p. 10.

⁷⁸ G. Pino, *Neil MacCormick*..., p. 14.

⁷⁹ T. Spaak, *Deduction, Legal Reasoning and the Rule of Law*, "Constitutional Commentary" 2006/1, p. 127.

⁸⁰ N. MacCormick, *Rhetoric*..., p. 21.

⁸¹ N. MacCormick, *Rhetoric*..., pp. 36, 88–91.

⁸² N. MacCormick, *Rhetoric*..., p. 79–80.

⁸³ N. MacCormick, *Rhetoric*..., p. 88.

⁸⁴ N. MacCormick, *Rhetoric*..., p. 99.

3.3. The approximation of Neil MacCormick's position to Ronald Dworkin's "one right answer" thesis.

In *Rh & RoL*, MacCormick revises his previous opinions on the issue of hard and clear cases⁸⁵. First, however, he discusses the historical meaning of hard cases as those that led to unjust decisions. Then, he refers to the later meanings of that term, stating that, in Dworkin's concept, it stands for a case that is a good opportunity to give a just decision⁸⁶.

This is not incidental, as a significant approximation of MacCormick's position is noticeable in the second phase of the theory of legal reasoning with Dworkin's concept of "one right answer"⁸⁷. The most important amendments made by MacCormick concern the previously used division into hard and clear cases, and thus relate to the limitation of the role of legal syllogism in legal reasoning due to the problem of one right answer⁸⁸. In *Rh & RoL*, MacCormick upholds the thesis that interpretation is ubiquitous in law⁸⁹. He states that there is always the need to turn to a resource of arguments helpful in interpretative activities – including the consequentialist arguments, arguments of coherence and consistency – which in the first phase would apply only to hard cases⁹⁰.

This view, however, is not an innovative achievement of MacCormick. It is close to Dworkin, who had previously developed his own understanding of a hard case and presented it in his 1975 article entitled *Hard Cases*⁹¹. According to the American critic of Hart, the distinction between easy and hard cases is immaterial as both are determined by interpretation and – in accordance with the idea of law as integrity – require the same interpretive methods⁹².

According to Pino, maintaining the distinction between clear and hard cases from *LR & LT* could lead to the conclusion that, even if interpretation is required in both, only in some cases there is no right answer, and therefore only they make hard cases⁹³. Yet, MacCormick rebuffs such a theoretical position in *Rh & RoL*, where he openly asserts that, even in hard cases, there can be one right solution⁹⁴. MacCormick's explanation of this issue is somewhat vague, and his view on the subject is more moderate than Dworkin's⁹⁵. The difference is that, to Dworkin, in every court case there is in principle one right answer, whereas according to MacCormick, it is sometimes possible that there isn't, which means that, in such cases, it is necessary and inevitable to appeal to the authoritative decision of the judge⁹⁶.

Incidentally, it should be added that the convergence of MacCormick's and Dworkin's positions does not preclude using different terminology by the two. According to the Scottish philosopher, an easy case cannot be identified with a clear case because a clear

⁸⁵ N. MacCormick, *Rhetoric*..., p. 49.

⁸⁶ N. MacCormick, *Rhetoric*..., p. 50.

⁸⁷ G. Pino, *Neil MacCormick*..., p. 7.

⁸⁸ In *Rh & RoL*, maintains the distinction between clear and hard cases. At the same time, according to Pino, it seems of no practical significance. G. Pino, *Neil MacCormick*..., p. 8.

⁸⁹ N. MacCormick, *Rhetoric*..., p. 122.

⁹⁰ N. MacCormick, *Rhetoric*..., p. 237.

⁹¹ R. Dworkin, *Hard Cases*, "Harvard Law Review" 1975/6, pp. 1057–1109.

⁹² R. Dworkin, *Law's Empire*, Cambridge 1986, p. 266.

⁹³ G. Pino, *Neil MacCormick*..., p. 8.

⁹⁴ N. MacCormick, *Rhetoric*..., pp. 278–279.

⁹⁵ More on the concepts of understanding a hard case in: M. Król, *Koncepcje trudnych przypadków a prawomocność*, in: *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo. Księga jubileuszowa Profesora Wiesława Langa*, Toruń 1998, pp. 97–109.

⁹⁶ G. Pino, *Neil MacCormick*..., p. 8.

case is not always easy⁹⁷. This is due to the fact that, even if in a given case there were no problems as regards the interpretation of law, the complexity of some areas of law does not allow such cases to be described as easy.

3.4. Application of the deductive model in the process of interpretation

The revision of some assumptions regarding the foundations of legal reasoning carried out by MacCormick in *Rh & RoL* requires some reflection on the application of the deductive model in deciding cases by courts. Primarily, however, it should be stated that, according to MacCormick, law is not an exact science and so legal syllogism cannot be understood in the same way as syllogism in logic. This is due to the fact that legal reasoning is not proof in the logical sense of the word. At the same time, the once accepted assumption that a court's decision is not equal to a logical conclusion does not mean that the conclusions regarding the question about a justified decision do not follow from logical premises.

Evolution in MacCormick's approach to legal deduction certainly does not consist of rejecting it due to adopting the argumentative-rhetorical attitude. In fact, the opposite is true. In *Rh & RoL*, the Scottish philosopher clearly states that deduction plays an important role in legal reasoning, and he places a great deal of importance on developing and defending this view⁹⁸. Yet, he does not explain what deduction is, though it can be said that, like in *LR & LT*, it is a correct deductive inference based on the principle that, if the premises are true, the conclusion must be true⁹⁹.

Of course, MacCormick can no longer claim, as he did in *LR & LT*, that in some cases syllogism may be all a judge needs to justify his legal decision. This is because, in *Rh & RoL* he acknowledges that interpretation of the law is always required, and therefore the judge must always have the need to justify his interpretation choices¹⁰⁰. In other words, the justification for a judge's decision according to the second phase of the Scottish philosopher's legal reasoning theory always includes a second order justification. At the same time, both logic and legal deduction remain important conceptual instruments in MacCormick's theory of legal reasoning. However, they play different roles: they are a structural tool for legal arguments¹⁰¹. So, although a logical conclusion {q} is not a judicial decision, it plays a significant role in the process of legal reasoning. MacCormick also emphasises that, just as one cannot equate a judge's decision with their deductive process, neither can one equate reasoning with justification and inference with adjudication.

To conclude, in the second phase of MacCormick's theory of legal reasoning, legal deduction and other logical inferences are either instruments for *ex post* assessment of a court decision already issued, or a kind of rational reconstruction of legal argumentation whose task is to clearly identify fragments of legal arguments.

4. Recapitulation

The application of the diachronic analysis method and the apparent distinction of MacCormick's theory of legal reasoning formulated in *LR & LT* and *Rh & RoL*

⁹⁷ N. MacCormick, *Rhetoric*..., p. 51.

⁹⁸ N. MacCormick, *Rhetoric*..., pp. 33–77.

⁹⁹ T. Spaak, *Deduction*..., p. 124.

¹⁰⁰ G. Pino, *Neil MacCormick*..., p. 9.

¹⁰¹ N. MacCormick, *Rhetoric*..., pp. 33, 42–43.

was aimed at distinguishing two different phases in the development of his theoretical position. The first of these phases was closer to formalism, while the second became clearly argumentative-rhetorical. Typical for the first phase of MacCormick's theory of reasoning is formalistic reasoning based on rules of logic (e.g. a simple deductive scheme in first order justifications, the use of consequentialist argument and arguments of coherence and consistency in second order justifications), while in the second phase the argumentative nature of reasoning and moral aspect of the judge's interpretation come to the fore (apparent antinomy between the *topos* of the argumentative nature of the law and the idea of the Rule of Law, the problem of universalisation of judicial decisions).

At the same time, the discussion of the basic assumptions of MacCormick's theory of legal reasoning was aimed not only at diachronic analysis that would illustrate the revision of his views, but also at presenting the achievements of the Scottish philosopher of law in a broader context, namely the development of the philosophy of law in the second half of the 20th and the beginning of the 21st century. For it seems that the gradual crystallisation of MacCormick's views, and especially the shift in his views on the theory of legal reasoning, can be (on a smaller scale) a model example of an extremely interesting process that contemporary philosophy of law has seen in passing over the past few decades from the safe positions of refined positivism initiated by Hart towards post-positivism, *i.e.* a position largely based on institutionalism, argumentative theories, hermeneutics and postmodern philosophy. Although the journey was long, with numerous shoals and traps along the way, MacCormick managed to make it safe, the result of which is his innovative theory of legal reasoning.

Neil McCormick's Theory of Legal Reasoning and Its Evolution

Abstract: This paper traces, examines and demonstrates Neil MacCormick's theory of legal reasoning and its evolution. MacCormick's views shaped gradually, therefore his theory could be divided into two main stages. Thus, a diachronic approach is justified. The aim of this paper is to analyse the difference between the theses of the theory of legal reasoning explained in *Legal Reasoning and Legal Theory* (1978) and general revisions to this theory marked in *Rhetoric and the Rule of Law* (2005). According to the author, the most important change in MacCormick's theory of legal reasoning is the re-examination of the role of deductive reasoning in the process of judicial reasoning. This change leads to extension of the logical aspects of MacCormick's theory of legal reasoning (legal syllogism) to include rhetorical aspects (argumentative character of law) and ethical aspects (the idea of the rule of law). The evolution of MacCormick's theory of legal reasoning seems to be a model example of the changes in contemporary philosophy of law.

Keywords: legal reasoning, MacCormick, legal syllogism, rhetoric, rule of law

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