1. Introduction

The most important contributions of Neil MacCormick to legal theory proper\(^1\) can be safely distributed in the following three main fields: a theory of law (by which I mean a theoretical inquiry into such topics as a definition of law, the relations between law and other normative spheres such as morality, the theory of legal knowledge, and the theory of legal sources), a theory of legal reasoning, and a theory of (legal) rights. MacCormick’s contributions to these fields are obviously interconnected, and MacCormick himself has stressed at several junctures the important mutual connections between these three topics.

MacCormick’s theory of law is, at its origins, a brand of legal positivism, enriched and reformulated with important insights borrowed from legal institutionalism\(^2\). It is important to stress right from the beginning that MacCormick’s membership in the club of legal positivism has never been unproblematic: starting from a basically Hartian stance (which was probably the best version of legal positivism

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\(^{1}\) Thus, I am consciously and somewhat arbitrarily excluding from this brief note the important work of MacCormick on topics that could be deemed more close to political theory, such as sovereignty and constitutionalism in the European Union: see Questioning Sovereignty, and Who’s Afraid of a European Constitution?.

\(^{2}\) Cf. An Institutional Theory of Law (with Ota Weinberger); Institutions of Law. On these aspects of MacCormick’s work, see the essays collected in M. Del Mar, Z. Bankoski (eds.), Law as Institutional Normative Order (and particularly the essays by Andrew Halpin, Massimo La Torre, Fred Schauer, and Vittorio Villa therein); and C. Michelon, MacCormick’s Institutionalism between Theoretical and Practical Reason.
available in the 1970s\textsuperscript{3}, he lately embraced what he called a ‘post-positivist’, or indeed even an ‘anti-positivistic’\textsuperscript{4}, approach, in which he sought a synthesis between a broadly positivistic framework and some important insights from contemporary natural law and anti-positivistic strands (particularly John Finnis and Robert Alexy), as well as from ‘interpretive’ theories of law (Ronald Dworkin)\textsuperscript{5}. Moreover, in MacCormick’s work many important strands can be traced of what is now commonly called ‘normative’ positivism – the idea that there should be some degree of separation between law and morality, and that the moral merits of the law depends on its being insulated, to a certain extent, from morality\textsuperscript{6}. We will see in due course that this shift in MacCormick’s legal philosophy (from Hartian positivism to post-positivism and normative positivism) has indeed played an important influence also on his theory of interpretation.

MacCormick’s theory of legal reasoning, firmly located within a legal positivistic stance – at the beginning at least – is a defence of the role of reason in the application of law\textsuperscript{7}: namely, a defence of the possibility that legal arguments and the application of law can be rationally structured and rationally reconstructed – and hence subjected to some form of rational assessment.

Finally, MacCormick’s contribution to the philosophical debate on rights consists in a strong and articulated defence of the ‘interest theory’ (the justification of rights is the protection of an interest of the right-holder)\textsuperscript{8}, against the ‘choice theory’, also in the version embraced by Hart himself (rights protect the autonomous choice of the right-holder)\textsuperscript{9}. To my mind, this is definitely one of the most clear and powerful contributions by MacCormick to the contemporary jurisprudential debate; at the same time, it is slightly disappointing that MacCormick didn’t really seemed interested in connecting explicitly his theory of rights with his theory of interpretation – the way Ronald Dworkin did, for instance\textsuperscript{10}.

This paper will deal only with Neil MacCormick’s theory of legal reasoning, and more specifically with his theory of interpretation. To begin with, I will try to summarize the main tenets of MacCormick’s theory of legal interpretation (§ 2); I will then move on to consider a specific interpretive problem, that is the place of

\textsuperscript{3} To be sure, MacCormick’s original positivistic stance was indebted to H.L.A. Hart as well as to H. Kelsen: see e.g. Legal Reasoning and Legal Theory, pp. 55, 62-65.

\textsuperscript{4} Institutions of Law, p. 279.

\textsuperscript{5} Compare the full-blown adherence to, e.g., the Hartian theory of the rule of recognition in Legal Reasoning and Legal Theory, pp.***, with the much more qualified positions expressed in Institutions of Law, ch. 15, and in the Foreword to the 1994 edition of Legal Reasoning and Legal Theory itself (see pp.***).

\textsuperscript{6} Cf. A Moralistic Case for A-Moralistic Law; The Ethics of Legalism; Reconstruction after Deconstruction: A Response to CLS. For a sympathetic discussion of ‘normative positivism’, see J. Waldron, Normative (or Ethical) Positivism.

\textsuperscript{7} Cf. Legal Reasoning and Legal Theory; H.L.A. Hart, ch. 10 (all quotes will be from the first edition of this book); Dworkin as Pre-Benthamite; On ‘Open Texture’ in Law; Legal Reasoning and Argumentation; Rhetoric and the Rule of Law (collects, sometimes in a heavily revised form, many important essays published after Legal Reasoning and Legal Theory); An Institutional Theory of Law, chs 11 and 13; Practical Reason in Law and Morality.


\textsuperscript{9} See H.L.A. Hart, Legal Rights.

\textsuperscript{10} See e.g. R. Dworkin, Hard Cases and Law’s Empire. Indeed in Legal Reasoning and Legal Theory (see pp. 246-258) there are a few hints on the relation between the theory of rights and the theory of legal argumentation; but in later writings this connection has apparently gone lost.
defeasibility in law (§ 3). Lastly, I will try to put these ideas in the context of MacCormick’s ideas on the Rule of law (§ 4).

The perspective of this examination will be diachronical in character: I will try to highlight what seems to me a substantial evolution of MacCormick’s ideas on these topics, and to put this evolution in the broader context of MacCormick’s position within the jurisprudential camp. For the sake of the present discussion, I will divide MacCormick’s jurisprudential work in two main phases. The first phase covers the 1970s and the 1980s (the book *Legal Reasoning and Legal Theory*, 1978, being the more representative contribution in this period). The second phase extends from the 1990s onwards (the book *Rhetoric and the Rule of Law*, 2005, being the main contribution in this period).

2. Legal Reasoning and Interpretation

2.1. The First Phase: Defending Deductivism (and Rejecting Strong Discretion)

MacCormick’s work on legal reasoning has gained a well-established place in Twentieth century jurisprudence. It is easy to see why: *Legal Reasoning and Legal Theory* is probably the first contribution specifically devoted to problems of legal reasoning and interpretation, from an author trained in analytical legal positivism. Back in 1978, that was indeed something original: until the seventies of the Twentieth century, European analytical legal positivism was mainly (or even exclusively) interested just in ‘structural’ questions, such as the concept of norm, the structure of the legal system, the defining features of law as contrasted with morality, and the like. It takes just a quick look at the work of Hans Kelsen, H.L.A. Hart, Norberto Bobbio, and Carlos Alchorrón and Eugenio Bulygin, to name a few, to see that interpretation and legal reasoning were out of the focus of positivist jurisprudential inquiry. On the other hand, that was high time for legal positivism to take a closer look at the issue of interpretation: the works of Stephen Toulmin and Chaîm Perelman on argumentation and rhetoric had already gathered considerable interest on the topic of general practical argumentation, and Ronald Dworkin was already mounting his attack on legal positivism drawing also on issues of legal reasoning and interpretation.

With *Legal Reasoning and Legal Theory*, then, MacCormick deploys a precise and deliberate cultural policy, one that consists in the elaboration of a theory of interpretation and legal reasoning fully consistent with, or even required by, a

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11 For a more detailed examination of MacCormick’s evolving position in (and even outside of) the legal positivist field, see V. Villa, *Neil MacCormick’s Legal Positivism*.
12 MacCormick’s work on legal reasoning draws heavily on English and Scottish legal systems (and lately, also on EU law: see e.g. J. Bengoetxea, N. MacCormick, L. Moral Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*; considerable attention is paid to decisions of the ECJ also in *Rhetoric and the Rule of Law*). Surprisingly, MacCormick’s work on legal reasoning has received much more attention in civilian systems, such as Italy, France, and Spain (where MacCormick’s works are regularly used and quoted in the relevant literature – and there are Italian and French translations), and relatively small consideration in other common law countries and especially in the US, where recent work on legal reasoning seems to ignore MacCormick’s contributions altogether: see, for instances of this neglect, the otherwise important works by L. Alexander, E. Sherwin, *Demystifying Legal Reasoning*; and F. Schauer, *Thinking Like a Lawyer*.
13 Quotations
positivistic conception of law – in the specific guise of Hartian positivism\(^\text{14}\). Before examining the way in which MacCormick’s project is connected to Hart’s legal theory, let’s briefly consider MacCormick’s own theory of legal reasoning and interpretation as it appears at this stage\(^\text{15}\).

A good deal of MacCormick’s theory of legal reasoning is a defence of deductive reasoning in the law. In a deductivist framework, a legal norm (a rule) plays the role of a major premise, a statement of fact is the minor premise, and these yield as a (deductively necessary) conclusion an individualised normative statement applying the general norm mentioned in the major premise to the facts mentioned in the minor premise.

In order for the deductivist model to work, it is necessary that both the relevant legal rule and the facts of the case are undisputed, or at least that problems of interpretation and validity (affecting the normative premise), and problems of proof (affecting the factual premise) have already been settled. MacCormick is indeed confident that, in many if not in most cases, such problems are negligible: in many cases, MacCormick assumes, there is a clear rule to be immediately used as a normative premise of the normative syllogism, so that the normative syllogism represents, in such cases, all the justification that is required in order to apply the law\(^\text{16}\) (in the following, I will leave aside the problems related to the determination of the minor, factual premise, since these are not, properly speaking, matters of legal interpretation but rather matters of proof).

Cases in which there is a clearly formulated rule ready to be used as a major premise are clear (or obvious) cases\(^\text{17}\). The clarity, or obviousness, of a case depends, according to MacCormick, both on semantic and on pragmatic factors (the terminology is not MacCormick’s). On the semantic level, a case is clear when it falls under a clearly formulated rule – so in this sense the clarity of a case is a function of the language used by the rule-giver. On the pragmatic level, a case is clear when the interpreter has no compelling reason to depart from the plain meaning of the rule-formulation – so in this sense clarity, like beauty, ‘is in the eye of the interpreter’\(^\text{18}\). Occasionally, MacCormick seems to rely also on a different, and so to speak sociological, understanding of the ‘pragmatic’ dimension of clarity: on this latter understanding, a case is clear when nobody has in effect thought of questioning it, or

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\(^\text{14}\) See Legal Reasoning and Legal Theory, xiv (of the 1994 Foreword): ‘Though not of anything like the same eminence, [this book] is something of a companion volume to H.L.A. Hart’s classic The Concept of Law. The account it gives of legal reasoning is represented as being essentially Hartian, grounded in or at least fully compatible with Hart’s legal-positivistic analysis of the concept of law. The analytical positivist approach to legal theory espoused by Hart is open to challenge, and has been challenged, for an alleged inability to give a satisfactory account of legal reasoning, especially reasoning-in-adjudication. This book took up the challenge’. See also pp. 63, 138-140, 240-245.

\(^\text{15}\) Apart from Legal Reasoning and Legal Theory, the relevant works from this phase in MacCormick’s work are: H.L.A. Hart, ch. 10; Dworkin as Pre-Benthamite; On ‘Open Texture’ in Law. Good general overviews of MacCormick’s theory are provided by M. Atienza, Las Razones del Derecho, ch. 5; E. Feteris, Fundamentals of Legal Argumentation, ch 7.

\(^\text{16}\) See Legal Reasoning and Legal Theory, pp. 72, 73, 74, 100, 120, 197, 199, 208, 210; On ‘Open Texture’ in Law, p. 77.

\(^\text{17}\) See Legal Reasoning and Legal Theory, ch. 8; On ‘Open Texture’ in Law, p. 77.

\(^\text{18}\) ‘Beauty is in the eye of the beholder’ (Margaret Wolfe Hungerford, Molly Bawn, 1878). For references to this pragmatic aspect of ‘clarity’, see Legal Reasoning and Legal Theory, p. 206; H.L.A. Hart, ch. 10; On ‘Open Texture’ in Law, p. 77.
when a court has not been convinced by the arguments put forward by a counsel in order to question a putatively clear case.\(^{19}\)

I find rather unconvincing this last shift from the normative to the factual dimension of what a clear case is (pragmatically clear, so to speak). Indeed, the difference between the two is evident: from the ‘normative’ point of view, a clear case is a case that cannot plausibly (i.e., from the point of view of the accepted canons of rational and reasonable legal discourse in the relevant legal culture) be questioned. From the ‘factual’ point of view, instead, a clear case is a case that has not been questioned so far, or that has been unsuccessfully questioned. True, at times there can be an overlap between these two pragmatic dimensions: for instance, the fact that nobody so far has questioned a certain kind of case (for instance, a long-established interpretation of a statute) can be deemed by an interpreter as a good reason not to question it. But we can say this only if we assume a normative criterion, for instance one that values stability and continuity in interpretations: so the factual dimension of the pragmatics of clear cases (what has happened so far in the legal community) is relevant only in the light of a normative criterion (what the interpreter has good reason to do). The reason why I am labouring here on this apparently marginal feature of MacCormick’s argument is that, as I will point later, in later writing MacCormick seems to rely almost entirely, and to my mind misleadingly, on such a sociological interpretation of ‘pragmatics’ of easy/hard cases.

However that may be, whenever the above mentioned conditions do not obtain the interpreter faces a hard case. More precisely, there is a hard case when a) the relevant rule is not linguistically clear (whether because its formulation is obscure, or because it is not clear if some facts are indeed a concrete instance of the concepts described in general and abstract terms in the formulation of the rule)\(^{20}\), or b) when the relevant rule is indeed clear but the interpreter has sound reasons to depart from the obvious meaning, or c) when there is no rule at all to be straightforwardly applied to the case, but the case appears nonetheless relevant from the point of view of the legal system as a whole.

Now, in such cases, the justification of the legal decision is no more entirely contained in a legal syllogism: the interpreter needs to give further arguments in order to justify his reconstruction of the normative premise. This is what MacCormick calls ‘second-order justification’. It is clear, by definition, that in hard cases the law does not provide the interpreter with a definite answer. But, according to MacCormick, in such cases the interpreter does not play a legislative role either: the interpreter is not at liberty to choose any ruling whatsoever as she pleases. There are indeed constraints to

\(^{19}\) See Legal Reasoning and Legal Theory, p. 199: a case is clear also when ‘no one thought of raising a point which was in truth arguable’, and ‘where such an argument has been tried but dismissed as artificial or far-fetched by the Court’; see also p. 250. The same approach shows up in Rhetoric and the Rule of Law, pp. 51-52 (a hard case ‘is a case in which a problem has been raised’; ‘clear cases’ are ones that no one has in fact problematized’; italics added)

\(^{20}\) To this concern, MacCormick distinguishes problems of ‘interpretation’ (regarding the language of the rule), from problems of ‘classification’ (regarding the possibility of subsuming the proved facts under the language of the rule), see Legal Reasoning and Legal Theory, pp. 203-213; Rhetoric and the Rule of Law, pp. 40-43, 70-72. The distinction seems to run parallel to other similar distinctions employed in the theory of interpretation, such as ‘interpretation in abstracto’ vs. ‘interpretation in concreto’ (see R. Guastini, L’interpretazione dei documenti normativi, **). For my part, I don’t see any clear dividing line between the two: it is by far preferable to conceive of interpretation as a complex intellectual process in which both linguistic and referential dimensions are involved at once.
the range of eligible choices, deriving from universalization (the need to conceive of the decision at hand as reproducible in future cases), consistency (the need to avoid contradictions with other existing rules), coherence (the need to look for a decision that fits well with the recognized principles of the legal system), and consequentialist arguments (the need to avoid a decision that would yield absurd consequences)\textsuperscript{21}.

The interplay of all this factors will indeed restrict, but not entirely erase, the margins of discretion of the interpreter.

2.2. \textit{MacCormick vs Hart (and Dworkin)}

To recapitulate the argument so far. For MacCormick there are easy (clear) cases, in which the decision of the interpreter follows from the straightforward, syllogistic application of a valid rule. In other (hard) cases, the interpreter is called on to exercise discretion in her job; this, in turn, is not a ‘strong’ discretion, because it is constrained by various legal factors. To this effect, MacCormick’s theory of interpretation and legal reasoning as espoused in \textit{Legal Reasoning and Legal Theory} has at least two important conceptual connections with Hartian positivism.

In the first place, MacCormick connects legal reasoning and interpretation to a Hartian-positivist conception of law – and of legal validity in the first place. According to MacCormick, the legal syllogism, the deductive model of legal justification, operates with rules whose validity has previously been established according to the criteria set forth in a (Hartian-like) ‘rule of recognition’\textsuperscript{22}.

Further, MacCormick broadly endorses (but with qualifications, as we will see) the idea that there may be clear cases as well as difficult or hard cases in the application of rules of law – an idea famously espoused by Hart in his well-known criticism of both formalism and rule-scepticism\textsuperscript{23}. Moreover, Hart himself thought that the clear (or ‘plain’, in Hart’s language) cases, in which official and private conduct are swiftly guided by determinate rules, were indeed the large majority\textsuperscript{24} – an assumption that, as we have seen supra, guides as well MacCormick’s own defence of the deductive model.

At the same time, it is safe to note that MacCormick supplements the Hartian model at least with two important addenda\textsuperscript{25}.

In the first place, MacCormick consistently stresses the role of principles both in legal reasoning, and in the possibility itself to conceive of the law as a system. While Hart considered sufficient to base the idea of a legal system on the unifying concept of the rule of recognition, MacCormick stresses the importance that the rules of a legal system be considered as parts of a meaningful whole\textsuperscript{26} – so according to MacCormick the unity and identity of legal systems should be traced not just at a formal level (i.e.,

\textsuperscript{21} See \textit{Legal Reasoning and Legal Theory}, p. 251; \textit{Coherence in Legal Justification}.
\textsuperscript{22} See for instance \textit{Legal Reasoning and Legal Theory}, p. 139. For Hart’s own presentation of the idea of the rule of recognition, see \textit{The Concept of Law}, ch. 6.
\textsuperscript{23} See H.L.A. Hart, \textit{The Concept of Law}, ch. 7.
\textsuperscript{24} H.L.A. Hart, \textit{The Concept of Law}, p. 135.
\textsuperscript{25} A further important integration provided by MacCormick to the Hartian model is the discussion on the internal aspect of norms, in the ‘Appendix’ to \textit{Legal Reasoning and Legal Theory}. Though very challenging, MacCormick’s treatment of this point does not bear directly on the present discussion.
\textsuperscript{26} See \textit{Legal Reasoning and Legal Theory}, ch. 7; H.L.A. Hart, ch. 10; \textit{An Institutional Theory of Law}, ch. 13.
the system is the total sum of the norms that satisfy the formal criteria of validity set up by the rule of recognition) but also on a substantial level (it is vital that valid norms are coherent with the background principles and values of the system).

Moreover, MacCormick does not follow Hart on judicial discretion (even if his analysis presuppose a Hartian framework, as noted supra). According to Hart, it seems that in those cases where no clear rule is available, the interpreter is left to her own devices, so to speak: she will have to make a choice not itself guided, let alone mandated, by the law. On this point, however, MacCormick parts company with Hart, and indeed takes a kind of intermediate stance between Hart and Dworkin.

Indeed on the one hand, and contra Hart, MacCormick endorses the possibility that the law still exerts some guidance also in hard cases (a possibility that Hart himself only came to endorse in later writing): this is so because, according to MacCormick, even if we ‘run out of rules’ the law still limits the range of possible interpretive choices via the requirements of universalizability, consistency, coherence, and acceptability of the consequences of the ruling.

On the other hand, MacCormick dismisses the theory, famously expounded by Dworkin, that there are right answers to legal questions also in hard cases (a possibility that Hart himself only came to endorse in later writing): this is so because, according to MacCormick, even if we ‘run out of rules’ the law still limits the range of possible interpretive choices via the requirements of universalizability, consistency, coherence, and acceptability of the consequences of the ruling.

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2.3. The Second Phase: Towards Interpretivism

Now, in later work MacCormick seems ready to give up many important points from the general framework above. I would argue that the main revisions concern the topic of the clear cases/hard cases divide (a distinction that, to be sure, MacCormick in previous work considered precarious, but not meaningless at all), and consequently the role of deductive logic in legal reasoning; and the topic of the one right answer.

All these theoretical shifts are connected, in turn, to MacCormick’s substantial endorsement of a sort of ‘interpretivist’ theory of law, much indebted to Ronald

28 See p. 274 of the Postscript (1994) to The Concept of Law: ‘when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law’.
29 See Legal Reasoning and Legal Theory, pp. 246-255; Dworkin as Pre-Benthamite, pp. 186-192; H.L.A. Hart, p. 130. The ‘one right answer thesis’ is elaborated by Dworkin in Is There Really No Right Answer in Hard Cases?: Law’s Empire, ch. 7; Justice in Robes, pp. 143-145. For a careful assessment, see T. Endicott, Adjudication and the Law.
30 See Legal Reasoning and Legal Theory, pp. 197, 228.
Dworkin’s legal philosophy. Simply put, interpretivist theories of law claim that the interpretation and identification of what the law requires – the truth of ‘propositions of law’ – depend on an interpretation of the point and purpose of the institution ‘law’; and interpreting the point and purpose of an institution, in turn, requires putting that institution in its best light. Interpretivism turns out to be an anti-positivistic approach, since it denies that the existence of the law is just a matter of social fact, the ‘source thesis’, and claims that it rather depends on both facts and values.

In this phase of MacCormick’s work, the distinction between clear cases and hard cases is still present, on the face of it (and what is more, is present in the curious ‘pragmatic’ version already mentioned), but it appears now to be devoid of any practical significance. Remember that the original import of this distinction was to stress that the former are capable of triggering immediately the deductive train of legal inference, while the latter require interpretation (and second-order justification generally). Now MacCormick stresses instead the quite different thesis that interpretation is ubiquitous in law. If so, then there is always the need to resort to the whole panoply of interpretive arguments (from consistency, from coherence, and from consequences) that in the ‘first phase’ where supposed to apply only to hard cases.

Of course there could be another way to rescue the theoretical difference between clear cases and hard cases. That would be to say that, even if interpretation is required in both kind of cases, only in some cases there is no right answer, and these are hard cases. But also this theoretical stance is now rejected by MacCormick, who now explicitly concedes that even in hard cases there could be one right answer. MacCormick’s explanation of this is to me a bit obscure, but what is clear is that his view on the issue is more moderate than Dworkin’s: indeed, while according to Dworkin there always is, in principle, one right answer to legal questions, according to MacCormick the possibility that sometimes no right answer is available still looms large – which makes it necessary, and inevitable, to resort to pure authoritative decision in such cases.

Lastly, one can wonder about the fate of the deductivist model, formerly espoused by MacCormick, within an interpretivist theory of law. Of course, MacCormick cannot claim any more, as he did in previous work, that in some cases the syllogism is all that we need in order to provide the justification of a legal decision. This is because now MacCormick acknowledges that interpretation is always in place (also in easy or clear

31 For MacCormick’s explicit endorsement on Dworkin’s interpretivism, see Rhetoric and the Rule of Law, pp. 6 (fn. 5), 39 (fn. 10), 234; but see also pp. 140-141 for a qualification of his support to this position. For a more detailed discussion of this point, see S. Bertea, Law and Legal Reasoning.

32 Interpretivism is the view that, if true, a proposition of law is true in virtue of an interpretive fact: in a nutshell, in virtue of the fact that the proposition follows from the best justification of a community’s political practice (N. Stavropulos, Interpretivist Theories of Law).

33 This is also, needless to say, Dworkin’s view: see Law’s Empire, pp. 266, 350-354 (the distinction between easy and hard cases is immaterial, because both are determined by interpretation, and because according to law as integrity both call for the same interpretive methods).

34 See Reconstruction after Deconstruction: A Response to CLS, p. 545; Legal Reasoning and Argumentation, p. 529 (arguing that deductive justification is rarely, if ever, sufficient to justify a decision); Rhetoric and the Rule of Law, p. 122; Institutions of Law, pp. 258-261.

35 See Reconstruction after Deconstruction: A Response to CLS, pp. 554-555 (stating that arguments from coherence and from consequences can point to the decisive preferability of one position over another); Rhetoric and the Rule of Law, pp. 278-279. For a discussion of this point, see A. Schiavello, Legal Reasoning and Legal Theory Revisited.
cases, if we still want to use this jargon at all), and so there is always the need for the interpreter to justify her interpretive choices (in other words, legal justification always includes second-order justification).

But nonetheless logic and the legal syllogism are still important conceptual tools in MacCormick’s theory of legal reasoning, even if with a different role to play: that of a structuring tool for legal arguments. Deductive logic and the legal syllogism are instruments for an ex post assessment and rational reconstruction of legal argumentation, their role is to help individuate clearly the passages of any legal argument.

3. Law and Defeasibility

An important chapter of Rhetoric and the Rule of Law is devoted to a discussion of the much-debated topic of defeasibility in the law.

In general, the idea of defeasibility is linked to the idea of exceptions: a legal norm (a rule, or a principle) is defeasible if, though being abstractly applicable to a given case, it is not eventually applied because of the presence of some defeating condition in the case at hand. It is easy to see why defeasibility is a much-debated topic in the theory of legal argumentation: it jeopardises the possibility to apply logic to law (since it displaces the monotonic character of deductive logic), it seems to be an enemy of legal certainty, and it blurs the separation between law and morality (at least when the source of defeasibility is some moral, and not merely legal, consideration).

MacCormick’s analysis of defeasibility moves along the following lines. In the first place, defeasibility is associated, according to MacCormick, to (express or implicit) conditions of validity. Second, defeasibility is a ‘pragmatic’, and not an ‘ontological’, feature of law and legal rules.

As to the first point, MacCormick claims that some legal entity (a right, a rule, a contract, etc.) can be endowed by an ‘appearance of validity’, since it seems to satisfy the conditions ordinarily required for that kind of entity to be valid; but nonetheless that entity is subject to some ‘invalidating intervention’, i.e. some fact that shows that what was, on the face of it, a valid legal entity is not really valid after all. This can happen in two kind of circumstances: first, there could be some explicit invalidating condition or exception expressly formulated by some rule of the system (express defeasibility), for instance: ‘in order for the legal entity LE to be valid, the conditions a), b), and c) must obtain, and at the same time the negative conditions d), e), and f) must not obtain’); second, the invalidating condition could derive from a principle of the system, or it could even derive from the extreme injustice of a legal provision (implicit

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36 See Rhetoric and the Rule of Law, pp. 33, 42-43; see also G. Sartor, Syllogism and Defeasibility: a Comment on Neil MacCormick’s Rhetoric and the Rule of Law.

37 See Rhetoric and the Rule of Law, ch. 12 (the chapter is based on a seminal article dating back to 1995: Defeasibility in Law and Logic). One of the first appearances of defeasibility in legal discourse is in H.L.A. Hart, The Ascription of Responsibility and Rights; the topic has been subsequently examined by, among others, G.P. Baker, Defeasibility and Meaning; G. Sartor, Defeasibility in Legal Reasoning; C. Alchourrón, On Law and Logic; F. Schauer, On the Supposed Defeasibility of Legal Rules; F. Attria, On Law and Legal Reasoning; R. Tur, Defeasibilism; J.C. Bayón, Why Is Legal Reasoning Defeasible?; B. Celano, True Exceptions; P. Chiassoni, La defettabilità nel diritto.
In both cases, what we have is, according to MacCormick, a negative condition of validity for that legal entity: if the (negative) condition obtains, the legal entity is devoid of legal validity; more precisely, that legal entity has never really (legally) existed.

As to the second point, defeasibility, according to MacCormick, finds its explanation in the pragmatics of the legal process. From this point of view, the difference between express and implicit defeasibility seems to boil down to the different distribution of the burden of proof: in cases of express defeasibility (negative qualifying conditions), it is the claimant that is supposed to prove that his claim is well founded – that is, that no negative qualifying condition is in place. In cases of implicit defeasibility, on the other hand, it is up to the defendant to show that some exception occurs to the vesting of the right of the claimant.

Now, I don’t really find convincing either of the two defining features that MacCormick attaches to defeasibility (that defeasibility affects legal validity, and that defeasibility regards the pragmatics of law, as here understood). As far as the first dimension is concerned (defeasibility and validity), I think that connecting defeasibility to validity obscures the way defeasibility operates in legal argumentation, and moreover can lead to theoretically odd results. This is because the possible exceptions that compound implicit defeasibility are, as MacCormick clearly acknowledges, innumerable and unforeseeable in character. This is the very reason why they are implicit, because we (or at least the law-giver) don’t know them in advance, and at any rate we are not able to specify them completely. But if we assume, as MacCormick does, a) that defeasibility (and even implicit defeasibility) affects validity; b) that implicit defeasibility is compounded by unstated and unforeseeable conditions; and c) that implicit defeasibility is always a standing option; then we cannot but conclude that def) no legal entity is ever valid (or conclusively valid, at least), because it is always subject to the threat of some implicit defeating condition. Legal validity then becomes a chimera, a useless concept.

This strikes me as rather absurd indeed. Let’s apply this analysis to the legal entities called ‘rights’, for instance. If we grant that rights are subject to implicit defeasibility, and we acknowledge that implicit defeasibility is not fully determinable in advance, then we are forced to conclude that no right ever exists. Or rather, a right exists only when it is upheld by a court – a sceptical conclusion that MacCormick would certainly not endorse.

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38 MacCormick’s discussion of implicit defeasibility seems to apply only to defeasibility on legal grounds, and does not seem to refer also to defeasibility on moral grounds. But since MacCormick, as we have seen, refers defeasibility to the dimension of legal validity, and since MacCormick has come to embrace a version of the view that lex iniusta non est lex (see Institutions of Law, pp. 277), according to which in cases of extreme injustice a norm is not really a norm, then it is possible to conclude that according to MacCormick defeasibility on moral grounds is possible only in cases of extreme injustice. On MacCormick’s views on the topic lex iniusta non est lex, see J. Dickson, Is Bad Law Still Law? Is Bad Law Really Law?.


40 Rhetoric and the Rule of Law, pp. 244-247.

41 Cf. Rhetoric and the Rule of Law, p. 245: ‘I treat the rather technical distinction between qualification and exception as neatly exemplifying the presence or absence of express defeasibility’.

42 See Rhetoric and the Rule of Law, p. 241: ‘implicit defeasibility afflicts all instances of legal institutions’; cf. also p. 28: ‘rule-statements […] are always defeasible’.
Indeed a better account of the phenomenon of defeasibility was offered by MacCormick himself in previous work, for instance when he distinguished between ‘prima facie rights’ and ‘rights all things considered’\(^{43}\). According to that view, prima facie rights are established by principles, or by rival and disputable interpretations of rules; all things considered rights are those rights that have been considered more important, and have won in the competition accordingly. But even a prima facie right is an existing legal right: in different circumstances it could justifiably prevail on other rights, or could even prevail on that very right by which it has been defeated in a previous occasion. A defeasible, or even a defeated, right can still exert some kind of normative pressure – a pressure that cannot be exercised by a non-existing right\(^{44}\). For instance, in order to defeat a right we need compelling reasons, defeating a right can lead to some form of compensation, at the very least it requires sound justification, etc.

In other words, and generalizing the argument, defeasibility affects the ‘applicability’, not the validity, of law\(^{45}\). A defeasible rule, or right, or the like, is a legal entity that is liable to be ‘set aside’, so to speak, under certain circumstances, scil. when there are good reasons, legal or otherwise, to do so\(^{46}\). But neither a defeasible rule, nor a defeated one, are invalid – let alone non-existent – for this reason alone. Defeasibility affects the application of the rule, or of a right, not its validity.

As for the ‘pragmatic’ dimension of defeasibility, two very quick comments are in order. First, it is just a contingent feature of some legal systems that the distinction between express and implicit defeasibility turns out to be linked to the distribution of the burden of proof; and this being just a contingent feature, it cannot be considered a defining feature of the concept of defeasibility. Indeed, a different system would be easily conceivable, a system in which defeasibility would affect the application of the law quite apart from the operation of the rules on the burden of proof – for instance, a judge could be charged with the duty to assess by herself the relevance of explicit or implicit exceptions alike, apart from those pointed to by the parties.

Second, here again MacCormick seems to toy on occasion with a pretty sociological, or factual, concept of ‘pragmatic’, one that would be coextensive to ‘what in fact happens’\(^{47}\): on this reading, a legal entity (a rule, a principle, a right, etc.) is

\(^{43}\) See Legal Reasoning and Legal Theory, pp. 257-258.

\(^{44}\) A useful parallel could be drawn here with the idea of ‘moral residue’ in moral theory.

\(^{45}\) For a more extended argument to this effect, see G. Pino, Norme e gerarchie normative and Diritti e interpretazione, ch 2. For legal-theoretical work on the concept of applicability, see E. Bulygin, Time and Validity; P. Navarro, J.J. Moreso, Applicability and Effectiveness of Legal Norms.

\(^{46}\) What reasons can defeat a rule, a right, etc? How strong must they be? These questions cannot be answered in an abstract way: it all depends on the values and attitudes that inform the relevant legal culture. For instance a legalistic, or formalistic, legal culture will require very strong reasons to override a legal rule, while a substantialist legal culture would allow more easily setting aside the law in view of some important value (justice, efficiency, etc.). For a detailed exemplification of the difference between formalistic and substantial arguments, see, P. Atiyah, R. Summers, Form and Substance in Anglo-American Law.

\(^{47}\) See Rhetoric and the Rule of Law, p. 241 (arguing that someone’s claim is defeasible if someone else can challenge it). For another example of this sociological interpretation of the pragmatic aspect of the application of law, see p. 51. Moreover, if we were to link this sociological understanding of the pragmatic aspect of defeasibility, to the idea (apparently endorsed by MacCormick) that defeasibility affects validity, we would wind up in a full-blown Legal Realist conception of law: valid law is what the courts say.
defeasible if it is actually challenged – and it is defeated if the challenge is successful. Now, of course there is a banal sense in which it is true that a legal entity is defeasible if it is at least conceivable to challenge it; and of course it is true that a legal entity is defeated if such a challenge is successful. But the important point here is that a legal entity is conceivably exposed to challenge only if there are good reasons to challenge it, not if it just happens to be challenged. What I mean is that the interesting part of the problem of defeasibility is not – not only, at any rate – to see what norms happen to be in fact defeated, but also to understand why this is so, for what kind of considerations this is considered acceptable (if it is considered acceptable), and so on. And to do this, we need to understand the criteria of acceptability of legal arguments in a given legal culture, not just the rules of the burden of proof in the legal process.

4. Interpretation and the Rule of Law

I will conclude this paper with some observations on the relation between legal interpretation and the idea of the Rule of Law in MacCormick’s work.

MacCormick’s original position on the Rule of Law can be summarized, to my mind, in two main points: first, the Rule of Law is to be understood as a law of rules (which is just another way in which MacCormick develops the legacy of Hartian positivism); the ‘ruly’ character of law is what enables the law to secure many valuable aims, such as predictability, stability of expectations, fairness (i.e., giving the citizen fair notice of the content of the law), and equality. Of course, MacCormick observes, the ‘ruleness’ of the law is not in itself sufficient to ensure the Rule of Law: at the very least, these rules also have to be clearly and publicly formulated, should not contradict each other, and have to fit in a coherent scheme of principles and policies upheld by the community at large. Moreover, a suggestion that seems to surface in the first phase of MacCormick’s work concerns the connection between the Rule of Law and the democratic method.

In this framework, the scope of interpretation appears to be constrained in the first place by the need to respect the (democratically produced) rules, when they are available (i.e., when there is a clear rule to be used straightforwardly as a major premise of a normative syllogism – see supra, § 2.1). And this commands assigning priority to the literal meaning in interpreting authoritative normative texts, since such obvious meaning is most probably what the rule-giver had in mind (democracy), and since the citizens themselves are probably relying on such most obvious meaning (fairness). The priority of literal meaning is not absolute, however. While, according to MacCormick, the interpreter has a prima facie duty to stick to the most obvious, literal

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48 To be sure, in MacCormick’s analysis seems to figure also a more ‘normative’, and to my mind more acceptable, interpretation of the pragmatic of defeasibility: see Rhetoric and the Rule of Law, p. 249. ‘Defeasibility concerns legally justifiable exceptions to ordinarily necessary and presumptively sufficient conditions’.

49 See for instance Legal Reasoning and Legal Theory, p. 204: ‘In a democratic constitution, it is the elected Parliament which must enact new laws. See also On ‘Open Texture’ in Law, pp. 75-76, referring to legislation as the most obvious example of enacted law.

50 Legal Reasoning and Legal Theory, p. 204: ‘the least unsuccessful way of securing that the will of elected legislators will prevail will be to take the words enacted by them at their face value and so far as possible apply them in accordance with their plain meaning’; see also p. 207.
meaning of the formulation of a rule, other pressing reasons could on occasion present themselves, pushing the interpreter to bend the meaning of the rule towards other, less obvious meaning. In such cases, the interpreter is entitled to search in the grey area of possible, less obvious meanings, provided that those less obvious meanings are still linguistically tolerable; moreover, the choice for a less than obvious meaning should be guided also by relevant principles and analogies (arguments from coherence with the overall body of the law). Finally, when no clear rule, or indeed no rule at all, is available (in hard cases), the interpreter will show her loyalty to the Rule of Law by applying the principles of the system, as they can be reconstructed by imputing a rational aim (the *ratio*) to existing rules of law.

In few words, then, we can say that in this first phase of MacCormick’s work Rule of Law values a) are connected to democratic values, and b) they justify allowing only limited discretion to the interpreter – judicial discretion being delimited by the words used in the formulation of the rules in the first place, and then by the principles of the system.

In MacCormick’s later work, to my mind, the democratic dimension of the Rule of Law is no longer prominent. In *Rhetoric and the Rule of Law*, for instance, references to issues of democracy and democratic method are mainly unrelated to the definition and the content of the Rule of Law. Indeed, MacCormick seems now to embrace a more substantial conception of the Rule of Law51, in which the ‘ruleness’ of the law is heavily supplemented by the requirement that the enacted rules can be conceived of as the determinations and concretizations of a (possibly coherent) body of values and principles52. Maybe now MacCormick relocates the democratic dimension of the Rule of Law in a quite different point: according to MacCormick, it is the intrinsic argumentative character of law that ensures that citizens (assisted by their counsels in Courts) participate in the making of the law, proposing and defending their interpretation of those legal norms that are relevant for their affairs53.

Accordingly, now the primary focus of interpretation is not so much the clear words of the (democratically elected) legislator, but rather the system as a whole, under the guide of an overall sense of practical reasonableness54. Moreover, MacCormick now acknowledges, legislative enacted rules cannot but be formulated in abstract and generic terms, and this makes them necessarily dependant on future interpretive concretizations (in other words, MacCormick now concedes that there are no clear, interpretation-free, cases). And still, even in the face of a clearly formulated rule, the possibility of setting that rule aside is always an option: a rule is always defeasible for the sake of some more weighty principles55.

52 See also *Reconstruction after Deconstruction: A Response to CLS*, pp. 547-551.
54 See for instance *Rhetoric and the Rule of Law*, ch. 7, esp. p. 139, where, after having listed different kinds of legal arguments (‘linguistic’, ‘systemic’, and ‘teleological-evaluative’ arguments), MacCormick argues that there is no fixed hierarchical order of priority between them (whereas, as we have seen, in the ‘first phase’ priority was given to linguistic arguments); on the concept and role of reasonableness, see *Rhetoric and the Rule of Law*, ch. 9.
55 See *Rhetoric and the Rule of Law*, p. 28; and see supra, § 3.
All this is not by chance, I submit. Indeed, this squares perfectly well with MacCormick’s conversion to some sort of ‘interpretivist’ theory of law\textsuperscript{56}. So in this second phase of MacCormick’s jurisprudential work, the role of the interpreter resembles more that of a counter-power, of a guardian of the Rule of Law\textsuperscript{57}: her job is to ensure, by means of the available interpretive tools, the maintenance of the quality of the legal system as a Rule of Law. The role of the interpreter is now conceived of, by MacCormick, as deeply entrenched in the values of the (substantive) Rule of Law. So much so, that in cases of extreme violations of those very values perpetrated by those entitled of producing law, MacCormick assigns the interpreter her ultimate task: that of declaring that *lex iniusta non est lex*.

\textsuperscript{56} See *supra*, § 2.3.

\textsuperscript{57} See *Rhetoric and the Rule of Law*, p. 201: a coherentist reasoning in the law helps ‘setting the judicial function in its context of constitutional principle and the checks and controls among different branches of government required for realizing the Rule of Law’.
Bibliography


Schiavello A., *Legal Reasoning and Legal Theory Revisited*, draft